



Appeal Decision

by P N Jarratt BA DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 9 February 2021

Appeal Ref: APP/Y3940/X/20/3248918

29A Seagry Road, Lower Stanton St Quinton, Chippenham, Wiltshire, SN14 6DB

- 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 Malcolm Reeves against the decision of Wiltshire Council.
 - The application Ref 19/11230/CLP, dated 21 November 2019, was refused by notice dated 26 February 2020.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is for a proposed new wall or fence on north boundary.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. As this appeal turns on the interpretation of legal matters, a site inspection was not considered to be necessary.
3. For the avoidance of doubt, I should explain that the planning merits of the proposed development are not relevant, and they are not therefore an issue for me to consider, in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.
4. The appellant has submitted a very detailed case, some of which, however, is immaterial to the main issue identified below, which the appellant acknowledges. Allegations against the Parish Council about land ownership claims is not a matter for this appeal, nor is the allegation of bias by Wiltshire Council. Reference to an application for

village green status and the issues that the appellant has with Wiltshire Council over this are not relevant. Likewise, criticism about the Council's IT issues, determination periods and officer's caseloads are, similarly, irrelevant matters.

5. S192(1) provides for the making of an application for an LDC to ascertain whether (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land would be lawful. S192 does not provide for an LDC to be sought or granted in respect of a proposed breach of condition. However, s193(4) provides that an LDC may be issued under s191 or s192 for the whole or part of the land specified in the application; and, where the application specifies two or more uses, operations or other matters, for all of them or some one or more of them. In this appeal, the appellant proposes the construction of a new fence or wall.
6. S193(5) provides that an LDC does not affect any non-compliance with a condition on a planning permission unless that matter is mentioned in the certificate. This means the LDC procedure cannot be used to circumvent conditions imposed on an existing valid planning permission.
7. The grant of an LDC is declaratory of lawful use or development rights and a refusal to grant one is simply a refusal to grant the declaration sought.

Main Issue

8. The main issue is whether the Council's refusal to issue a certificate of lawfulness was well-founded.

Appeal site and relevant planning history

9. The dwelling at 29A Seagry Road together with its access and residential curtilage resulted from planning permission N.86.1805.F of 19 August 1986. Condition 2 of that permission states: "Prior to the occupational use of the development hereby permitted, the existing gated access on the northern boundary of the site shall be permanently stopped up in accordance with the details hereby approved." The approved site plan was annotated with "Block gateway in stone (as existing wall)." The reason for the condition is in the interests of highway safety. The condition was complied with after the construction of the dwelling.
10. I note that there have been various other applications relating to the site which the Council has responded to in detail in their submissions including a refused application and dismissed appeal in 2018 for the creation of a new vehicular and a pedestrian access.

Reasons

11. The appellant's application for an LDC is indicated to be for the demolition of an existing north boundary wall which is undermined with roots and to build a new wall or fence on north boundary 1m or less in

height. It is further requested that the LDC should indicate that Condition No 2 is invalid (*ultra vires*) and therefore void; thus normal planning rules apply and under those rules the proposed demolition of the existing wall is lawful; and, the normal permitted development rules apply and under these rules the proposed construction of a wall or fence less than 1m in height is lawful.

12. The appellant states that government guidance has distilled legal precedence into a number of tests which planning conditions must pass in order to be lawful and *intra vires*. The appellant relies on the tests for conditions (as set out in Circular 1/85 - The use of conditions in planning permissions) and, in his view, condition 2 fails some of these tests. It is also claimed that the highway safety reason given for the condition contradicts advice from the County Surveyor and other permissions.
13. The Town and Country Planning (General Permitted Development) (England) Order 2015, as amended indicates that a wall or fence up to 1m in height is permitted by virtue of Schedule 2, Part 2, Class A which refers to the erection, construction, maintenance, improvement or alteration of a gate, fence, wall, or other means of enclosure. Permission is not required for the demolition of the wall in the circumstances of this case.
14. However, in order for an LDC to be issued, a proposal under s192 should not lead to a breach of a condition on an existing permission that has been acted on. The condition was not challenged following the grant of planning permission and remains in force. No application to remove or vary the condition has been received by the Council since the grant of permission.
15. The appellant seeks to use the wording of s191(2)(a) in applying also to s192 applications because of its reference to operations being lawful if no enforcement action may be taken "...or for any other reason". The appellant argues that "...or for any other reason" includes a condition being *ultra vires* but he fails to submit any legal support or caselaw for this interpretation. In the absence of any substantive support for such an interpretation, I can only interpret the sections in a simple and straightforward way. These sections of the Act have different wording for specific purposes. S191 applications relate to the lawfulness of *existing* use or development and makes reference to the relevance of enforcement action. Applications under s192, on the contrary, refer to the lawfulness of a *proposed* use or operation. If a development has not yet taken place, it cannot be the subject of enforcement action.
16. The appellant's questioning of the validity of this condition and his challenge to the Council's interpretation of planning law is not convincing as the situation is very clear in legal terms. As a matter of fact the condition remains in effect until such time as it may be removed or varied by way of a successful s73 application to the Council (or appeal if refused). Whether condition 2 would satisfy current requirements for

conditions as summarised at paragraph 55 of the National Planning Policy Framework would need to be assessed as part of such an application and is not a matter for the current appeal. There is no scope to remove the condition or to set it aside through an application for an LDC.

17. Demolishing the boundary wall would not ensure that the access is permanently stopped up as required by Condition 2 and the erection of a fence in its place up to 1m in height would not comply with the requirement for the stopping up to match the wall.
18. The Council consider that only a 'like for like' replacement would comply with the condition but any alternative boundary treatment would require an application for planning permission where the planning merits could be properly considered.
19. Under s193(4) there would be scope for me to issue an LDC for the rebuilding of the wall if it satisfied the terms of condition 2. However, the proposed development is unspecific and vague in terms of the height and materials of the boundary treatment. In the absence of such information it cannot be concluded that condition 2 would not be breached. If the condition is breached, it follows that the proposed development cannot be lawful and it would not have been lawful at the time of the application for the LDC. Where legal matters are involved, as they are in s192 applications, the onus rest with the appellant to prove the lawfulness of the proposed development and the level of proof is on the balance of probability. This has not been achieved in this case.
20. The appellant states that the choice of planning route (s73 application, planning application or LDC application) is a matter for the applicant and not for the LPA to restrict. Whilst this is the case, the applicant is ill-advised to pursue an application on the basis of the lowest fee, rather than following the appropriate route provided for through planning legislation.
21. The appellant makes reference to the First Protocol of the Human Rights Act. However, rights under the HRA are not engaged in the context of an LDC appeal, except in relation to the fairness of the proceedings.

Conclusions

22. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a proposed new wall or fence on north boundary was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

P N Jarratt

INSPECTOR