

Reference No:	07/02686/CPD	Cert of Lawfulness of Proposed Dev
Proposal:	Certificate of lawfulness to the proposed installation of timber entrance gates and associated metal fencing	
Location:	Tangles 17 Llanvair Drive Ascot SL5 9HS	
Applicant:	Ms T Payne	
Agent:	John Andrews Associates	
Date Received:	11th October 2007	
Case Officer:	Alison Barker	Member Call-in: Cllr D Hilton
Recommendation:	PERM	Date of Expiry: 6 December 2007

Planning Context:

Excluded Settlement

Sustainable Development Implications:

None as the application is for a Certificate of Lawfulness

LIST OF BACKGROUND PAPERS:**1. Main Relevant Policies**

In this instance the policy provisions of the Structure and the Local Plans are not applicable. This is because the application is for a Certificate of Lawfulness, which is not a planning application, and must be determined on the basis of the legal issues involved and not on the planning merits or otherwise of the proposal.

2. Previous Relevant Decisions

05/02895	Construction of 2.1m electric sliding gate, 1.85m high wall with 2.2m high piers with lanterns fronting Llanvair Drive and alterations to existing vehicular access	Refused	10.01.06
		Appeal dismissed	19.12.06
06/02664	2.0m electric sliding gates with 2.2m high piers fronting Llanvair Drive and alterations to existing vehicular access	Refused	09.01.07

3. Neighbour Notification Responses

Not consulted as the application is for a Certificate of Lawfulness, although a 57 signatory petition has been received from residents of Llanvair Drive who are concerned that they have not been formally consulted and consider:

1. The applicant is trying to circumvent the recognised planning process as previous planning applications have been refused;
2. It is the duty of the Council to respect, protect and enhance the character and appearance of existing residential areas and the granting of the Certificate would be contrary to this duty;
3. Allowing the Certificate would contradict the Planning Inspector's consideration, in dismissing the previous appeal, that the development would be detrimental to the street scene;
4. Just because the application is for a Certificate does not make the development any less harmful;
5. There would be an obstruction to users of the footpath as vehicles attempt to gain

- access to the property because vehicles would need to pass through two sets of gates (the existing low metal railing gates and the proposed gates which are set further back); and
6. There is a restrictive covenant preventing the erection of boundary fences.

4. **Parish Council**

The Parish Council was notified of the application and any response will be reported as Late Observations.

5. **Society for the Preservation of Ascot and Environs**

SPAЕ's objections to the application can be summarised as follows:-

- Concern the applicant is trying to overturn an appeal decision;
- The development will give rise to a 'almost a fortress feel' to the property;
- The 2m high timber gates would give the appearance a formidable and stark contrast to adjacent dwellings.

6. **Legal Officer**

The Legal Officer has assumed there is no dispute that the proposed boundary treatment would have a function of enclosure, and that the only issue is whether or not the proposed boundary treatment would be adjacent to the highway. This is a matter of fact and degree in each case and there are many disparate appeal decisions on the subject which does not make it easier to make a judgement. However, reading through the appeal decisions, the following principles have emerged over the years:

A

It is clear that a wall or fence does not actually have to touch the edge of a highway to be considered adjacent and may be some distance back provided it is close enough to have the perceived function of forming a boundary between a highway and a property. Thus in Rother DC 9/4/03, a fence that was about 2m from the highway edge was considered to be "adjacent".

B

In addition to the actual distance from the highway, the existence of intervening structures and the character of the area are also important factors to take into consideration. Thus in one case (South Oxfordshire DC 25/1/99), proposed piers were to be 1.9m tall and 6m back from the highway. It was held that in a countryside location with buildings standing in reasonably spacious plots, 6m was not a significant distance and therefore the piers would not be permitted development. However, in another case (Tunbridge Wells BC 18/2/02), a 1.8m high fence was positioned 1.7m back from the footway. The intervening space contained a newly dug and planted bed with young trees, shrubs and plants. The Inspector considered the planted bed to be a feature of substance in its own right that separated the fence from the highway.

C

There are appeal decisions which advise that the entire boundary treatment (piers, gates, walls, fencing, etc), should be viewed as a single structure, and therefore if any part of the proposed development is adjacent to the highway, the whole development will be subject to the 1m rule (see Wycombe DC 19/11/91 and North Wiltshire DC 20/8/97).

With regards to this site the Legal Officer notes from the application that the nearest parts of the fencing are to be set 1.2 and 1.3 metres back from the highway boundary. There are many appeal decisions where fences of this sort of distance from the highway have been considered to be adjacent. However, the Legal Officer also notes from drawing number 2151.3 that there is an existing 2m high (approx)

laurel hedge between the highway and the proposed fencing. It could be considered that the hedge is a sufficient intervening feature and the sliding gate to be set back sufficiently from the highway, so that neither has the general appearance of being adjacent to the highway.

REMARKS

1. The application has been brought before the Panel at the request of Councillor Hilton. Councillor Hilton has concerns that the proposed gates were the subject of two planning applications both of which were refused and the latter dismissed at appeal and that the proposal requires planning permission.

The Site and Surroundings

2. The site is a large detached property of sylvan character, typical to this section of Llanvair Drive. It is characterised by mature boundary hedges, evergreen shrubs and trees, some of considerable height, which separate large detached houses from the road. There are no other properties in the immediate vicinity which have hard boundary treatments of gates, walls or fences. There is a 2m high close-boarded fence that lies behind the existing hedge along the front boundary. The driveway entrance is about 8m wide and there is a pair of existing low metal railing gates.

The Proposal

3. The applicant seeks a Certificate of Lawfulness for a proposed timber sliding gate and curved metal fencing either side. The metal fencing would be a maximum of 2m high and join onto the existing 2m timber close-boarded fences behind the front hedge. The metal fencing would join the timber fence with a set back of between about 1.2 and 1.3m from the footpath. The metal fencing would be perpendicular to the footpath and then curve to join the 2m high timber sliding gate which would be set back about 3.5m from the footpath and behind the existing pair of low metal railing gates.

Principal Planning Issues

4. Since the application is for a Certificate of Lawfulness for a proposed development, which ought to be determined on the legal issues involved and is not a discretionary matter, it is not possible to take into account the visual impact of the proposed fencing or the gates, nor any of the other issues raised by objectors which refer to the planning merits or otherwise of the proposal. The application is seeking a formal legal view as to whether the proposal can be constructed without the need for planning permission.
5. The determination of the application must be made on the basis of whether the proposed metal fences and gates would constitute permitted development under Class A of Part 2 to Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995, as amended (the GPDO). Under the GPDO the erection of a gate, fence, wall or other means of enclosure would be permitted development and therefore not require planning permission unless:
 - The height of the gate, wall, fence or other 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; or
 - The height of the other gate, fence, wall or means of enclosure would exceed two metres above ground level.

A fence or gate of up to two metres in height and forming a means of enclosure can therefore be erected without requiring planning permission provided that the fence is not '**adjacent to**' a highway used by vehicular traffic.

6. There is no definition in the GPDO of what constitutes 'adjacent to' a highway. In order to be adjacent to a highway a fence or wall would not have to touch the edge of a highway, and could be set some distance back.
7. The following cases (not within the RBWM) are a selection of those that have discussed the interpretation of what 'adjacent to' a highway can mean:
 1. A 1.8m high fence at 1m from the highway edge was proposed. It was considered that the fence, without any significant intervening feature, could be considered adjacent to the highway as this phrase did not require the structure to touch the boundary. Accordingly the fence exceeded the 1m permitted development height and permission was required;
 2. Enforcement action was taken against the erection of brick gate piers, walls and timber gates. The development consisted of 1.7m brick piers some 1.8m from the edge of the carriageway from whence two stepped brick walls curved away to 2.7m brick piers supporting 2 five bar gates. It was maintained that the structures were not adjacent to the highway and thus those parts less than 2m were permitted development. An Inspector considered that the word adjacent had the meaning bordering or close to and it was not required that a wall touch a highway. As the walls, piers and gates were a single structure the whole fell within the 1m rule;
 3. Enforcement action had been taken against walls of under 1m in height which were set back 45cm from the garden area heightening to about two brick piers supporting a pair of gates. The piers were just under 2m in height. A local authority felt that the walls and gates were not permitted development but an Inspector disagreed. He noted that the Council had agreed at the Hearing that a wall running back into a site could not be considered adjacent. He added that the walls and gates were set back sufficiently from the road for them not to be perceived by passers by as marking the boundary of the appellant's land;
 4. An Enforcement Notice alleged the erection of a plywood fence more than 1m high. The structure lay along the frontage of a vacant piece of land in a town centre. The fence was situated 1.65m behind a line of kerbing and a low wooden rail which separated footway paving from forecourt paving. An Inspector felt that the fence enforced against was not adjacent to the highway, not being contiguous with it. The Notice was quashed;
 5. In a case concerning enforcement action taken against stables, access works and a 1.8m fence in a rural area, one of the grounds argued was that the fence element was permitted development. An Inspector felt that the fence was clearly adjacent being close to a ditch which ran along the back of the highway verge. However, on either side of the access the fence splayed into the site only obliquely facing the road. The Inspector viewed the two sections of fencing as continuous structures and stated that it would be illogical to treat their parts differently. The whole of the fencing was subject to the 1m rule. The Enforcement Notice was upheld;
 6. An Enforcement Notice alleged the erection of a fence over 1m in height, and required its reduction to that level. It was accepted that the 1m rule applied but it was suggested that the appellant could comply with the notice and then erect a further fence of 1.8m high about 1.1m behind it. An Inspector felt that this would be a most unsatisfactory result, and was referred to *Simmons, Simmonds & Foxton v SOS & Rochdale MDC 1981*. He deduced from this judgment that the two structures which would result if the appellants threat were carried out would be so close as to be viewed as one structure;

7. An Enforcement Notice required the reduction in height of a 1.8m high wall and railings at a dwelling house in the Green Belt and Chilterns AONB. In upholding the notice, an Inspector held that although the wall was separated from a highway by a grass verge and a line of recently planted hedging plants, it remained no more than approximately 2 m from the edge of the carriageway and this was sufficient for it to be considered adjacent. The inspector commented that for the purposes of applying Class A of Part 2 of Schedule 2 of the GPDO, it was not necessary for the wall to be contiguous with the highway and therefore since it exceeded 1m in height, it was not permitted by the Order;
8. A 2m high fence had been erected for a length of 50m at a farm and set back from a road by 5m. An Inspector concluded that there were two belts of shrubs/small trees, a post and wire fence and a small depression. The existence of other boundary features supported the view that the fence did not lie adjacent to a highway and was therefore permitted under Class A of Part 2 of the GPDO;
9. A Certificate was sought for the erection of entrance gates, piers, walls and railings and six proposed piers were to be 1.9m tall. The issue was whether a distance of 6m from a highway constituted being adjacent. It was found that in a countryside location with buildings standing in reasonably spacious plots, 6m was not a significant distance and therefore this did amount to development adjacent to the highway. As such it would breach the 1m limitation within Class A;
10. Enforcement action was taken against the erection of a fence at 1.8m high. It was argued that the fence was not 'adjacent to' the highway. An Inspector noted that the fence was set back 500mm from the carriageway behind a grass strip. It was agreed that this land was part of the highway and the inspector concluded that even if this were not so the setback was still within the reasonable meaning of 'adjacent';
11. Enforcement action was taken against a front boundary wall including the return to its sides. The wall was 1.19m in height and it was not argued that this was permitted development along the frontage. The local authority contended that the flank walls were caught by the 1m rule as well. The Inspector examined the question in some detail and concluded that the Council's interpretation would create an illogical result meaning that walls at some considerable distance from the highway would be limited to 1m. He concluded that the term 'adjacent' should be interpreted as excluding walls which did no more than meet the highway at one point;
12. An Enforcement Notice was directed against a 1.9m high fence within an AONB. The fence stood on top of a bank approximately 3.5m from the edge of a highway and the Council claimed that as a rule of thumb any fence erected within 5m of a highway should be treated as lying adjacent to it. Accordingly it was not permitted under Class A of Part 2 of Schedule 2 of the GPDO 1995. The appellants claimed that the 5m rule was arbitrary and had no foundation in law. They argued that it did not adjoin the highway because of an intervening strip of land which was in their ownership. An Inspector held that the term 'adjacent' did not necessarily mean that the fence should physically adjoin or touch the highway. The latter included the highway verge which was 1.2m wide so in reality the fence was approximately 2m from its edge and this was sufficiently close as to lie adjacent. Accordingly permission was required;
13. The retention of gates leading to a dwellinghouse was requested. The access to the property consisted of a private drive which ran between the garden areas of two other houses. It joined a public highway and piers supporting the gates had been erected between four and six metres from the junction. On this basis the appellant claimed that it was permitted under Class A of Part 2 of the GPDO because they did not exceed two metres in height and did not lie adjacent to a

highway. An Inspector stated that it was not necessary for the gates or piers to stand on the boundary of the highway in order to be adjacent. The existence of a bellmouth between them and the highway which was in private ownership, did not prevent them from being viewed as being adjacent. In the street scene, the gates and piers would appear as an integral part of the features defining the extent of the gardens of the appeal property and those on either side. Thus there would be insufficient physical or visual detachment and accordingly they would to all intents and purposes lie adjacent to the highway;

14. An Enforcement Notice alleged the erection of a 2m high fence. A Council argued that the fence was permitted development under the GPDO because it was located adjacent to a highway and as a consequence the maximum permitted height was 1m. In rejecting this claim, an Inspector agreed that whether the fence was 'adjacent' to the highway was a matter of fact and degree. However in the instant case it was separated from the carriageway by a wide grass verge, a row of mature trees and another post and wire fence. It was concluded that this was such a strong barrier that the fence did not have the appearance of being next to or close to the highway;
 15. An Enforcement Notice sought the removal or reduction in the height of a 1.8m fence, some 20m in length, that ran parallel to the highway at a point some 1.7m back from its footway. The intervening space to be a newly dug and planted bed with young trees, shrubs and plants. There was no dispute that the fence constituted development for which permission was required and the question identified by the Inspector was whether, in this case, it was permitted development under the GPDO. The Council argued that the fence was so close to the highway as to be regarded as adjacent to it and as such could not exceed 1m without express permission. The Inspector rejected the Council's submission as he considered the planted bed to be a feature of substance in its own right that separated the fence from the highway. Furthermore it was held that the distance precluded a person from touching the fence when standing on the footway and he found no sense of immediacy or proximity of the fence in that situation. In all the circumstances as a matter of fact and degree the fence was considered not adjacent to the highway and accordingly was development permitted by Class A;
 16. An Enforcement Notice was directed towards the erection of a two metre high boundary fence at a dwellinghouse. The appellants accepted that the fence amounted to development but argued that it was permitted under the GPDO because it did not lie adjacent to a highway used by vehicular traffic and therefore the one metre limit which would otherwise apply, was not relevant. The Inspector observed that the fence enclosed an area of open space owned by the appellant in front of an existing slope which defined the rear garden of the dwellinghouse. The fence lay approximately one metre from the edge of the footpath which formed part of the highway and although separated from it by a gravel strip and line of small fir trees, it clearly formed a boundary between the highway and the garden and thus lay adjacent to it. In so concluding the Inspector noted an appeal decision in Kent in which one of his colleagues had concluded that a test of whether a structure lay adjacent to a highway could be determined by whether it was within arms length. While noting that reference to other appeal decisions was useful, it was judged that the appeal had to be determined on its own merits;
8. Needless to say from the above, the Panel will be aware that there is some judgement to be made in the definition of 'adjacent to'. Most of the appeal cases have been centred around fences or walls set around 2m away from a highway where in general it has been considered that such structures are 'adjacent to' the highway and require planning permission. Members are reminded that the proposed fencing and gates are between 1.2m and 3.5m away from the highway measured back from the nearest edge of the footpath. There are examples of other cases where fences or

walls set behind an intervening feature, including established or recently planted screening, have been considered as not being adjacent to the highway and therefore not require planning permission. In the Llanvair Drive case the intervening features comprise the frontage hedging with fencing behind together with the existing low metal gates to the front. Behind these, at a distance of between about 1.2 and 1.3m, the proposed 2m high metal fencing (that would be perpendicular to the highway) would be located and this would curve around at a distance of about 3 to 3.5m away from the highway. The existing low metal gates are not considered to be such a strong barrier that the fence and gates behind would have the appearance of not being adjacent to the highway. These gates ought therefore to be discounted in the consideration of the application.

9. In a recent appeal decision within the Borough at 208 Windsor Road, Maidenhead an Inspector considered an Enforcement Notice appeal against a wooden fence that was between 1.8 and 2m high running along the frontage boundary and set back about 1m from the footpath. The fence returned perpendicular to the road along the side boundary with the neighbour. In that case there were no intervening features along the frontage and the Inspector saw no reason to consider that the side fence was not permitted development (it was set back about 1m from the footpath with Windsor Road). This appeal decision would appear to favour the application in Llanvair Drive being permitted in the interests of consistency and equity in decision-making, as would the perpendicular curved metal fencing being behind some existing frontage hedging and fences. Even so, it is only one Inspector's opinion and other Inspectors have looked at the question as a matter of fact and degree in the particular circumstances of the case.

Conclusion

10. This is not an easy judgement to make. Having considered the circumstances of the case and the interpretation of what amounts to 'adjacent to' a highway, it is considered that it is more likely than not that the proposed development constitutes permitted development under Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) Order 1995, as amended. It is therefore recommended that a Certificate of Lawfulness for the proposed development is granted.

Recommendation:

That the Certificate of Lawfulness is granted.

Conditions and Reasons

- 1 The proposed development constitutes permitted development under the provisions of Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) Order 1995, as amended, and planning permission is not required.