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<b>Appeal Reference:</b>	2022/E0058
<b>Appeal by:</b>	Donal O’Kane
<b>Appeal against:</b>	An Enforcement Notice dated 23 <sup>rd</sup> February 2023
<b>Alleged Breach of Planning Control:</b>	Unauthorised erection of a fence
<b>Location:</b>	Between 4 and 4a/4b Malone Park Central, Belfast
<b>Planning Authority:</b>	Belfast City Council
<b>Authority’s Reference:</b>	EN (01) – LA04/2021/0454/CA
<b>Procedure:</b>	Hearing on 10 <sup>th</sup> April 2024
<b>Decision by:</b>	Commissioner McKeary, dated 7 <sup>th</sup> May 2024

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## Grounds of Appeal

1. The appeal was brought on Grounds (a) and (c) as set out in Section 143(3) of the Planning Act (Northern Ireland) 2011 (the Act). There is a deemed planning application by virtue of Section 145(5).

### **Ground (c) - that those matters (if they occurred) do not constitute a breach of planning control.**

2. Ground (c) raises the questions whether the alleged breach of control is ‘development’; and if it is development whether planning permission is required. The appellant considers that the development was considered acceptable and permission has been granted because they received a letter from the Council dated 20<sup>th</sup> January 2021 stating that the breach of “*unauthorised works including boundary fencing*”, was not expedient to pursue by virtue of only slightly exceeding permitted development rights subject to the Article 4 Directive for Malone Conservation Area (CA). At the time of the closure letter, only the fence posts were in place and the fence had not in itself been erected. The Council acknowledged that the letter had been erroneously headed, “*unauthorised works including boundary fencing*” but in fact the consideration only referred to the fence posts that were in situ at that time. The appellant considers that the Council were aware of the extent of the works due to ongoing conversations between him and the Council, and that the Council were always aware of his intent.
3. S138 of the Act permits the Council to issue an Enforcement Notice (EN) where it appears to the Council that there has been a breach of planning and that it is expedient to issue the notice having regard to the provisions of the local development plan and other material considerations. The Council stated that the situation on the ground at that time was different from the context under which the

EN was issued. I, therefore, agree with the Council that if the situation has changed, and where additional or different development has occurred that they are entitled to take enforcement action against it, notwithstanding any compromises that they had offered previously. The development referred to in the EN at the time it was issued is fundamentally different to the development referred to in the closure letter, even if the fence had been completed by the time the closure letter had been issued. I do not agree that the Council had given de facto planning permission for the fence which was latterly constructed. Furthermore, I do not accept that such a letter could give planning permission for development which had not occurred and for which a full planning application is required. In the absence of any other evidence that planning permission has been granted or that the works constitute permitted development, I am satisfied that the development in place requires planning permission and at the time of the issue of the EN, did not have the requisite permission. The appeal under ground (c) fails.

### **Ground (a) and the Deemed Planning Application**

4. The deemed application is for the retention of a fence between 4 and 4a/4b Malone Park Central, Belfast.
5. Section 45(1) of the Planning Act (NI) 2011 (the Act) requires the Commission, in dealing with an appeal, to have regard to the local development plan, so far as material to the application, and to any other material considerations. Section 6(4) of the Act states that where regard is to be had to the Local Development Plan (LDP), the determination must be made in accordance with the Plan unless material considerations indicate otherwise.
6. The Council considered that The Strategic Planning Policy Statement for Northern Ireland 'Planning for Sustainable Development' (SPPS) is relevant in relation to the development even though the Belfast Local Development Plan – Plan Strategy 2035 (PS) is adopted. Whilst the SPPS remains material in accordance with paragraph 1.9 thereof, as the Council has adopted its PS, the previously retained policies have now ceased to have effect.
7. As the Council has adopted its PS, in line with the transitional arrangements as set out in the Schedule to the Local Development Plan Regulations 2015 (as amended), the Local Development Plan now becomes a combination of the Departmental Development Plan (DDP) and the Plan Strategy (PS) read together. Again, in accordance with the subject legislation any conflict between a policy contained in the DDP and those of the Plan Strategy must be resolved in favour of the PS.
8. The Belfast Urban Area Plan 2001 (BUAP) operates as the relevant DDP. In that plan, the site is located within the Belfast Settlement Limit. The appeal site is also identified as being within the Malone CA. Subsequently the Draft Belfast Metropolitan Plan (dBMAP) was published in 2004 and then purportedly adopted, but the 2014 iteration was declared unlawful in 2017. Consequently, dBMAP 2004 is material in certain circumstances. In dBMAP the appeal site is within the Belfast Settlement Limit and is also identified as being within the Malone CA.

9. The PS has built heritage policies including Policy BH4 – ‘Works to grounds affecting built heritage assets’. BH4 states that within CAs, planning permission will be granted for works affecting boundaries, garages and plot subdivision subject to a number of criteria, of which there are three pertaining to works affecting boundaries: boundaries should be of an appropriate scale and respect the historic scale of such structures in the heritage area; boundaries should generally not prevent visual permeability between the public and private realms; and boundary structures should be of an appropriate style and form contextually appropriate to the host property and area. Having reviewed the policies, there is no conflict between the relevant plans insofar as they relate to the proposal before me and determining weight shall be given to the provisions of the PS. The Malone Park/Adelaide Park Design Guide is silent on the introduction of boundaries such as fences and walls.
10. The appeal development is a boundary fence erected between the dwelling at No.4 and the building containing two flats at No. 4a/4b Malone Park Central, within Malone CA. The appeal fence runs perpendicular to an existing fence, which demarks the rear garden of No. 4. It extends to the edge of the drive and is approximately 2.3m in height to the rear, reducing to approximately 2.18m in height in front of the building line. The dwelling and flats are accessed by a shared private driveway off Malone Park Central road which forks to serve each building. The front boundary of the dwelling at No.4 onto Malone Park Central consists of mature hedges approximately 1.8m in height. The flats at No.4a/4b have a conifer hedge approximately 1.8m high separating the front of the flats from the shared driveway. There is a gravel area to the side of the flats which abuts the appeal fence.
11. Malone Park (including Malone Park Central) is covered by the direction made under Article 4(1) relating to Malone Park CA. Planning permission is therefore required for the erection, construction, maintenance, improvement or alterations of a gate, fence, wall or other means of enclosure within the area from the front boundary between the front and side boundaries of the curtilage of the property to the front building line of the property, as usually permitted by Class A of Part 3 of the Schedule of the 2015 Order. The Article 4 Direction took effect on the 19th April 2019.
12. The EN remedy seeks to reduce the height of the fence to 2m and remove the part of it that extends in front of the building line of the host dwelling to accord with the permitted development rights which accord with the above Article 4 Direction. The appellant considers that an adjacent garden shed and a nearby dwelling have already breached the building line. However, these were constructed with the benefit of full planning permission and not subject to the permitted development restrictions. Moreover, they were not boundary treatments and were approved prior to the PS, so were dealt with under a different policy context. They, therefore, are not directly comparable to the appeal development.
13. The appellant considers that the fence does not detract from the setting of the dwelling or the CA and should be permitted to provide screening of an unattractive view of a shed on the neighbouring property and to provide some privacy for them at the front of their dwelling, when using their living room and their front garden.

14. Criterion (a) of Policy BH4 requires that boundaries should be of an appropriate scale and respect the historic scale of such structures in the heritage area. The Council considers that at between approximately 2.18m and 2.30m the fence is not of a human scale as expected within the CA. They suggest that approximately chest height is more appropriate for any boundary within the CA. I consider a 2.3m high fence still to be of a domestic scale and not out of scale with the large single dwelling with which it is associated. Furthermore, it is sited to the side boundary of Nos. 4a/4b, is mostly obscured by the existing large conifer hedge when viewed from the driveway and therefore does not dominate the flats. There is a view of the fence from Malone Park Central road due to its height. However, there is an area of lawn and a beech hedge approximately 1.7m high between the proposal and the road, therefore, only the top section of the fence can be seen over a limited section of the public road when travelling along it in either direction. Overall, I am not persuaded that this very limited view of the fence means that it does not respect the historic scale of such structures or is detrimental to the CA. Criterion (a) is satisfied.
15. Criterion (b) requires that boundaries should generally not prevent visual permeability between the public and private realms. The Council states that the dwelling was designed so that both the front and side elevations could be appreciated, as demonstrated by the architectural embellishments such as the moulded brick and the double height bay window on the side elevation between No. 4 and 4a/4b. The Council considers that the construction of the fence impacts negatively on the view of the side of No. 4 by restricting the public view of it.
16. Views of the side elevation of No. 4, particularly the ground floor, are obscured by the fence when travelling up the shared driveway. However, this view is also limited by the mature vegetation to the front of Nos. 4a/4b and the large tree located on the boundary between No. 4 and Nos. 4a/4b. Furthermore, the construction of No. 4a/4b already interrupts this view from both the driveway and from wider views from the public road. Therefore, the addition of the fence does not appreciably worsen the existing situation. The fence prevents views into the living room and a small area in front of the host dwelling when viewed from the shared driveway and the adjacent property. Views only become obscured when one has passed the entrance to Nos. 4a/4b and therefore are limited to the appellant's approach on his private section of the driveway, which is not a public viewpoint. Overall, the fence does not prevent visual permeability between the public and private realms to any objectionable degree given its location at the end of a private driveway and within the context of this large site. Criterion (b) is satisfied.
17. Criterion (c) of Policy BH4 requires that the boundary structures should be of an appropriate style and form contextually appropriate to the host property and area. The Council stated that the use of a wooden fence of such a height is not appropriate in this location and that historically there would be minimal boundaries between plots. BH4 states that tall, visually defensive structures such as timber boarded fences will not, therefore, generally be acceptable. It goes on to state that these are alien in form and will generally be regarded as having a harmful impact on the character and appearance of conservation areas and ATCs. The use of the word 'generally' infers that there are circumstances where timber boarded fences may be acceptable.

18. The Council considers that the fence is not contextually appropriate in this historic context undermining the spatial quality of the historic plot. However, as the Council acknowledges, the historic rectory plot has already been compromised by its subdivision to construct the flats at Nos. 4a/4b in 1981. The introduction of the fence does not further undermine the historic plot due to its relatively small scale and location between the dwelling and flats where a partial tree boundary already exists.
19. As described above, there are very restricted public views of the fence and the only sustained views of it would be by the appellant, from the front of the host dwelling. In this instance an exception could be made for the use of a timber boarded fence where it has a minimal visual impact on the character and appearance of the CA due to the very limited public views of it. I am not persuaded that the development is of an inappropriate style and form, or is inappropriate to the host property and area, or would set a precedent in these very particular circumstances. Criterion (c) is satisfied. Overall, I am satisfied that the development meets the requirements for Policy BH4 for the reasons given above.
20. S104 (11) of the Act requires that, *“where any area is for the time being designated as a conservation area, special regard must be had, in the exercise, with respect to any buildings or other land in that area, of any powers under this Act, to the desirability of –*
  - (a) *Preserving the character or appearance of that area in cases where an opportunity for enhancing its character or appearance does not arise;*
  - (b) *Enhancing the character or appearance of that area in cases where an opportunity to do so does arise.”*
21. In this instance the boundary treatment does not provide the opportunity to enhance the character of the CA by virtue of the minimal public views of the fence. Having had special regard to preserving the character or appearance of the Malone CA, these minimal public views of the development are such that retention of the appeal fence would preserve the CA’s character and appearance.
22. The Council suggested two conditions in the event of approval under ground (a), one in respect of the retrospective approval which is not necessary given that the fence is in place and the other requiring that both sides of the fence were painted a particular shade of green to protect the setting of the property and the character of the CA. The Council considers that the currently unpainted fence stands out in this location where there is a predominance of hedges. Due to the limited views of the development from anywhere but immediately adjacent to the host and neighbouring properties, I am not persuaded that painting the fence is necessary to protect the character of the CA. Furthermore, I am not persuaded that painting the fence green would protect the setting of the host property as it forms only a small part of a large heavily vegetated garden and driveway and therefore has a minimal impact within the context of the plot.
23. In context of the consideration above, I have found that the fence as constructed is acceptable on its planning merits and the Council’s objections are not sustained. The appeal on ground (a) succeeds.

## **Decision**

The decision is as follows: -

- The appeal on Ground (c) fails;
- The appeal on Ground (a) succeeds and the deemed planning application is granted unconditionally.; and
- The enforcement notice is quashed.

**COMMISSIONER CATHY MCKEARY**

**List of Appearances**

Planning Authority:- Richard White (Belfast City Council)  
Robert Kennedy (Belfast City Council Conservation Officer)

Appellant:- Donal O’Kane

**List of Documents**

Planning Authority:- Statement of case by Belfast City Council

Appellant:- Statement of case by Donal O’Kane