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DATE:

TOWN AND COUNTRY PLANNING ACT, 1990

APPEAL ON: 8 COTTESMORE GARDENS, LONDON, W8

I attach for your information a copy of the decision for the appeal on on the above-mentioned premises.

EXECUTIVE DIRECTOR OF PLANNING AND CONSERVATION

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The Planning Inspectorate

An Executive Agency in the Department of the Environment and the Welsh Office

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RG27 9TL

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21 AUG 1996

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Your Reference:

2416

Council Reference:

DPS/DCC/ACH/E/94/366/C

Our Reference:

T/APP/C/95/K5600/638954-5

Date: 19 AUG 1996

Exec Dir	records	ARB	Gen Des
Appeals Office	10	Fees Officer	Forward Plan
			Head DC

Dear Sirs

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 174 AND SCHEDULE 6
PLANNING AND COMPENSATION ACT 1991
APPEAL BY MR AND MRS C MACKENZIE
LAND AND BUILDINGS AT 8, COTTESMORE GARDENS, LONDON, W8.

1. I have been appointed by the Secretary of State for the Environment to determine your clients' appeal against an enforcement notice issued by the Kensington and Chelsea Royal Borough Council concerning the above mentioned land and buildings. I held an inquiry into the appeal on Tuesday 2 July 1996. The evidence was taken on oath.

THE NOTICE

2. (1) The notice was issued on 4 May 1995.
- (2) The breach of planning control as alleged in the notice is without planning permission, the erection of trellis fencing on the rear garden wall.
- (3) The requirement of the notice is to remove the trellis fencing from the rear garden wall.
- (4) The period for compliance with this requirement is one month.

GROUND OF APPEAL

3. Your clients' appeal is proceeding on the ground set out in section 174(2)(d) of the 1990 Act as amended by the Planning and Compensation Act 1991. As the prescribed fees under the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989-93 have not been paid to the Secretary of State and the Local Planning Authority within the period specified, the deemed application for planning permission under section 177(5) does not fall to be considered.

THE APPEAL SITE AND SURROUNDINGS

4. The site lies on the south side of Cottesmore Gardens within a mature and attractive residential area which in turn forms part of the De Vere Conservation Area. No 8 is a mid-terrace property comprising a basement, ground and two upper floors occupied as a single family dwelling. The rear garden is laid to lawn with a patio and backs onto the rear gardens of Nos 18 and 19 Eldon Road. There is a wall bounding the bottom of the garden which continues around either side at a height of about 1.5 m. Wooden square trellis is bolted to the upper part of the wall rising to a total height of about 3 m. On the other side of the wall and close to this common boundary is a glazed lean-to conservatory or studio at No 19 Eldon Road.

THE APPEAL ON GROUND (d)

5. For your clients' appeal to succeed on this ground it is necessary for them to show, on the balance of probabilities, that the trellis fencing was erected before 4 May 1991.

6. The Council called no witnesses of fact and the only direct oral evidence of the history of this matter was given by Mrs Lucy Gummer of Dean Manor, Chipping Norton who, with her husband, formerly owned and occupied the appeal property. Mrs Gummer told me that they bought the house in the autumn of 1988 and spent over a year on building works and did not move in until January 1990. At this time there was a wall at the bottom of the garden with ivy growing up it, probably on a trellis which went all round the garden. In order to enhance the appearance of the wall and to provide screening it was decided to place trellis on top of it.

7. Estimates were obtained for this work in March 1990 (Document 6) but because the amount quoted was so high the estimate was not accepted. Instead another contractor who was working in the locality was approached for a quotation; he was hired and the work was carried out quickly. It was estimated by Mrs Gummer that the work was completed in May 1990 and she was sure that there was not a delay of as much as a year. In this respect she confirmed the evidence of her affidavit at Document 7/4. She recalled the telephone conversation noted at Document 7/2 and confirmed her recollection that the letter from Mr Sewell dated 31 May 1990 (Document 7/3/1) was received while the trellis work was in progress. She thought that his reference in that letter to 'a year ago' was probably to the building works to the whole house which were then in progress.

8. In fixing the date in her mind, apart from the unacceptable estimate for the work, Mrs Gummer could recall admiring the trellis the day before her son was born on 4 August 1990. The 'gardening boys' referred to in Mr Sewell's letter erected the garden shed but not the trellis. There were two of them employed at the house in 1990, but by May 1991 there was only one.

9. The note dated "1/6" (Document 7/3/2) from Mr Gummer to

Brian Sewell was, in Mrs Gummer's understanding, a response to Mr Sewell's letter of 31 May 1990. She firmly maintained this view despite the brief letter dated 16 June 1991 from Mr Sewell at Document 7/3/3; neither she nor her husband had any record or recollection of receiving this, nor was it on their file. Although she recalled agreeing with Mr Sewell that endeavours would be made to prevent climbing plants from blocking his light, she could remember no undertaking to remove the trellis or the shed once the house was sold. Discussions between Mrs Gummer and Mr Sewell continued after the exchange of correspondence in May 1990 and it may be to this which Mr Sewell was referring in his letter of 21 October 1991 (Document 7/3/4) where he set out his understanding of the agreement. Mrs Gummer could not recall telling him that his understanding was wrong. Mr and Mrs Gummer sold the house to your clients in May 1993 but did not move out until 2 or 3 months later. The trellis was not removed.

10. The remaining direct evidence was in the form of sworn affidavits and a letter, from witnesses who were not available to be tested on their evidence. Firstly there is the affidavit of Mr Randall Anderson, the Gummers' gardener (Document 4); secondly the letter from an adjoining owner, Mr Garner (Document 2), both of which are supportive of Mrs Gummer's evidence. Thirdly, and perhaps most importantly, there are three affidavits from Mr Brian Sewell, who occupies No 19 Eldon Road, which is a property immediately adjoining the appeal site to the rear (Documents 8, 9 and 10). His evidence contradicts Mrs Gummer's in that he recalls that the trellis was erected on Friday 31 May 1991 and over the ensuing weekend. He asserts that the letter from him of 31 May 1990 is incorrectly dated, as a result of a typing error, and that its true date was 31 May 1991. In his view this is confirmed by the correspondence attached to his affidavit (Document 8) as BS2, BS3 and BS7 which he says, when read in conjunction, clearly forms a sequence.

11. In his third affidavit, Mr Sewell has produced extracts from his travel diary for the period Wednesday 30 May to Tuesday 5 June 1990 which show that he was in Germany during that period. In his affidavit he states that he could not have written the letter dated 31 May 1990 on that date because he was not in the country at the time.

12. There is a clear conflict between the evidence of Mrs Gummer and that of Mr Sewell. Both witnesses are of some standing and it is not likely that either would consciously give false testimony. This places any adjudicator in a very difficult position when deciding which evidence to prefer. After much careful deliberation, taking into account the comments of the professional witnesses for both sides, the other written evidence and legal submissions for the Council and the appellants, I have concluded, on balance, that Mrs Gummer's version of events is the more robust. There are a number of reasons for this.

13. Firstly and principally, she was available to be cross-examined and remained unshaken and consistent in her account throughout. It was unfortunate that through ill health Mr Sewell

could not attend and answer questions on his evidence. Secondly, Mrs Gummer does not have the direct interest in the outcome of the appeal which Mr Sewell has. Whilst this is no criticism of Mr Sewell, where the balance is a fine one, this factor tends to tip the scales in favour of Mrs Gummer's account. Thirdly, the crucial letter of 31 May from Mr Sewell is the only firm documentary evidence which might contradict her recollections. However, taken at its face value with its complete date of 31 May 1990 it bears out her testimony. It is only if Mr Sewell's claim is accepted that it was mis-dated by a full 12 months that any doubt is cast on her account. On balance, I find it difficult to accept that this resulted from a typing error or slip. People usually make such mistakes in the first weeks of a new year, not 5 months into it.

14. Mr Gummer's note of 1 June, addressed from Dean Manor Charlbury, unfortunately bears no year except for a subscript, presumably by Mr Sewell, noting that it was received on "5 vi 91". However it could as easily have been written on Friday 1 June 1990 as Saturday 1 June 1991 and still have been consistent with his comment in it that "we are in the country this weekend". From my earlier finding I conclude that the date of receipt was probably added later and was mistaken.

15. Mr Sewell's evidence that he was in Germany on 31 May 1990 does not prove that the letter could not have been posted from abroad, or perhaps it was left for hand delivery. Of his other evidence, I can find no ready explanation for his copy of a short letter dated 16 June 1991 to Mr Gummer thanking him for his note of "1.vi" unless Mr Gummer also wrote a note on 1 June 1991, which has not been produced. Likewise I can find no reason why, appended to Mr Sewell's first affidavit as BS4 and BS7, are two seemingly identical letters from him to Mr Gummer dated 21 June 1991 and 21 October 1991 respectively. It is anomalies of this nature which impel me to place greater weight on well-tested oral evidence in preference to documentary evidence, whose author is unavailable for cross-examination. Apart from the suggestion of typing errors, the fact that seemingly related items of correspondence are dated about a year apart could be explained by Mrs Gummer's evidence that Mr Sewell had cause to complain on two occasions, about slightly different matters. He was initially concerned about the erection of the trellis itself and later about the loss of light caused by plants subsequently growing up it. However, I am unable to reach any firm conclusion to resolve these anomalies in the documents.

16. Subsidiary evidence which I find also supports Mrs Gummer's account is the sequence of carrying out the works to the house itself before moving into it in January 1990 when it would be most logical for her to turn her attention to the garden. This is borne out by the date of the quotation for the trellis work in March 1990 which in the event was rejected in favour of a more local service, and by Mr Anderson's affidavit in which he says that he created a border below it in August 1990. I found Mrs Gummer's fixing of the date when she first recalled appreciating the finished planting and trellis work by reference to the birth

of her son in August 1990 also to be convincing.

17. Accordingly, I conclude, on the balance of probability, that Mrs Gummer's evidence that the trellis was erected by May 1990 should be accepted and that by her testimony your clients have discharged the onus of proof in this regard. In consequence, the appeal on ground (d) succeeds and the notice will be quashed.

OTHER MATTERS

18. I have taken account of all the other matters raised, including Mr Hughes's evidence about Mr Sewell's telephone complaint to the Council on 27 October 1994 and his subsequent letter of 31 October 1994. These matters are, however, of insufficient weight to affect the considerations which have led to my decision.

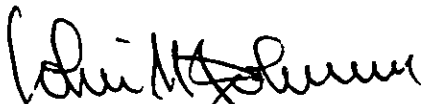
FORMAL DECISION

19. For the above reasons, and in exercise of the powers transferred to me, I allow your clients' appeal, and direct that the enforcement notice be quashed.

RIGHTS OF APPEAL AGAINST DECISION

20. This letter is issued as the determination of the appeal before me. Particulars of the rights of appeal against my decision to the High Court are enclosed for those concerned.

Yours faithfully



C H JOHNSON FRICS
Inspector

ENC

APPEARANCES

FOR THE APPELLANTS

Mr Gary Grant - of Counsel, instructed by the Bell Cornwell Partnership, Oakview House, Station Road, Hook, Hampshire, RG27 9TP.

He called:

Mrs Lucy Gummer - Former owner-occupier of appeal property.

Mr Simon Avery BA BPhil - Planning Consultant with the Dip Urban Design MRTPI - Bell Cornwell Partnership.

FOR THE LOCAL PLANNING AUTHORITY

Ms Leverne Parker - Senior Planning Solicitor with Kensington and Chelsea Royal Borough Council.

She called:

Mr Alan Hughes BSc Dip TP - Senior Planning Enforcement Officer with the Royal Borough Council.

DOCUMENTS

Document 1 - List of persons present at the Inquiry.

Document 2 - Notification letter to interested persons with circulation list and replies.

Document 3 - Copy of the enforcement notice.

Document 4 - Affidavit of Randall Anderson, Mr and Mrs Gummer's head gardener.

Document 5 - Affidavit of Mr C Mackenzie.

Document 6 - Quotation for trellis work from Stuart Garden Architecture and correspondence with Mr Anderson March 1990.

Document 7 - Indexed appendices to Mr Avery's evidence.

- Document 8 - First affidavit of Mr Brian Sewell with exhibits.
- Document 9 - Second affidavit of Mr Brian Sewell.
- Document 10 - Third affidavit of Mr Brian Sewell with exhibit.
- Document 11 - Indexed appendices to Mr Hughes's evidence.