



Appeal Decision

by D Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 25 May 2022

Appeal Ref: APP/W4325/X/22/3291235

Entrance to The Stables, Manor Drive, Upton CH49 6JF

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) 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 Mrs Maria Collado against the decision of Wirral Metropolitan Borough Council.
 - The application Ref LDP/21/2029, dated 18 October 2021, was refused by notice dated 13 January 2022.
 - The application was made under section 192(1)(b) of the 1990 Act as amended.
 - The development for which a certificate of lawful use or development is sought is erection of driveway gate and pedestrian gate.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The planning merits of the use are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act as amended. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.
3. I consider that this appeal can be determined without the need for a site visit. This is because I have been able to reach a decision based on the information already available.

Background and Main Issue

4. The dispute between the main parties concerns whether or not the proposed gates would comprise 'permitted development' under Article 3 and Schedule 2, Part 2, Class A of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO 2015). This concerns the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. Development is not permitted under A.1(a)(ii) if the height of any gate, fence, wall or other means of enclosure erected or constructed adjacent to a highway¹ used by vehicular traffic would exceed 1 metre above ground level.

¹ Section 336(1) of the 1990 Act provides that, for the purposes of that Act, 'highway' has the same meaning as in [s328] of the Highways Act 1980. It states that, except where the context requires, 'highway' means the whole or any part of a highway other than a ferry or waterway.

5. I must consider whether the local planning authority's refusal to grant an LDC was well-founded.

Reasons

6. The plan submitted by the appellant "proposed position of gates" shows the gates would be located across the entrance to a private drive known as The Stables. This provides access to Nos 1-4 The Stables and also to Alwood Farm. The gates would be a maximum height of 2 metres and would incorporate vehicular and pedestrian openings.
7. The Council maintains that The Stables is a highway for the purposes of Part 2 of the GPDO 2015 and, as the gates would be erected across the entrance, the development would not be permitted by virtue of A.1(a)(ii). The appellant argues that The Stables is a private driveway, owned by No 3, and cannot be classed as a highway since the public have no right of way.
8. Common law has established that a highway is a defined route over which the public can pass and repass without hindrance or charge. The use must be "as of right", meaning without force, secrecy or permission and may be limited to a particular class of user or mode of transport. The way in which a highway comes into existence is through dedication and acceptance by the public. Dedication may be express or may be inferred from public use. Both dedication and acceptance are necessary at common law, although there is a rebuttable statutory presumption of dedication after 20 years use as of right by the public.
9. In the absence of any contrary statutory definition, a privately-owned or maintained or an unmaintained way may be a highway if the public can use it "as of right". This applies to the GPDO 2015 except in relation to Part 1. For the purposes of Part 1, 'highway' is defined in paragraph I as including an unadopted street or a private way. Since those terms are not qualified, paragraph I would appear to include unadopted streets or private ways where the public do not have a right of use. In addition, the Technical Guidance² sets out that – "highway is a public right of way such as a public road, public footpath and bridleway. For the purposes of the Order, it also includes unadopted streets or private ways. 'Unadopted street' means a street not being a highway maintainable at the public expense". Although the GPDO definition in paragraph I is aimed at Part 1, the Technical Guidance does not make such a distinction. It implies that unadopted streets or private ways may be a highway for the purposes of Part 2.
10. The appellant insists that the public have no right to pass and re-pass The Stables as it is a privately owned driveway. Nonetheless, the driveway is the sole means of access to Nos 1 to 4, hence, there must be a right of access. This right would be exercised by the occupants and people who have reason to visit those properties. It is correct that there is no 'public right of way', such as a bridleway or public footpath, but it does not follow that the driveway is not a highway. The Stables provides access to several houses and, as such, it is a defined route over which the public, albeit those with a cause to be there, can pass without hindrance. This right has been exercised since the houses came into existence and its use was accepted when the right of way was granted. I, therefore, consider that The Stables is a highway for the purposes of Part 2 of the GPDO.

² MHCLG – Permitted Development Rights for Householders: technical guidance (Sept 2019).

11. The appellant refers to appeal ref APP/Z3825/C/02/1088969, dated 1 October 2002, and *Oldham v Sheffield Corporation* [1927], in which it was stated that “in the case of a cul-de-sac it seems to be very difficult indeed to presume dedication”. The Inspector concluded that a residential cul-de-sac, which was a private road, was not a highway as there was no public right to pass and re-pass. However, that decision was based on the GPDO 1995 and the Inspector relied solely on the common law definition of a highway. In my opinion, it cannot be assumed that a cul-de-sac should not be considered a highway because it may not be expressly dedicated as a public right of way. It is a fact and degree assessment to be made by the decision maker on the basis of the site-specific circumstances, which the Inspector acknowledged. In this case, I consider that The Stables allows unhindered access to a number of properties other than No 3 which owns the driveway. This is evidence of dedication and acceptance.
12. My attention is drawn to appeal ref APP/T5150/C/04/1158828, dated 7 January 2005. In that case, the Inspector found that a private driveway providing access to rear gardens and garages was not a highway for GPDO purposes. This conclusion was based on the common law definition of a highway and the GPDO 1995 definition of a ‘private way’, which was “a highway not maintainable as the public expense and any other way other than a highway”. The Inspector considered that the inference from the definition of ‘highway’ means a ‘public highway’. The case differs from the matters before me in that, crucially, the driveway in question was not the sole means of access to houses, as it is in this instance.
13. Finally, appeal reference APP/E3715/X/17/3187581, dated 15 October 2018 is submitted. The Inspector was considering fencing which ran alongside a landscaped area and a parking space, which were found not to be part of the highway used by vehicular traffic. The Inspector made a fact and degree finding based on the matters before them. It is clear that the site-specific circumstances differed from the issues in this appeal.
14. I note the appeal reference APP/Z4310/A/10/2126236, dated 3 September 2010. This was against a refusal of planning permission for gates and a wall and is of limited relevance to the matters before me.

Conclusion

15. I conclude that the proposed development would not comprise ‘permitted development’ under Article 3 and Schedule 2, Part 2, Class A of the GPDO 2015. As such, express planning permission would be required for the proposal.
16. For the reasons given above, I conclude that the Council’s refusal to grant a certificate of lawful use or development in respect of the erection of a driveway gate and a pedestrian gate 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.

D Moore

Inspector