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# Appeal Decision

Site visit made on 18 July 2017

**by Anthony J Wharton BArch RIBA RIAS MRTPI**

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

**Decision date: 25 July 2017**

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## **Appeal Ref: APP/L3625/X/16/3165616**

### **Whistlers, 3 Can Hatch, Burgh Heath, Surrey KT206DS**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mr Kevin Major-Morell against the decision of Reigate and Banstead Borough Council (the LPA).
  - The application Ref 16/02410/CLP dated 14 October 2016 was refused by notice dated 9 December 2016.
  - The application was made under section 192 (1) (b) of the Town and Country Planning Act 1990 as amended. (note: this application is made on the basis that a proposed development is lawful for planning purposes).
  - The proposed development for which a certificate of lawful use or development is sought is worded as follows: remove entrance gates and reduce height of existing piers to less than 1m high. Rebuild piers and rehang entrance gates further into the site i.e. not adjacent to the highway.
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### **Decision**

1. The appeal is dismissed.

### **Introduction and background information**

2. 'Whistlers' (No 3) is the last of three, 20<sup>th</sup>C, substantial detached dwelling houses located on the west side, at the northern end, of the short cul-de-sac known as Can Hatch. The appeal site is around 50m north of the junction with Canons Lane. All of the dwellings are set within extensive grounds and, to the east and north, there are agricultural fields, yards and open countryside. The properties lie within the Metropolitan Green Belt (MGB) and are also located within an area of great landscape value (AGLV).

3. Several years ago (stated to be 'in or around 2011'), the appellant started to construct two sets of entrance gates to the site; one to the southern end and the other at the northern end. The southern set of gates incorporated a pair of vehicular gates and a pedestrian gate and the northern ones just a pair of vehicular gates. Both gate installations were 2m in height and were located immediately abutting the boundary with the highway (Can Hatch).

4. The works were not completed and, therefore, could not benefit from being considered lawful under the '4 year rule'. Neither could they benefit from permitted development rights (being over 1m in height and abutting the highway), under the relevant section of the Town and Country Planning (General Permitted Development) Order 2015 (GPDO). The remainder of the boundary appears to consist of a post and wire fence, 1m in height and I noted this during my site visit. I also noted various vehicles (including vans) parked on the footway and the highway which blocked access to the turning circle at the end of Can Hatch.

5. Following a visit from a LPA Enforcement Officer in July 2016 the appellant was advised (by his agent) to reposition the gates and piers so that they were not immediately adjacent to, or abutting the highway. It was considered that in doing so they would benefit from permitted development rights under the relevant section of the GPDO. The LDC application (the decision of which is now the subject of this appeal) was made in October 2016 but the LPA enforcement officer was still of the view that the proposal was not considered to be permitted development.

6. The LDC application drawing indicates that the two sets of main gates are proposed to be set back 1m from the inner face of the piers as built. The outer piers abutting the highway are proposed to be reduced in height to 1m and a 900mm high wall is proposed to be built between the reduced height outer piers and the 2m high inner piers. It is stressed that the 900mm high wall would not be attached to the 2m high piers and, therefore, that the enclosure would not be a continuous wall, gate or fence enclosure to the boundary of the property.

### **The representations**

7. There are representations in the form of initial '*Grounds of Appeal*' and statements/final comments on behalf of the appellant and a statement/officer report made by the Council. As well as setting out their respective cases, these submissions refer to previous Appeal decisions (including one on Reigate Road) relating to the same subject: that is, what does or does not constitute an enclosure, wall, and fence or gates that is considered to be '*adjacent*' to a highway. These also include one of my decisions.

8. However, none of these other appeals, including my own, have had any influence on my decision in this case. Each appeal must be considered its merits and none of the other situations was identical to the physical layout of these gates, posts and walls regarding their positioning and relationship to the highway. I have dealt with this case on its merits and in an open, fair and impartial manner. In reaching my decision I have taken into account all of the material considerations relating to the LDC application; all of the written submissions and what I saw during the course of my site visit.

### **Reasons**

9. An appeal relating to a Certificate of Lawful Use or development (LDC) is confined to the narrow remit of reviewing the Local Planning Authority's (LPA) reason for refusal and then deciding whether the reasons are well founded. The planning merits of the case do not fall to be considered.

10. The erection of a gate, fence, wall, or other enclosure can be permitted development under Article 3, Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) Order 2015 (GPDO). However, the erection of a gate, fence, wall, or other enclosure over 1m in height, which is '*adjacent*' to a highway used by vehicular traffic, is not permitted development and planning permission is required for such a proposal.

11. The question in this case, therefore, revolves around whether or not the proposed, set-back, re-positioned and rebuilt piers and gates (at 2m in height) would be '*adjacent*', or not, to the highway, Can Hatch. Clearly, the lower piers (1m in height) and the wall (also 1m in height) would be immediately next to the footway and there is no dispute that these would be '*adjacent*' to the highway. Due to their reduced height not exceeding 1m, they would constitute permitted development under Article 3, Schedule 2, Part 2, Class A of the GPDO.

12. The word '*adjacent*' is not defined in the Planning Act and the courts have held that legislators were not likely to have intended '*a one size fits all approach*'. The common dictionary definition of '*adjacent*' is '*lying near to*' or '*contiguous*', although Case Law also clarifies that that '*adjacency*' does not equate to something being '*contiguous*' or '*abutting*'.

13. Thus the position established by the courts is that the word '*adjacent*' does not necessarily mean that the fence has to be abutting or touching the highway. In the case of *Simmonds v SSE and Rochdale MDC [1981]* it was held that a fence higher than one metre and less than one metre from a footway to a highway did abut the highway. In another case a 2m distance (between highway and enclosure) also resulted in a conclusion that the structures were '*adjacent*' to the highway.

14. Thus, the thrust of case law and other appeal decisions is that a wall or fence or a pier and gates can be set back from a highway, but still be '*adjacent*' to it, as a matter of fact and degree, provided that the enclosure is clearly to define the boundary of the property concerned from the highway and is perceived to do so. As indicated above each situation has to be considered on its merits and a planning judgement needs to be made in each case.

15. Having seen the appeal site and the proposed drawing (1:500/100@ A3, October 2016 216/11/02) I note that both north and south gates would be set back and would not be joined to the lower piers and walls. However, it is clearly intended that the lower piers and walls and the re-positioned higher piers and gates would be a major element in the means of enclosure to the appellant's' land.

16. Having seen the existing and proposed new location of the 2m high, re-positioned piers and gates in relation to the highway, it is my view that they would, as a matter of fact and degree, still be clearly perceived as being '*adjacent*' to the highway at Can Hatch. Due to their size and form they are dominant and distinctly noticeable features along the side of this part of the cul-de-sac. This perception of proximity to the highway is reinforced by the fact that the other two dwellings to the south have no such gate piers, gates or other enclosures.

17. The presence of vehicles parked on the footway and the road also emphasised the proximity of the existing gates and piers and gates to the highway. In my view a simple setting back of these features by just 1m would make no discernible difference as to how the re-positioned piers and gates would be perceived when viewed from the highway. On the basis of what is now proposed, therefore, I consider that the proposed piers and gates would still be '*adjacent*' to the highway and, because they would exceed 1m in height would not constitute permitted development under the GPDO.

18. I acknowledge that the proposed 2m high gates and piers would not be attached to the lower piers and walls and that they would be set back at least 1m from the back of the footway (the highway). However, each case must be assessed on its merits and, as a matter of fact and degree, I consider that the piers and gates in these positions and of this height would still be perceived as being part of the main boundary between the highway and the appellant's property. I conclude, therefore, that the wall and gates (exceeding 1m in height) as proposed would not be lawful within the meaning of Article 3, Schedule 2, Part 2, Class A of the GPDO. I consider that the LPA decision was sound and that planning permission would be required for the proposal. The appeal, therefore fails and a LDC will not be issued.

### **Other Matters**

19. I have taken into account all of the other matters raised on behalf of the appellant and by the Council. These include the detailed grounds of appeal; the submitted statements and the officer report. They also include the appellant's detailed comments in relation to the difference between this case and the appeal on the Reigate Road.

20. In particular it is contended that in this case, because there are physical structures between the highway and the proposal (and that these are not connected), the newly positioned gates and piers cannot be construed as an integral part of the boundary treatment. However I disagree and consider that this part of the boundary treatment has simply been moved further away from the highway. For the reasons set out above I have concluded that the proposal would still be '*adjacent*' to this part of the highway at Can Hatch.

21. None of the other matters alters my conclusions and nor is any other factor of such significance so as to change my decision that the proposal would not have been lawful for planning purposes on the date of the LDC application.

*Anthony J Wharton*

Inspector

