

ITEM: 04

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 Develop

Site Address: WIDEWELL PRIMARY SCHOOL, LULWORTH DRIVE
PLYMOUTH

Ward: Southway

Valid Date of Application: 17/11/2009

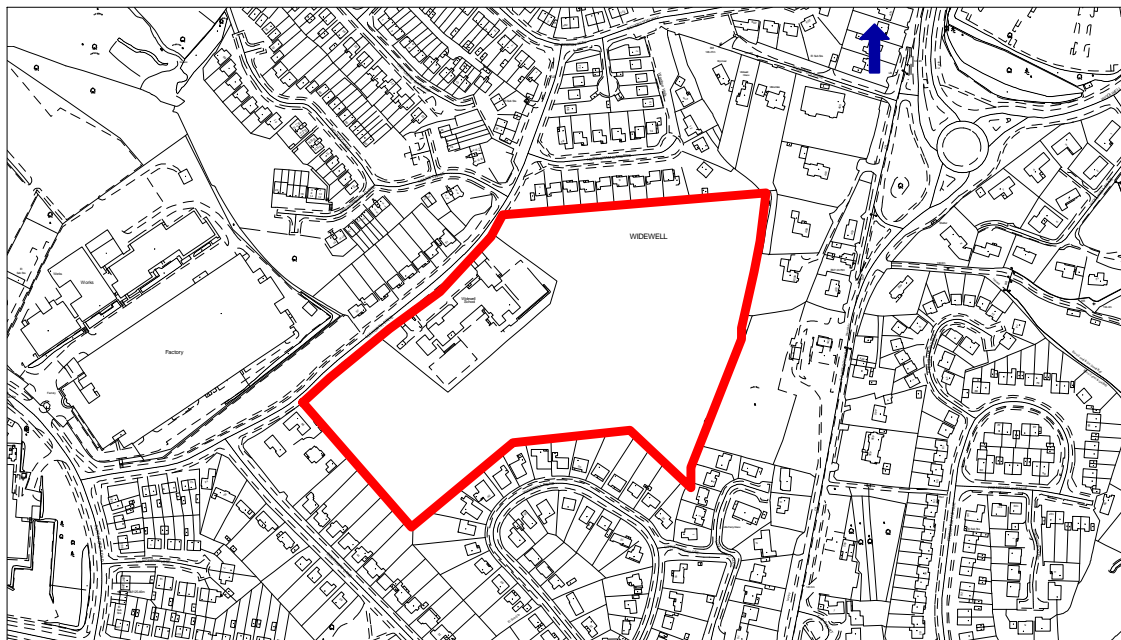
8/13 Week Date: **12/01/2010**

Decision Category: Member Referral

Case Officer : Karen Gallacher

Recommendation: Issue Certificate - Lawful Use Cert (Ex)

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This application was presented to the Planning Committee on 7 January 2010. At that meeting, committee members were minded to refuse the application, but deferred making a decision in order that they could give further consideration to previous case law relating to the erection of fencing.

Legal Services has provided additional commentary on case law as follows:

BRIEFING NOTE

Re: Widewell Primary School, Lulworth Drive, Plymouth

Application for Lawful Development Certificate

An application for a Lawful Development Certificate was made on 17 November 2009. The application was supported by the necessary requisite information in accordance with Section 192 (3) of the Town and Country Planning Act 1990, namely (A) The applicant is required in the application to specify the land to which it relates. (B) Describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55 (2) (F) identifying it by reference to that class. (C) Give the reasons for determining the use or operations to be lawful and (D) specify the date of the application for the certificate. **All of these requirements were satisfied by the applicant.**

The application was subsequently considered by both the Case Officer (Planning Service) and the Council's Legal Service. It was concluded by officers that the supporting evidence supplied by the applicant satisfied the requirements stipulated in Section 192(2) of the Town and Country Planning Act 1990 and the criteria contained within the Town and Country Planning (General Permitted Development) Order 1995 and the Case Officer was subsequently advised accordingly.

The Case Officer however was unable to determine the matter and issue a certificate, due to a Member request for referral to Committee being made. As a result the application was then brought before Planning Committee, being reported on 7 January 2010. The Case Officer's Addendum Report included a consultation from Legal Services advising that as the application had been made in accordance with Section 192 (2) of the Town and Country Planning Act 1990, and the Local Planning Authority had been provided with information satisfying them that the use or operations described in the application were lawful, if instituted or begun at the time of the application, they should issue a Certificate to that effect, as stipulated in Section 192(3) of the Town and Country Planning Act 1990. Prior to making the decision both the Case Officer and Legal Services considered substantive case law totaling more than 20 cases in connection with the lawfulness of the application. This included the definition of the word "adjacent" to a highway as referred to in Part 2 Class A of the Town and Country Planning (General Permitted Development) Order 1995, as development is not permitted by Class A.1(a) "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 one metre above ground level". The case law pertaining to the issue of whether or not a fence is adjacent to the highway quite clearly demonstrates that although a wall or fence does not actually have to touch the edge of a highway, and may be some distance back, it has to be close enough to have the perceived function of forming a boundary between a highway and a property. The legal definition of the word

“adjacent” is ‘laying near or close by, but not necessarily connected’. This differs from the term ‘adjoining’ for example which means “touching at some point or along a line, contiguous’. Both terms are defined in Websters New Word College Dictionary

It should be noted that in 1988 the word “adjacent” as incorporated within the Town and Country (General Permitted Development)Order 1995 replaced the word “abutting” used in previous orders.

The case of (South Oxfordshire DC 25/11/99 DCS No 034-715-308) determined that a distance of six metres from a highway constituted being adjacent. However the difference in this case from the situation at Widewell, was that it was in a countryside location. It was therefore considered that six metres was not a significant distance in this specific context and therefore it did amount to development adjacent to the highway. All of the other cases researched could not be directly compared to the current application, as the distance from the highway was considerably less than 8 metres, in most of the cases, and in some cases where distances of up to 10 metres have been considered to be adjacent, the land has been part of the adopted highway.

Where the land is in private ownership and not part of the highway, case law indicates that distances of between 45 cm and 5 metres have not been considered adjacent, which is the case in this application.

Another significant consideration as mentioned in the case officer’s report appears to be whether there is any feature between the fence and the highway. **Again case law has shown that 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 not adjacent. In this case there is an existing chain link fence and hedge along a significant section of land between the fence and pavement.

The current legal position can be illustrated by two cases: *Simmonds and Others v Secretary of State for the Environment and Rochdale Metropolitan District Council* (Divisional Court of Queen's Bench November 5 1980) and *Cleethorpes Borough Council v Forrester* (1987). In the latter case it was stated that even a "reasonably limited setting back" of the wall in question would have allowed permitted development rights to be relied upon. **An article in the Journal of Planning and Environment Law (June 1999 pp 569-571) following the re-wording brought about by the introduction of the Town and Country Planning (General Permitted Development Order) 1995 supports a distance of 1.5m from a highway being the general maximum regarded as falling within the "adjacent" exemption.**

Whilst it has to be emphasised that each individual case is considered on the basis of "fact and degree", the case law, studied by both the Case Officers, is not supportive of the fence in question being "adjacent" to the highway. Therefore, as stated previously, if the requirements of Section 192(2) of the Town and Country Planning Act 1990 have been complied with, then an appropriate Certificate should be issued.

In conclusion should Members decide not to approve the Officer's recommendation, culminating in refusal to grant a Certificate, then Section

195(1) of the Town and Country Planning Act 1990 provides for an appeal to the Secretary of State. An appeal can be made where an application is refused in whole or in part, or in the event of non-determination within eight weeks. Such appeals fall within the categories to be determined by an Inspector, rather than the Secretary of State, unless the Secretary of State decides to recover jurisdiction. So far as the mode of appeal is concerned, a public local inquiry will generally be held where facts are at issue or in dispute and, as with all other appeals, costs may be awarded on the basis of unreasonable conduct; for example where a Planning Authority refuses a Certificate where the weight of evidence should have made it clear that the applicant had discharged his burden of proof.

Aside from the above members should also note that there is a further appeal to the High Court under Section 288 of the Town and Country Planning Act 1990, challenging a decision of the Secretary of State made under S195(1). The procedure is open to any "person aggrieved" by the decision.

Having fully reviewed the case law, officers would strongly recommend granting the lawful development certificate.

The report below is the same as that presented on 7 January 2010.

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:
Issue Certificate - Lawful Use Cert (Ex)

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.