



Appeal Decision

Site visit made on 11 March 2020

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 04 May 2020

Appeal Ref: APP/A2335/X/19/3228823

Newhouse Farm, Lancaster Road, Slyne, Lancaster LA2 6AW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Kevin Sanderson against the decision of Lancaster City Council.
 - The application Ref 17/01405/ELDC, dated 9 November 2017, was refused by notice dated 15 June 2018.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is reinstatement and use of access for vehicular purposes.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr Kevin Sanderson against Lancaster City Council. This application is the subject of a separate Decision.

Preliminary Matters

3. The issue of an LDC depends entirely on factual evidence about the history and planning status of the building or land in question and the interpretation of any relevant planning law or judicial authority. The planning merits are not relevant in deciding an LDC application or appeal.
4. The burden of proof regarding decisive matters of fact rests on the appellant. An appellant must therefore adduce enough relevant, clear and unambiguous evidence to demonstrate the truth of that assertion. The relevant test of the evidence is 'the balance of probability'.

Main Issue

5. The main issue is whether the Council's decision to refuse to grant a certificate of lawful development was well-founded.

Reasons

6. New House Farm is one of a group of dwellings which have vehicular access via a track off Aysgarth Drive which in turn is accessed from Green Lane. There is a second pedestrian/cyclist access track from the A6 (Slyne Road/Lancaster

Road), which is the subject of the appeal. Although narrow, the track behind the gated access point still exists in its previous physical form, as does the dropped kerb onto the A6 highway. The appellant wishes to reinstate the A6 access for vehicle use and seeks to establish the lawfulness of this use.

The 1980s planning permissions

7. Historically, New House Farm was the sole dwelling on the site. In 1982, permission was granted for the *'conversion of existing disused agricultural building into two semi-detached dwellinghouses with integral garages and closure of existing access and construction of a new access'* (ref: 1/82/727, 'the 1982 permission'). Condition 2 stated that *'All access to the new dwellings shall be via Green lane as indicated on the application plan. To this end before the development is completed or occupied the existing access onto Slyne Road shall be permanently blocked to the satisfaction of the Local Planning Authority'*.
8. The following year, in response to a letter from the Council stating that a separate application was needed, permission was granted for *'Formation of pedestrian access to the A6'* (ref: 1/83/0005, 'the 1983 permission'). Attached condition 2 states that *'The proposed pedestrian access shall not exceed a width of one meter and shall be gated at all times'*. Attached condition 3 requires that *'Prior to the occupation of the dwellings, the remaining section of the former vehicular access point shall be closed by the construction of a stone wall at the same height as the existing wall to the south, the stone to match as closely as possible the existing wall'*.
9. In 1984, planning permission was granted for *'Conversion of derelict barn into two houses and erection of two garages and construct new access and close existing access'* (ref: 1/84/0441, 'the 1984 permission'). Attached condition 2 requires that *'All access to the new dwellings shall be via Green Lane as indicated on the application plan. To this end before the development is completed or occupied, the existing access onto Slyne Road shall be permanently blocked to the satisfaction of the Local Planning Authority'*.

Consideration of the 1980s permissions

10. The 1982 permission was not implemented and so is not extant. From the reading of condition 3, the implementation of the 1983 permission relies on the occupation of the houses permitted in 1982. As that development has never been implemented, it may be argued that the 1983 permission has never lawfully been implemented either. However, it could also be argued that it is a standalone permission, as in practice there is no reliance on the occupation or otherwise of the dwellings permitted in 1982.
11. From the evidence relating to the Council's enforcement action at the time, it appears that the operational works to form the pedestrian access did not take place until 1987. The completion of the work was confirmed by a Council letter dated 9 February 1987. It is apparent from enforcement action in 2001 that the vehicular access was recommenced for a period of time. The aerial photographs from 2000 and 2003 appear to show the mouth of the access open. However, it is not possible to make out the form of the access from the 2010 and 2014 aerial photographs. In the absence of strong evidence to the contrary, it seems that the pedestrian access has been in place for in excess of ten years. Regardless of the effects of condition 3 of the 1983 permission, the

works to form the pedestrian access were carried out and the development it is now lawful, even if only through the passage of time.

12. The 1984 permission for the conversion of the barn was implemented. It made no provision for the retention of a pedestrian access, or indeed any type of access to the A6. I note that it makes no reference to any of the previous permissions relating to the appeal site. Therefore, it is the appellant's case that condition 2 of the 1984 permission has been breached for a period in excess of 10 years, rendering it unenforceable.
13. The appellant argues that the 1983 permission was clearly superseded by the 1984 permission. In the case of *Pilkington v SSE & Lancashire CC [1973] 1 WLR 1527*, the court held that where there are two permissions which are clearly inconsistent and not intended to be alternatives, the implementation of one will negate the other. The test is whether it is physically possible to implement the second permission in the light of what has been done to implement the first.
14. On the basis that the pedestrian access permitted in 1983 permission is now lawful, it is necessary to consider the provisions of the 1984 permission in the light of these principles. Condition 2 of the 1984 permission is clear that 'all access' to the new dwellings will be via Green Lane. There is no differentiation between vehicle, pedestrian, or any other form of access, and there can be little room for interpretation of these words. To achieve this, the existing Slyne Road/A6 access is to be 'permanently blocked'.
15. Again, there is no qualification with regard to the type of access to the A6. Therefore, it follows that any and all types of access are to cease in this location. It seems to me that the word 'permanently' must be interpreted to take its natural meaning. Applying the test in *Pilkington*, it is clear that it remains physically possible to implement the works to block off all access to the A6.
16. I appreciate that condition 2 included the words 'to the satisfaction of the Local Planning Authority', and that they were satisfied with the pedestrian access. The pedestrian access may well be acceptable in terms of highway safety considerations, but it does not amount to the permanent blocking off of access required prior to the occupation of the permitted dwellings. Therefore, taking the words at face value, it seems to me that condition 2 of the 1984 permission has never been complied with, and has thus been breached for a period in excess of 10 years. It therefore follows that the pedestrian access in its current form is lawful.

Whether the works to reform the vehicle access to the A6 would need planning permission

17. Under section 336 of the Town and Country Planning Act 1990, a 'means of access' includes any means of access, whether private or public, for vehicles or for foot passengers, and includes a street. The appellant argues that the definition would include the length of the track as well as the point of access to the highway, which is not in dispute. Whilst a means of access exists, the vehicular access cannot be reinstated without physical works to remove the timber gate, the sections of timber fencing and the two sections of stone wall.

18. S55(1) of the 1990 Act defines operational development as the carrying out of building, engineering, mining or other operations in, on, over or under land. S336 of the 1990 Act includes within the definition of engineering works the formation and laying out of means of access to highways, for which there are limited permitted development rights.
19. Under Schedule 2, Part 2, Class B of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), means of access to a highway is permitted development if it comprises the formation, laying out and construction of a means of access to a highway which is not a trunk road or a classified road, where that access is required in connection with other permitted development. As the A6 is a classified road, this factor alone indicates that the conditions of Schedule 2, Part 2, Class B cannot apply in this case.
20. The words 'formation' and 'laying out' indicate that, as a matter of fact and degree, some physical works to reform the access must be involved. The works may indeed be small in scale, but there is no indication within s336 that such works need be very substantial. My attention has been drawn to the judgement arising from *Fayrewood Fish Farms v SSE & Hampshire CC* [1984] JPL 587, where it was held that an 'engineering operation' could be an operation which would generally be supervised by an engineer but that it was unnecessary that it should actually have been so supervised. Deputy Judge David Widdicombe QC defined engineering operations as those of a type usually undertaken by, or calling for the skills of, an engineer.
21. The inclusion of the words 'generally' and 'usually' within these summaries indicates that there is room for interpretation of what constitutes an engineering operation, and that the involvement of a qualified engineer is not a determinative factor. I am mindful of *Coppen v Bruce-Smith* [1998] JPL 1077 where the court held that the breaking and digging up of tennis courts to clear a site for redevelopment was held to be an "engineering or other operation" and not demolition. It is thus clear that some leeway exists for the categorisation of works in each case.
22. Moreover, whilst the removal of the walls, gate and fencing in themselves would ordinarily not constitute development, the correct approach is to look at the operation as a whole, and not its component parts. In this case, the works would be properly characterised as the reinstatement of an access large enough for a vehicle to access an A road where no such access currently exists. The physical works, which are essential to this operation, amount in my view to the 'formation' of the access and are therefore engineering works. Drawing these factors together, I am satisfied that the proposal is development requiring planning permission.

Conclusion

23. For the reasons above, I therefore conclude that the Council's refusal to grant an LDC in respect of the reinstatement and use of the access for vehicular purposes was well founded and that the appeal should fail. I will therefore exercise accordingly the powers transferred to me under s195(3) of the Act.

Elaine Gray

INSPECTOR