



Appeal Decision

Site visit made on 8 September 2020

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 December 2020

Appeal Ref: APP/D5120/C/19/3236383

Old Bexley Equestrian Training Centre, Stable Lane, Bexley, Kent DA5 2AW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Ms Wendy Tucker against an enforcement notice issued by the Council of the London Borough of Bexley.
 - The enforcement notice was issued on 22 August 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the creation of a new access.
 - The requirements of the notice are 1) Remove the new access shown in the approximate location outlined and hatched in blue on the plan attached to the notice, including the gate and wooden fence and fence posts; and 2) Remove all resultant materials from the site.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied by deleting the words in Step (1) and substituting the words 'Remove the new access as formed, comprising a pair of wooden gates, fencing and fence posts shown in the approximate location outlined and hatched in blue on the attached plan'. Subject to these variations the appeal is dismissed and the enforcement notice is upheld.

Procedural Matter

2. The appeal concerns a vehicular access from Vicarage Road into the rear of a site occupied by Old Bexley Equestrian Training Centre. The access is currently denoted by a gap in the roadside hedge where there is a pair of new-looking, wooden gates set back from the carriageway, flanked either side by, equally new-looking, timber post and rail fencing.
3. Whilst not raised as a ground of appeal at the outset, the appellant has none the less, made a submission that the vehicular access point has been in situ for many decades. This falls to be considered under ground (d), that at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice. The appellant and the Council were therefore given an opportunity to deal with this matter in full within an extended appeal timetable, which occurred after the site visit.

4. The appellant also makes submissions that there are no issues with the acceptability of the sight lines, as well as other matters that relate to the merits of the case, but I am unable to consider these as there is no ground (a) appeal before me.

The Notice

5. There are some details about the notice that I need to put in order before I can proceed. The reason for issuing the notice refers to the harm caused by the access to highway safety, however the requirements do not specify that the use of the access should cease. It is open to me to vary the requirements of the notice but, in this case, where I would be extending the steps required to be taken, this would cause injustice to the appellant. I will not therefore direct that this requirement to cease the use of the access is added. However, step (1), as worded, is imprecise as it uses the word 'including', which is unclear as it implies there may be other items that the Council wish to see removed. I shall therefore direct that the notice be varied so that it is clear what the appellant is required to do. This is because the appellant appears to be under the impression that she needs to 'put the old gate back on (which I retained) and replace the barb (*sic*) wire to either side'. There would be no injustice caused to either party by the variation as the terms of the notice would not be extended.

The ground c) appeal

Reasons

6. Under a ground c) appeal, the onus of proof is on the appellant to show that there has not been a breach of planning control. In this case the appellant submits that the allegation, 'without planning permission, the creation of a new access' is incorrect as she made a 'drop kerb application' to the Council to alter the kerb adjacent to her existing vehicular access. She states it was not her intention to seek planning permission for the access as it was already there. Nevertheless, the application she made¹, which transpired to be a planning application, was made to the Local Planning Authority, as opposed to an application to alter the kerb, which is made to the Highway Authority.
7. The site comprises a large complex of stables and associated related outbuildings. There is an existing vehicular access into the site from Stable Lane, which is classified as a bridleway and appears to be a private road. Stable Lane leads onto Vicarage Road, one of the main roads into Old Bexley, which is classified as the A2018. The Council allege that the appellant has removed a section of hedgerow that separates her site from the A2018 and has formed and laid out a new vehicular access.
8. At the site visit I saw what appeared to be a relatively new gap in the roadside hedgerow, with the remains of tree root balls and cleared undergrowth to one side. The access has a hard surface comprising hard core, which also extends into the site beyond the gates.
9. Section 55 of the Town and Country Planning Act 1990 (the Act) includes in the definition of the word 'development' the carrying out of 'building, engineering, mining or other operations in, on, over or under land'. Section 336 of the Act defines the formation and laying out of a means of access to a highway as an

¹ Ref: 19/00944/FUL Retention of vehicular access, planning permission refused 4 July 2019

engineering operation. From what I saw at the site visit I am satisfied that development comprising engineering works has taken place in that a means of access to a highway has been formed and laid out.

10. Section 57(1) states that planning permission is required for any development of land. Section 55(2) sets out some exclusions to this but the development at the appeal site does not fall to be considered against any of the exclusions. Planning permission is therefore required for the development. The appellant has not provided any details of any planning permission for the laying out and formation of the means of access and the Council state that there is no record of any planning permission for the development.
11. In some circumstances some forms of development can be permitted development (PD) under the provisions of the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO). That is to say that an express grant of planning permission is not required for certain developments. Schedule 2, Part 2, Class B of the GPDO sets out that 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 development permitted by any class in Schedule 2, is PD. However, the appellant's access is onto a classified road. The development therefore does not benefit from any of the provisions within the GPDO.
12. I therefore conclude that development has occurred, that the development is not PD and express planning permission has not been granted for the engineering operations. As such, the development constitutes a breach of planning control and the appeal on ground (c) fails.

The appeal on ground (d)

13. The onus of proof in an appeal on this ground also lies with the appellant. She needs to show, on the balance of probabilities, that the formation, laying out and construction of a means of access to the highway was substantially complete more than four years before the notice was issued. The notice was issued on 22 August 2019 so the appellant needs to show that the development took place not later than 22 August 2015.
14. The appellant states that the vehicular access has existed for many years from when the land formed part of an agricultural unit, known as Lower College Farm. The appellant acquired the site in 1982 and at that point the access was used by furniture lorries that used the site for parking until 2004. Following changes in legislation affecting her riding business in 2015, this led to the appellant resuming her use of the Vicarage Road access as it was easier than the Stable Lane access.
15. The appellant submits letters from two different customers who stabled their horses with her in the past in 1994-1999 and from 2004 to date. Both recall the existence of the access and that it faced on to the main road. In addition, there is a letter from the person who carried out the ground works before the new gate was installed. He states he removed dead trees and brambles that had grown over 'a wooden and barbed wire gateway'. The aerial photographs submitted by the Council also support her timeline of events as these show that the manure heap was re-positioned from where it was shown in the 2013 image to a new position within the site after 2015. This was the reason she

- had to resume using the Vicarage Road access to service the new location of the manure heap and to take deliveries of hay.
16. At the site visit the appellant pointed to pieces of broken wood lying within the hedgerow to one side of the access, stating that they were the remains of the previous gate. However, whilst the items were recognisable as wood and some pieces lay across each other, whether they amounted to a gate was difficult to make out.
 17. The appellant also encloses an extract of a site survey drawing of the stables complex, which shows various spot level measurements. A Council date stamp of March 2004 has been highlighted in one corner of the extract and the location of the point of access has been circled. However, there is no explanation as to where this drawing comes from and what it purports to show. The circled area appears to show some hedging (indicated by the wavy line) and an angled line, possibly denoting the top of the earth bank. There is also a crescent moon marking at the back edge of the pavement but there are no words either on the drawing or in the appellant's submissions to explain what this means. Furthermore, the drawing does not show the presence of an existing access in the same way as the Stable Lane access is shown, with lines marking a splayed entrance.
 18. What is noticeable on the drawing is that the surveyor has recorded the positions of gates and hard surfacing materials. There is 'Rough Tarmac' adjacent to the symbol for a gate onto Stable Lane and within the site there are areas labelled 'Rough Ground, Concrete, Paving, Gravel track'. However, within the circled area no surfacing materials are recorded. There is though, a gate at the end of the concrete area between two stable blocks, which is just outside the circled area. This appears to lead into a field and as such, it is not clear how furniture lorries prior to 2004 entered the site and where they were parked.
 19. The Council submit that the access is a more recent development as evidenced by Google Street View images dated: September 2008, October 2008, October 2010, May 2012, September 2015, July 2016, May 2017, July 2017, May 2018 (in all cases where no access is shown) and May 2019 (where it is shown) and Google satellite earth imagery dated: July 2013, June 2015, April 2017, May 2018 (in all cases where no access is shown) and April 2019 and June 2019 (where it is shown).
 20. Although the appellant has submitted letters from customers, there is no documentary evidence to show the existence of the access or what it looked like when the appellant first acquired the site. There are no legal documents to show the location of the access and no legal agreements which, for example, show the terms on which other people or businesses may have used the access. The fact that the address of the site used to be Vicarage Road does not show the location of the access.
 21. On the other hand, the Council's evidence consistently shows that between the roadside utility box and a streetlight, there was existing hedgerow in the place of the claimed access. The appellant queries the clarity of the images as the point of access sits atop an earth bank but in this case, I find that the images are clear. This is because it is possible to see boundary fencing at the top of the bank in the September 2015 and May 2017 images. The appellant states that the furniture lorries used the access until 2004 but it is my view that the

hedgerow growth visible in the October 2008 image would not have occurred over four years, especially the growth of the trees. The density of hedgerow formed in the 2008 image would have taken longer to form. In addition, the May 2017 image shows the post and rail boundary fence approximately where the new gates are positioned and it is possible, in the absence of any substantiated evidence to the contrary, that the timbers pointed out to me at the site visit were the remains of fencing rather than a gate.

22. The Google images do show that the manure heap was moved at some point between June 2015 and April 2017. This supports the appellant's submissions. However, they also show that the clearing referred to by the appellant on the 2013 satellite image is more likely, in my view, to be the thinner hedging around the utility box as shown in the Street View image dated October 2008. This is because the location of the clearing is to the east of a field boundary whereas the new access is to the west of that point.
23. The appellant also states that the Council, for various reasons, changed the description of development in her planning application without her consent and that this led to the issue of the enforcement notice. This is a matter which should be raised with the Council, in the first instance, and I note from the copies of her emails to and from the Council that this process has been instigated. However, it has no bearing on the outcome of the appeal and I am therefore unable to give it any weight in reaching my decision.
24. The Planning Practice Guidance advises that if a Local Planning Authority has no evidence itself or from any others to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to reject it. This is provided the appellant's evidence alone is sufficiently precise and unambiguous, on the balance of probabilities.
25. From all the material before me, I conclude that the appellant has not satisfied this requirement. Consequently, she has not discharged the onus of proof that the access was substantially complete more than four years before the issue of the notice. The appeal on ground (d) therefore fails.

Conclusion

26. For the reasons given above I consider that the appeal should not succeed.

D Fleming

INSPECTOR