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## Appeal Decision

Site visit made on 30 September 2016

**by John Whalley**

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

**Decision date: 7 October 2016**

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### **APPEAL A:**

**Appeal refs: APP/X5210/C/16/3145106, /07, /08, /09, /10**

**Land at Merton House, Merton Lane, London N6 6NA**

- The appeals were made by Mr R Auterac, (Appeal ref: APP/X5210/C/16/3145106); Mrs Jill Auterac, (APP/X5210/C/16/3145107), Mr Alexander Auterac, (APP/X5210/C/16/3145108), Mr Charles Auterac, (APP/X5210/C/16/3145109) and Mr Nicholas Auterac, (APP/X5210/C/16/3145110), under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the London Borough of Camden Council.
- The notice was issued on 14 January 2016.
- The breach of planning control alleged in the notice was: Without planning permission; Erection of front boundary fencing.
- The requirement of the notice is: The metal boundary treatment to Merton Lane shall be completely removed and either:
  - replaced with fencing to match the design of the fence previously in place; or
  - replaced with fencing no more than 1.0m in height.
- The period for compliance with the requirement is four months.
- The appeals were made on grounds (a), (c) and (g) as set out in Section 174(2) of the 1990 Act.

**Summary of Decision: The enforcement notice is invalid for uncertainty and is quashed.**

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### **APPEAL B:**

**APP/X5210/W/16/3144970**

**Land at Merton House, Merton Lane, London N6 6NA**

- The appeal was made under Section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal was made by Mr Richard Auterac against the decision of the London Borough of Camden Council.
- The application, ref: 2015/6310/P, dated 10 November 2015, was refused by a notice dated 7 January 2016.
- The application was the submission of landscaping details as required by condition 3 of planning permission ref. 2010/2460/P dated 7 September 2010 (for excavation to create basement floor level, and widespread changes to north and east elevation of the single family dwellinghouse).

**Summary of Decision: The appeal fails. Planning permission is not granted on the details submitted to discharge condition 3 to planning permission ref. 2010/2460/P dated 7 September 2010**

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**Procedural matter**

1. Mr Richard Auterac made an application for a full award of costs against the London Borough of Camden Council. That is the subject of a separate decision.

**Appeal site**

2. Merton House is a large brick built detached house situated on the northern side of Merton Lane at its junction with the road Highgate Hill West. The enforcement notice appeals deal with the recently erected front boundary fencing to the Merton Lane and Highgate Hill West road frontages. The fencing has been erected on a low brick wall varying in height from about 0.5m to about 0.8m high along its entire length. The wall has intermediate brick piers about 1m high along its length.
3. From its western end alongside the vehicular access to Merton House the wall is surmounted by a metal rail fence that extends eastwards for some 15m. The wall and fence have a total height of about 2.4m above the wide grass verge to the roadside. There is an evergreen hedge as high as the fencing immediately inside the fence. The metal fence has been built of 10 panels about 1.5m wide, 1.8m high with vertical rails at 100mm spacing. Each panel has 2 horizontal rails spaced about 100mm apart some 300mm from the bottom edge. The remaining length of wall is surmounted by feather edge timber panel fencing. This approximately 24m length of fencing curves around the corner from Merton Lane on to Highgate Hill West where it adjoins the rear edge of that road's narrow footway. The wall and timber fencing has a total height of about 2.4m above the verge and footway. There is a pedestrian gateway in the fence on to Highgate Hill West.
4. Merton House lies within the Highgate Village Conservation Area. Merton House itself is identified in the Conservation Area Appraisal as a "positive building", one that makes a positive contribution to the Conservation Area.

**The enforcement notice**

5. The Appellants said there was a lack of precision in the enforcement notice. They were right. The description of the breach of planning control - *Erection of front boundary fencing* - appears to be directed at all of the boundary fencing to Merton House along its boundaries with Merton Lane and Highgate Hill West. However, the requirement of the notice applies only to the metal railings. There is no reference to the timber fencing along part of the Merton Lane frontage or to Highgate Hill West.
6. The Council officer's report on the alleged breach of planning control deals only with an objection to the erection of the metal fencing. The plan attached to the notice does not assist in identifying the length of fencing alleged to be in breach of planning control. It applies only to; "... the metal boundary treatment to Merton Lane ... ". The reason for issuing the notice makes no distinction between the metal fencing, (described as "metal boundary treatment"), and the timber fencing. It is only when the requirement is read it becomes evident the

complaint is limited to the metal fencing fronting Merton Lane. There is reference to the timber fencing in the Officer's report. That says, uncritically: "The solid timber fence replicates a previous fence of similar appearance, ...". If, as it appears, the Council are untroubled by the timber fencing, presumably they would not be worried about the possible consequence of s.173(11) of the Act. That is, if the enforcement notice was upheld and the requirement complied with, the remaining front boundary fencing would benefit from a planning permission by virtue of that section of the Act.

7. The notice plan should have shown the length of fencing complained of. The requirement is also lacks clarity. The metal boundary fencing, (inaptly described as "treatment"), fronting Merton Lane is to be removed. There is no mention of the low brick wall. Is it to remain? If the intention behind the first option of the requirement was to replace the metal fencing with fencing to the same height, appearance and use of materials as the previous fencing, said to have been chicken wire, it should have said so.
8. It is not clear from the second part of the requirement, (and from the officer response to the ground (c) appeal, that consideration of the timber fence is not relevant), that the Council concurred with the Appellants that the timber fencing was permitted by virtue of the concessions in The Town and Country Planning (General Permitted Development) (England) Order 2015, (the Order), in particular, Schedule 2, Part 2, Class A. In my view, it was not. So an attempt to revise this part of the requirement could lead to injustice, (see note below). The requirement's alternatives should have included the option to simply remove the fence. That is, to remedy the breach of planning control.
9. The deemed planning application arising from the ground (a) appeals lacks certainty. The allegation describes "front boundary fencing". A normal reading of that would suggest that would encompass the entire length of fence to the frontage of Merton Lane and Highgate Hill West. That is especially so in the absence of an identifying line on the plan attached to the notice. The reasons for issuing the notice again use the words "front boundary fencing" without reference to, or distinguishing between, metal and timber fencing.
10. In my view, the alleged breach of planning control, as drafted in the notice, gives rise to a ground (a) appeal asking for planning permission for the retention of the low brick wall and metal fence and the low brick wall and timber fence erected along Merton House's frontage to Merton Lane and Highgate Hill West. However, the ground (a) appeal will not be considered. That is because, although I conclude that the enforcement notice is not a nullity in that it is not invalid on its face, it is void for uncertainty.
11. If I attempted to correct the enforcement notice it would have be necessary to change the description of the breach of planning control, referring only to the metal railing fence and its dwarf wall. That would have much changed the deemed application. A new notice plan to properly show the extent of the metal railing fencing would also have been needed. Finally, revised requirements would have been needed to better describe reasonable remedial measures. There is a duty upon me to get the notice in order if I can, (*Hammersmith LBC v SSE and Sandra [1975] 30 P and CR19*), by exercising the powers available to me under s.176(1)(a) of the Act. The case of *Simms v SSE & Broxtowe BC [1998] JPL B98* is authority for the view that any correction can be made, so long as there is no injustice to either side. In *Simms* was held it was irrelevant

whether the corrections go to the substance of the matter; also see *R v SSE and LB Tower Hamlets, ex parte Ahern [1989] JPL 757*. However, in this instance, because so much of the notice requires revision, I conclude that would not be possible to do that without injustice to one or both parties. The enforcement notice is quashed.

**Note:** Having said, in effect, that the ground (c) appeal would have failed, further explanation is necessary. It is not for me to offer gratuitous advice, but this matter has relevance to my consideration of the merits of the s.78 appeal.

The Appellants said the fencing and boundary treatment to the road frontage to Merton House benefitted from concessions in Order. Article 3, Schedule 2, Part 2 at Class A to the Order permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. That is subject to, amongst others, limitation A.1(c) – provided the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or the height referred to in paragraph (a) or (b) as the height appropriate to it if erected or constructed, whichever is the greater;. It was contended that the previous fencing was to the same height as that the subject the s.174 appeals. The Council said that no evidence had been provided to support that assertion. My inspection of a Google Earth aerial image taken on 19 July 2013 does not assist the Appellants. Even if that image had clearly shown any previous fencing, all of the appeal fencing on the low brick wall is new. Neither the timber panel fence nor the metal railing fence was, as a matter of fact and degree, an old fence that has been maintained, improved or altered, notwithstanding the retention of the brick wall upon which the fence was erected. There may have been timber panel fencing at the eastern end of the road frontage, but the timber fencing there now is new. It seems there was some chicken wire fencing at the western end of the frontage. Again, however, the metal rail fencing is new. Also, when the timber fence was erected, it was topped with shallow trellis panels. That apparently took the overall height of the fence above that of the original fence. Even if it could have been shown that the timber panel section of the fence otherwise complied with the Part 2, Class A of the Order concessions, the extra height would have amounted to a failure to comply with limitation A.1(c). It was also accepted that the white painted arrowheads to the metal rails were slightly higher than the former chicken wire fencing. That extra height was said to have been insignificant. But where a development is built in excess of permitted development limits, the whole development is unauthorised, (*Garland v MHLG [1968] 20 P and CR 93*). Any subsequent work that might bring the development into conformity with those limits does not result in the development becoming permitted development. Rights under the Order cannot be claimed retrospectively. The situation must be judged at the date the development was carried out. In my view, none of the new appeal road facing fencing at Merton House benefitted from the Part 2, Class A, Order concessions.

The Appellants said that the metal railings fronting Merton Lane had the benefit of planning permission. That was because the Council had approved the hard and soft landscaping details to discharge condition 3 to planning permission 2010/2460/P, (decision ref. 2013/2999/P). The approved landscape plan, drawing No. 93-014 dated February 2102, showed a photograph of the proposed "metal railing installed on existing brick wall with existing hedge behind.". However, the plan and photograph fail to specify the height of the metal rail fencing. Also, the plan shows metal railings to be erected along the southern, Merton Lane and the eastern, Highgate Hill West boundaries, that is, the entire road fronting boundary. The plan does not show an intention to retain the timber fencing along part of the Merton Lane frontage and along the entire Highgate Hill West frontage. There appears to be no planning permission for the timber fence section where it bounds the roadside. If, as I said above, the timber fencing is new, it was not permitted development. The front

boundary fencing as erected to Merton House is not that shown on approved drawing No. 93-014.

### **Appeal B - the s.78 appeal by Mr Richard Auterac**

12. The s.78 appeal proposals are those particularly shown on drawing No. 94-100, entitled Proposed External Landscape Plan and dated October 2015. The works have been completed.
13. The Council's decision on the application, dated 7 January 2016, gave 2 reasons for refusing permission. They firstly criticised the appearance of the metal fencing along the Merton Lane frontage. They said it failed to preserve or enhance the appearance of the Conservation Area. The feather board timber fencing along the remainder of the site frontage to Merton Lane and Highgate Hill West was not mentioned. Nor were other aspects of the landscaping project, including the tree planting, grassed areas, 1.8m high timber fencing to the rear and sides of the property as well as the driveway and paving areas.
14. The Council's second reason for refusal concerned the artificial grass laid between the appeal fencing and the house. They said it would detrimentally affect the biodiversity of the site and jeopardise trees within the covered area.

#### *The road fronting fence*

15. The Council's concentration on the effect of the metal railing fence to the Merton Lane frontage was to the exclusion of any comment on the timber fencing that forms the greater length of the fencing to the frontage to Merton House as proposed in drawing No. 94-100. As above, I consider all the fronting fencing to be unlawful. In addition, the entire fence is part of the s.78(1)(b) appeal application. Therefore I must consider the acceptability or otherwise of all the fencing to the front of Merton House along Merton Lane and Highgate Hill West.
16. In considering the merits of the drawing No. 94-100 frontage fencing proposals, now built, I bear in mind that the Council approved the hard and soft landscaping details to discharge condition 3 to planning permission 2010/2460/P, (decision ref. 2013/2999/P). The 2013/2999/P landscape plan, drawing No. 93-014, dated February 2102, shows metal vehicular access gates to the western, Merton Lane, end of the site. The current appeal plan 94-100 shows "ex, (existing), metal gates upgraded". The approved 93-014 plan shows, running eastwards, "existing brick wall to be made good and existing timber fence to be replaced with metal railing with hedge behind". This metal railing fence, of unspecified height, was then to run the remainder of the frontage to Merton Lane, then run around the corner into the Highgate Hill West frontage up to a pedestrian gate into Merton House, described as West Hill gate. The remainder of the approved fencing, of about 5m in length to the boundary with No. 35A Highgate Hill West, was shown to be "existing brick wall and fence". However, the current appeal application drawing shows metal fencing from the western end vehicular access running about 15m to the start of the curve into Highgate Hill West, described as "existing brick wall to be made good and existing timber fence to be replaced with metal railing to match existing height 1.8m high with hedge behind". The section thereafter up to the pedestrian gate is shown as a "New West Hill feather edge boarded Timber Fence to match existing height 1.8m high". The section from the pedestrian gate to the northern boundary with No 35A is shown as "existing brick wall and fence".

17. I have set out the approved and proposed fencing schemes in some detail because I think a wider view than that taken by the Council is necessary. Their case appears to suggest they consider the timber fencing to be permitted development. If so, it is not a position I adopt, for the reasons set out above. Notwithstanding that, I must deal with the merits of the October 2015 drawing No. 94-100 appeal proposals in total.
18. The Council said the London Borough of Camden Local Development Framework was adopted in November 2010. They said policies most relevant to the appeal scheme were CS5 (Managing the impact of growth and development), CS14 (Promoting high quality places and conserving heritage), DP24 (Securing high quality design) and DP26 (Managing the impact of development on occupiers and neighbours). Camden Planning Guidance No. 1: Design, adopted in 2015 was also of note.
19. I agree with the Council that the metal railing fencing has a detrimental effect on the appearance of Merton House and on this part of the Conservation Area on the northern side of Merton Lane. The high metal fencing is a discordant feature in the street scene, especially so when contrasted with the attractive open frontage to the property next door to the west. The design and form of the metal railing panels themselves are not without some merit. But, because of its overall height, the metal fencing has an appearance more akin to a security fence around a commercial building rather than to a family home. The unduly high metal fence, as the Council said, does not co-exist sympathetically with the adjoining mostly tree, shrub and grassed character of domestic curtilages and house frontages just to the west.
20. The fencing to the front of Merton House, including the timber panel fencing, has introduced an unattractive, over-dominant feature in what is a fairly prominent spot at the junction of Merton Lane and Highgate West Hill. The wide grassed verge to the Merton Lane part of the fronting fence helps to soften its unfavorable effect. But the slight slope down to the carriageway edge also worsens the adverse effect of the height of the fencing. The low brick wall and timber fence adjoins the back of the footway alongside Highgate Hill West, providing privacy to Merton House, but an uncomfortable effect on those walking alongside the road.
21. My conclusion is that the fencing part of the appeal landscaping scheme for Merton house is not acceptable. As such, fails to preserve or enhance the character and appearance of the Conservation Area, contrary to local policy DP25. The fencing, at its current height, is detrimental to the appearance of Merton House and to the otherwise attractive appearance of this part of the northern side of Merton Lane, contrary to policy DP24.
22. The Appellant, in relation to the s.174 ground (f) appeal, said that if the metal fencing was not acceptable, there was an alternative of reducing its height such that the top rail of the metal fence was 1.1m above the top of the brick wall, as shown on submitted plan, drawing No. 69-600, revision A of April 2016. If that fencing was applied to the whole length of the Merton House road frontage I consider that it could form part of an acceptable landscaping scheme to meet the requirements of condition 3 to the 2010/2460/P planning permission dated 7 July 2010.

*The artificial grass*

23. The Council had been concerned that the synthetic grass covering might not be porous. Newly-planted trees were located within slits where the synthetic plastic covering had been sliced open rather than having been planted in dedicated tree pits. Their access to moisture and air would be compromised. Also, as well as restricted air and moisture, the lack of natural turf vegetation meant there would be limited plant or insect life around the trees to support a natural ecosystem. That could compromise the ability of the trees to grow naturally, to reach a mature height and to serve as genuine replacements for trees that had been removed without permission. The Council expressed similar concerns about the long term health and the capacity for growth of existing trees now surrounded by synthetic plastic covering. A restriction on permitted development rights for creation of hard impermeable surfaces to front gardens of dwellinghouses had been introduced in October 2008. The Council concluded that the alteration detrimentally affected the biodiversity of the site and the long-term health of the trees. That was contrary to policy DP25, (Conserving Camden's Heritage).
24. If, as the Appellant pointed out, the artificial grass is fully porous, there should be no significantly harmful effect upon trees planted within the covered area. It may be that natural grass would be better, especially in relation to providing for more biodiversity. But my conclusion is that the Council's objection, based largely on an assumption of impermeability of the artificial grass, should not prevail.
25. In all other regards, I consider the submitted landscaping scheme for Merton House to be acceptable.

**FORMAL DECISIONS**

**APPEAL A: Enforcement notice s.174**

**Appeal refs: APP/Q9495/C/15/3137243, /44**

26. The enforcement notice is invalid for uncertainty and is quashed. The deemed planning application was not considered.

**APPEAL B: Planning appeal s.78 Appeal ref: APP/Q9495/W/15/3137242**

27. The appeal fails. Planning permission is not granted on application ref: 2015/6310/P, dated 10 November 2015 for the approval of landscaping details as required by condition 3 of planning permission ref. 2010/2460/P dated 7 September 2010 (for excavation to create basement floor level, and widespread changes to north and east elevation of the single family dwellinghouse), at Merton House, Merton Lane, London N6 6NA.

*John Whalley*

INSPECTOR