

Planning

Growth & Development

Delegated officer report for planning application

Application no. 135443/LP/2022

Date registered valid: 16 February 2023

Proposal: Erection of a 2 metre high palisade fence and installation of a 1 metre high hedge to form a means of enclosure of land

Address: Land At West Side Of Welling Road, Manchester, M40 3QS

Ward(s): Moston Ward

Applicant: Mr Martin Zhu

Agent (if any): Mr Liam Gooding LDM Group

Case officer: Robert Tyrer
Tel: 0161 234 4068
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Recommendation: REFUSE

Date of recommendation: 15June 2023

Application details

Type of application: Certificate Lawful Development Proposed

Development type: Certificates of lawfulness

Date of site visit: 23 February 2023

Standard consultations:

No consultations have been printed and sent.

Neighbour notifications

No neighbour notifications have been printed and sent.

Site notice

No site notice has been produced

Press advert

No press advert had been published

Departure from Development Plan: No

Environmental Statement: Not required

Description of site and area

The application site is an area of semi-natural grassed land, surrounded by trees, which falls steeply away to Moston Brook below. The site also slopes down the length of the southwestern side of Welling Drive, to the junction of Welling Drive with Moston Lane East.

Field Footpath 79 crosses the Application site, and there may also be other rights of way established by usage on the site.

The area is one of family dwellinghouses with bungalows making up the bulk of the housing stock. The housing is situated along Rishworth Drive, Welling Drive and Moston Lane East is located on the opposite side of the highways to the application site.



Listed building: Not applicable

Conservation area: Not applicable

Tree Preservation Order: Not applicable

Description of development

The applicant is seeking a Certificate Lawful Development Proposed to erect a 2 metre high palisade fence and installation of a 1 metre high hedge to form a means of enclosure of land.

Consultations & Notification Responses

Highway Services confirmed that Field footpath number 79 is located within the site and runs from Hale Road to St Mary's Road.

Issues

Legislative Issues

Sections 191 and 192 of the Town and Country Planning Act 1990 provide for anyone (not just a person with a legal interest in the land) to apply to the local planning authority (LPA) for a lawful development certificate (LDC). A certificate is a statutory document certifying:

(1) in the case of an application under section 191, the lawfulness, for planning purposes, of existing operations on, or use of land, or some activity being carried out in breach of a planning condition; or

(2) in the case of an application under section 192, the lawfulness of proposed operations on, or use of land.

The onus of proof in regard to (1) is firmly on the applicant and the issue of a certificate will depend on the on factual evidence provided about the history and planning status of the building or other land and the interpretation of any relevant planning law or judicial authority. The relevant test of the evidence in this matter is “the balance of probability” and the applicants own evidence does not need to be corroborated by independent evidence. If the LPA have no evidence to contradict the applicants version of events or make them less then probable, there is no good reason to refuse the issue of a certificate.

In regard to (2), this provides that, if the LPA are supplied with information satisfying them that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect; and, in any other case, they shall refuse the application.

In short, the purpose section 192 is to enable any person who wishes to find out whether any proposed use or operations would be lawful to apply to the LPA for that purpose

The application needs to describe the proposal with sufficient clarity and precision to enable the LPA to understand (from a written description and plans) exactly what is involved in the proposal; and to submit whatever supporting information or legal submission that are to be relied upon in order to satisfy the LPA that a certificate should be granted for the proposal.

In making their decision on an application under section 192, the LPA ask themselves the hypothetical question - *"If this proposed change of use had already occurred, or if this proposed operation had commenced, on the application date, would it have been lawful for planning purposes?"* In doing so, the LPA will not only consider whether the proposal would involve "development" requiring an application for planning permission, but whether it would involve a breach of any existing condition or limitation imposed on a grant of planning permission which has been acted upon, and which therefore constrains what can be done on the land. The LPA will not make a proposal fit a scenario; the only question is whether the proposal made by the applicant is lawful at the time of submission.

The Application

This application is pursued under subsection (1) of section 192, which provides for an application to determine whether any proposed use or operations would be lawful for planning purposes.

The erection of a gate, fence, wall or other enclosure can be permitted development under Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) Order 2015 (as amended). The proposal will therefore be considered against Class A.

Part 2, Minor Operations Class A –gates, fences, walls etc

Permitted development

A. The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

Development not permitted

A.1 Development is not permitted by Class A if—	Complies
A.1 (a) 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—	
(i) for a school, 2 metres above ground level, provided that any part of the gate, fence, wall or means of enclosure which is more than 1 metre above ground level does not create an obstruction to the view of persons using the highway as to be likely to cause danger to such persons;	N/A
(ii) in any other case, 1 metre above ground level;	No
Explanation In this application the proposed 2-metre-high palisade fence and 1 metre high hedge would form the boundary between the back of the footpath at the side of the highway and the applicant's land. It is clear from the drawings that the fence and hedge would be a means of enclosure. Despite the proposed intervening hedge, the proposed fence and hedge would be perceived as being adjacent to the highway. Whilst the hedge to some extent will screen the fence and land it is considered that the hedge will not act as a sufficient intervening obstruction or feature which would physically obstruct the fence from the highway. Therefore, it is considered that the development would not be lawful as it would fail to comply with A.1 (a)(i)	
A.1 (b) the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level;	Yes
A.1 (c) 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; or	N/A
A.1 d) it would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding, a listed building.	N/A

Interpretation of Class A

A.2 For the purposes of Class A, “school” includes—

(a) premises which have changed use under Class S or T of Part 3 of this Schedule (changes of use) to become a state-funded school or registered nursery as defined in paragraph X of Part 3; and

(b) a building permitted by Class C of Part 4 of this Schedule (temporary buildings and uses) to be used temporarily as a school, from the date the local planning authority is notified as provided in paragraph C.2(b) of Part 4.

Other Legislative Requirements

Equality Act 2010

Section 149 (Public Sector Equality Duty) of the Equality Act 2010 requires due regard to the need to: Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act and; Advance equality of opportunity between persons who share a

protected characteristic and persons who do not share it. The Equality Duty does not impose a legal requirement to conduct an Equality Impact Assessment. Compliance with the Equality Duty involves consciously thinking about the aims of the Equality Duty as part of the process of decision-making.

Human Rights Act 1998 considerations

This application needs to be considered against the provisions of the Human Rights Act 1998. Under Article 6, the applicants (and those third parties, including local residents, who have made representations) have a right to a fair hearing and to this end the local planning authority must give full consideration to their comments.

Protocol 1 Article 1, and Article 8 where appropriate, confer(s) a right of respect for a person's home, other land and business assets. In taking account of all material considerations, including Council policy as set out in the Core Strategy and saved policies of the Unitary Development Plan, the Director of Planning, Building Control & Licensing has concluded that some rights conferred by these articles on the applicant(s)/objector(s)/resident(s) and other occupiers and owners of nearby land that might be affected may be interfered with but that that interference is in accordance with the law and justified by being in the public interest and on the basis of the planning merits of the development proposal. She believes that any restriction on these rights posed by the recommendation given is proportionate to the wider benefits of and that such a decision falls within the margin of discretion afforded to the Council under the Town and Country Planning Acts.

Recommendation: REFUSE

Condition(s) to be attached to decision for approval OR Reasons for recommendation to refuse

Refuse on the basis that to erect a 2 metre high palisade fence and installation of a 1 metre high hedge to form a means of enclosure of land does not constitute permitted development and is not in accordance with Schedule 2, Part 2, Class A, A.1 (a)(i) of the Town and Country Planning (General Permitted Development) Order 2015 (as amended).

Appendix 1 – List of consultees & neighbours notified

Appendix 2 – Planning constraints

Article 4 Direction - Removal Of PD Rights Change Of Use From Class C3 To Class C4

Aircraft Safeguarding Zone - Aircraft Safeguarding - Not Affected

Coal Authority - Development Low Risk - Name: DEVELOPMENT_LOW_RISK_AREA

Coal Authority - Surface Coal Resources - Name: Coal bearing strata at surface

Flood Zones Type 2 (low to medium risk) -

Flood Zones Type 3 (high risk) -

Historic Landfill Site 250m Buffer -

Susceptible to Surf Water Flood (Less) -

Susceptible to Surf Water Flood (Less) -

Susceptible to Surf Water Flood (Middle) -

Susceptible to Surf Water Flood (Middle) -

Area Team Boundary - Name: NORTH AREA