

ITEM: 5

Application Number: 09/01496/PRDE

Applicant: Mr James Welsh

Description of Application: Provision of fence 8 metres from the public highway in Lulworth Drive (application for LDC for proposed development)

Type of Application: LDC Proposed Development

Site Address: WIDEWELL PRIMARY SCHOOL, LULWORTH DRIVE
PLYMOUTH

Ward: Southway

Valid Date of Application: 17/11/2009

8/13 Week Date: **12/01/2010**

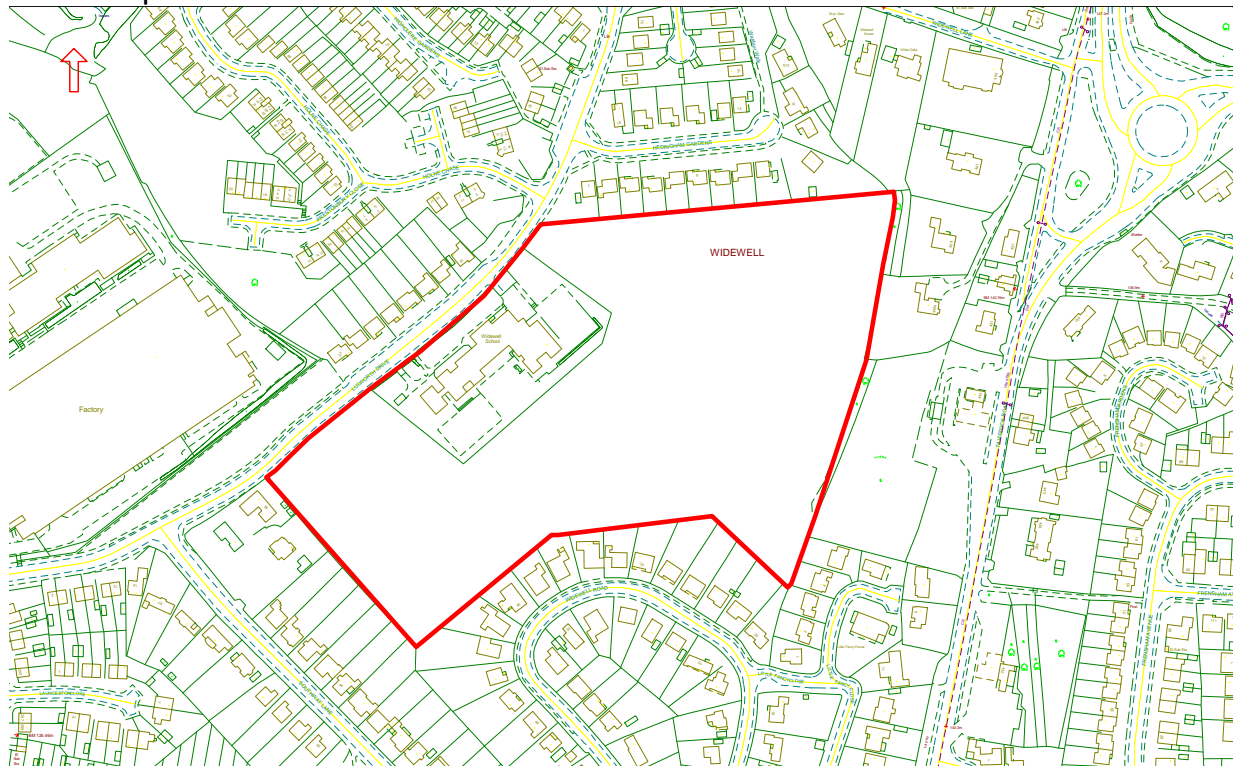
Decision Category: Member Referral

Case Officer : Karen Gallacher

Recommendation: Grant Conditionally

Click for Application Documents: www.plymouth.gov.uk

Insert map for committee.



OFFICERS REPORT

Site Description

The site is part of the playing fields adjacent to Lulworth Drive.

Proposal Description

The application is to establish whether planning permission is required for the erection of a 1.8m high fence, set back 8m from the highway to enclose the playing field by adjoining to existing means of enclosure.

Relevant Planning History

09/00645/FUL – erection of 1.8m high fence adjacent to highway – REFUSED

Consultation Responses

Legal services – Awaited.

Representations

Representations were received in respect of this application, but the objections related to planning considerations and were not relevant to this application. The people who sent in these letters have been advised of this.

Analysis

This is not a planning application. It is an application seeking a lawful development certificate ie it is a formal process seeking a legal opinion as to whether planning permission is required.

The only consideration is whether the proposed fence would require the submission of a planning application. The Town and Country Planning (General Permitted Development) Order 1995 allows for a 1.8m high fence to be erected without the need for the submission of a planning application providing it is erected as a means of enclosure and it is not adjacent to a highway used by vehicular traffic.

The proposed fence is shown to enclose a part of the playing field, and so the main consideration is therefore whether the fence is considered to be adjacent to a highway used by vehicular traffic.

It has been long held that there is no set distance that can be applied to determine whether a fence is adjacent to a highway. It is one of those matters that is considered by fact and degree. It is therefore necessary to consider case law to come to a judgement. There are a large number of cases relating to this matter and the case officer has considered more than 20 in coming to an opinion in this case.

One of the main issues, highlighted by case law, has been whether the land between the fence and the road/pavement is adopted highway ie highway maintainable at public expense (HMPE). Where this land has been part of the adopted highway, distances of up to 10m have been considered to be adjacent. Where this land is in private ownership, and not therefore part of the highway, distances of between 45cm and 5m have not been considered as

adjacent. In this application the area of grass between the fence and the pavement is not highway

Another significant consideration has been whether there is any feature between the fence and the highway. Where there has been a ditch, or partial planting or fencing on the intervening land, the proposed fencing has been more likely to be considered as NOT adjacent. In this application there is an existing chain link fence and hedge along a significant section of the land between the fence and the pavement.

In some of the cases judgements have been made about whether a specific distance is adjacent. In one case the inspector considered that 1.8m was sufficient distance for it not to be adjacent, whereas another considered arms length to be far enough. The closest case to be uncovered involved a distance of 45cm, which an inspector considered to be far enough away to not need permission. At the other end of the spectrum a distance of 6m was considered to be adjacent because in the open countryside 6m was not a significant distance. It is not clear cut, however, as one inspector held a 2m gap to be adjacent.

On balance, in a suburban setting, where the fence is a distance of 8m from the highway, where the intervening land is not HMPE and there are other features on the land, the case law that has been considered would indicate that the proposed fence is not adjacent to the highway and that permission is not required for the fence. Of the cases considered there are no directly comparable circumstances to conflict with this view. However, the opinion of Legal Services has not yet been received and will be reported in an addendum to the planning committee.

Human Rights Act - The development has been assessed against the provisions of the Human Rights Act, and in particular Article 1 of the First Protocol and Article 8 of the Act itself. This Act gives further effect to the rights included in the European Convention on Human Rights. In arriving at this recommendation, due regard has been given to the applicant's reasonable development rights and expectations which have been balanced and weighed against the wider community interests, as expressed through third party interests / the Development Plan and Central Government Guidance.

Conclusions

The main consideration in this case is whether the proposed fence is considered to be adjacent to the highway. The case officer has considered the case law for a number of similar cases where this matter was under consideration, and at the time of writing the report is of the opinion that the fence would not require the submission of a planning application. However, the consultation response from Legal services is awaited and will be reported to planning committee in an addendum report.

Recommendation

In respect of the application dated **17/11/2009** and the submitted drawings, **location plan received on 17th November 2009**, it is recommended to:
Grant Conditionally

Conditions

LAWFUL DEVELOPMENT

The proposed development complies with Class A of Part 2 of the Schedule to The Town and Country Planning (General Permitted Development) Order 1995. The proposal is therefore permitted development and a Certificate of Lawfulness is hereby issued.