



Appeal Decision

Site visit made on 6 March 2023

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 17 March 2023

Appeal Ref: APP/A4710/X/22/3302731

2 Grove Terrace, Brighouse HO6 2RF

- 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 Sandra Moulson against the decision of Calderdale Metropolitan Borough Council
 - The application Ref 21/01039/191, dated 30 October 2021, was refused by notice dated 10 May 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use/development for which a certificate of lawful use or development is sought is:
The creation of a vehicular access and use of the land for parking a car.
-

Decision

1. The appeal is dismissed. See formal decision below.

Matter of clarification

2. The use/development description above is taken from the appeal form. This is an application under Section 191(1)(a) for a LDC that the existing use of the appeal site for the parking of a vehicle is lawful. However, the appellant's case is based on the previous historic usage of the site for the parking of a vehicle. The current layout is clearly different from the previous use for parking and I can only consider what was lawful at the time of the application. This is how I have dealt with the appeal and have based my decision on all of the submissions and my site visit.

Background information

3. The appeal site is a small area of land located immediately to the south-west of No 2 Grove Terrace, which forms the first in a row of back-to-back terraced stone cottages. The cottages are at right angles to the classified Elland Road and slope gently to the south-east. The appeal land is currently paved and fenced and is immediately adjacent to a 'road marked bus stop' on Elland Road. It is bounded to the south-west by a hedge which separates it from the adjacent restaurant car park. At the time of my site visit there was one car parked in the middle of the newly paved and fenced parking area and I noted that the width of the current access is approximately between 4.5m and 5m.

4. The LDC application was refused by the Council on 10 May 2022. The reason given was as follows: *'From the evidence it is considered that, on the balance of probability, there has not been a lawful use of parking of vehicles on land to the SW in association with 2 Grove Terrace Brighouse HD6 2RF'.*

5. In April 2021 the Council's Enforcement Section had contacted the appellant alleging the creation of the current access and parking area off Elland Road. The Council had indicated that there was no planning permission in place for the access and parking area and, therefore, that there had been a breach of planning control.

6. The Council stated that *'There is no record of a planning approval for an access in this location. There used to be a wall/fence but it was relatively recently knocked through and a hard standing created onto the main A road and through a bus stop. The fence line indicates that there was not an access until relatively recently. Street view imagery supports this view'*.

7. On behalf of the appellant it is indicated that *'a narrower access onto the highway at this point has existed and a smaller area has been used to park a private car for in excess of ten years, hence it is immune from action due to the passage of time'*. It is indicated that the evidence submitted with the LDC application, including historic images of the site and testimony from residents, confirms that an access has existed for a period in excess of 10 years. It is indicated and corroborated by others that the original access has been widened and the parking surface laid recently.

The gist of the case for the Appellant

8. A letter from a previous owner is submitted which indicates that he purchased No 2 and the adjacent building in the 1990s and created an access on to the land in order to park a vehicle. This is shown on a *'Get Mapping'* image dated 2000. The previous owner also confirmed that he had paid the Council for a *'drop crossing'* to access the parking space.

9. The appellant accepts that the access has recently been widened from the original width created by the previous owner and that the widened element may require consent. However, it is maintained that a vehicular access has existed for more than 10 years and that the original access is immune from enforcement action. It is contended that the works carried out do not require planning consent.

10. It is stressed that the LDC application was submitted to establish that an access for parking a car has been in existence for a period in excess of 10 years and that the recent development must be assessed within this context. It is stated that whether the original access is lawful depends on *'whether, beyond reasonable doubt, the use of the access and parking on the land has been established for a period in excess of 10 years'*.

11. It is contended that the reason for refusal is based upon inaccurate comments from the Highways Authority (HA). The first point relates to *'the regular removal of the fencing to achieve access for the parking of a car'* and that this *'is not usually seen at a regularly used driveway'*.

12. The Appellant accepts that she may be at fault for not making it clear why the old fencing panel was used to secure the access to the parking area. It is indicated that this was because, on moving into No 2, he had been informed by neighbours that patrons of the adjacent restaurant *'frequently entered the open parking area to relieve themselves'*.

13. Therefore, for security purposes and also due to the unguarded drop at the rear of the parking area, the panel of fencing was put in place for reasons of health and safety. It is noted that it came from a sloping section of wall, hence the panel is tapered rather than square. This should clarify why the HA comment, *'this is not usually seen at a regularly used driveway'* is incorrect. Gates are common features of private drives and it is not uncommon for drives to be closed by a gate.

14. In relation to the HA's second point, (relating to the width of the opening; the standard size of kerbs and the contention that the 2.4m width is incorrect), it is argued that, for the highway officer to be able to estimate the width, they would surely have had to visit the site and to have actually measured the access rather than guessing it from a kerb stone.

15. The original width pre 2012 was exactly 2550mm. After the encroachment with the new wall, it was 2250mm in width. Now the wall has been demolished the remains of the apron are still visible, as is the footprint of the stone pillar that formed the access to the parking. A photograph shows the historic wall with the gate posts defining the access to the right. Furthermore, the previous owner who created the access disputes the HA suggestion that it was only 1.9m.

16. It is argued that the suggestion that this was not wide enough to accommodate a car, simply does not stand up to the facts and that what the HA officer does not recognise is that the issue here is not whether the access is to a standard size, but whether it has been used for ten years or more. The submitted photographs show a trailer in the space that was created, with the fence gate open but still in situ. The trailer bearing the registration No YG60PTU is 1690 mm wide.

17. On behalf of the appellant it is stressed that over the years this space has been more than wide enough for the past and current owners to park their cars. The fact that a car has been parked on this land has been confirmed by all the other residents who have written letters in support of the LDC application.

18. It is explained that the new widened access was created to make the parking manoeuvres easier and that cars have increased in size over the years. An old Ford Escort Mark II from the seventies is 1595mm wide and bears little or no resemblance in size to its current replacement, the Focus at between 1825mm to 1844mm. It is also indicated that a previous property owner parked his Land Rover (1676mm wide) on the original shingle parking area.

19. It is noted that shortly before the appellant took possession of the property, the original car park wall, adjacent to the neighbouring restaurant was rebuilt. Google Street view images are submitted to show that in 2009 and 2015 the wall is different in design and construction. The rebuilt wall encroached onto the appellant's concrete apron. Whatever the reason for this, it is stressed that the current hedge line lies on the appellant's land still leaving adequate width to park a vehicle.

20. This encroachment did cause initial concern but as the intention was to increase the width of the parking for ease of access/egress, the issue was not addressed. The appellant has photographs of the encroachment over the apron which was approximately 300 mm. The access was therefore approximately 2250mm wide (enough for a Ford Focus to navigate).

21. The HA suggestions that *'the fence is in exactly the same position which suggests it was not moved between those periods'*; that *'the internal hedge that runs alongside the claimed parking space has not been cut back which would be expected if the opening was being used for parking'* and that the *'surface material in the 2017 image also strongly suggests that the opening has not been used'* are not considered to be reasoned arguments.

22. Again intermittent views from Google Earth show the gate closed which is the normal position of the gate. To suggest that this proves it has not been open between the biennial photographs is simply not a sound argument. Photographs of the hedge being cut back are provided and it is routinely trimmed. The image from June 2018 where the hedge has been cut back severely in late winter shows green shoots visible

on top. With regards to the surfacing material, the Google Earth images show the parking area with shingle rather than being left as garden. This supports the case it has been used for parking.

23. In conclusion it is contended that a vehicular access has existed for more than 10 years; that the original access is immune from enforcement action; that planning permission is not required for the current access and, therefore, that a LDC should be issued for the access and parking on the land.

The gist of the case for the Council

24. The Council's case relies, amongst other things on the HA's comments, referred to above. These are set out in detail in the Officer Report. The Council points out that the 2008 and 2009 photographs are outside of the required 10-year period. Although they show a gap between the hedge and fence, it is stressed that there is no photo of a car parked on the land or any details of the size of the gap in order to establish if it would be large enough to even accommodate a modest sized car.

25. In assessing the later photographs between 2014 and 2018, the Council indicates that the earlier one only shows a trailer parked on the gravel surface. It is indicated that the 2015 photograph shows a fence across the gap and no car. This is also the case for the 2017 photograph whilst again, in 2018 when the gap was being widened, there is no car visible.

26. With regard to the contention that the parking area has been used for 10-20 years, the statement that the fence was removed regularly is questioned in that this would not be feasible or practicable every time the area was accessed. The only photograph showing something parked shows a trailer (partly within the overgrown hedge) and not a car. As indicated above the photo is from 2014 and does not show a continuous or consistent use of parking of a vehicle.

27. Reference is made to the HA officer's view that the gap shown in the 2008-2009 and 2015-2017 photographs is too narrow to accommodate a large family sized vehicle. The overgrown hedge is also referred to and this is considered to prevent the parking of a car on the land. It is further stressed that the 2009 image does not show any impressions in the grass where vehicle car treads might have been.

28. The Council argues that, based upon the submitted photographic evidence there is no substance to the information, some of which is outside of the 10-year period. It is also contended that the remaining evidence is *'quite weak in determining the use of the land to the SW of 2 Grove Terrace'*.

29. From the evidence it is considered that on the balance of probability there has not been a lawful use of parking of vehicles on land to the SW in association with 2 Grove Terrace Brighthouse HD6 2RF. From the evidence it is considered, therefore, that on the balance of probability the existing development is not lawful. The material time was between 27/07/2012 and 27/07/2022. As such, in the light of the above, the submitted evidence does not satisfy the requirement at paragraph 8.15 of Circular 10/97.

My assessment

Introduction

30. An appeal relating to a Certificate of Lawful Use or development (LDC) is confined to the narrow remit of reviewing the LPA's decision and Section 195(2) of the Act requires an assessment to be made as to whether the refusal of the application is, or is not, well-founded. The assessment is based on whether or not the development, for which the certificate is sought, would have been lawful at the

time of the application (30 October 2021). The planning merits of the development are not relevant. The burden of proof lies with the applicant and the relevant test is '*the balance of probabilities*'. In this case it is the earlier scheme for which a LDC is sought, rather than for the current situation on site.

The Main Issue

31. The main issue is whether or not the appellant has demonstrated, on the balance of probability, that at the time of the LDC application the access and the use of the land for parking a car was lawful. In order for this to be the case it is necessary to demonstrate a continuous use over a 10 year period.

My Assessment

32. It is evident from the appellant's submissions; comments from the previous owner (and owner of the adjacent restaurant) and from other neighbours that there is a history of the land being used for the parking of a vehicle. The previous owner refers to parking a vehicle in the year 2000 and there is an aerial photograph which appears to prove that this is the case. There is also photographic evidence to indicate that a trailer has been parked on the land.

33. Although there are no other detailed photographs showing vehicles parked on the land, from all of the evidence it seems to me that this narrow strip has been used intermittently since 2000 for the parking of a car or other vehicles. As indicated above, there was one car parked on the land at the time of my visit. I consider, therefore, that the principle of using this land for parking could, to some extent, have been established in the past. My view in this respect is reinforced by the fact that the previous owner formed the earlier access and had some contact with the Council with regard to a crossover from the main road.

34. However, for the access and parking area to have been lawful at the time of the LDC application, it would have been necessary for the appellant to have provided precise and unambiguous evidence of a continuous 10 year use of both the access and the parking area. Having considered all of the submissions I am far from convinced that there has been a continuous 10 year use of this access and parking space for this period.

35. With regard to the access/crossover, there are no dimensioned drawings of the previous access created by the original owner. Nor is there any indication of how this access had been physically changed in recent years, as referred to by the appellant. However, it is evident when comparing the historic facts with what I was able to see on site, that the two schemes are significantly different.

36. The very fact that the appellant has referred to the recent change must mean that at the time of the application, even though the use of the land used intermittently for parking might have not changed, the access as laid out on 30 October 2021 could not have been in place for the required 10 year period. It is stated that '*a narrower access onto the highway at this point has existed and a smaller area has been used to park a private car for in excess of ten years*'. Thus, not only had the access been narrower than it is now, but the parking area had also been smaller and has recently been re-surfaced.

37. These facts, together with the lack of any other detailed photographs or more precise evidence showing vehicles parked on the land, indicate that at the time of the LDC application the current scheme was significantly different to the narrower opening and smaller parking area created by the previous owner. It is also the case that the Council was not precluded from taking enforcement action against the the current access and parking area.

38. I have noted the appellant's reference relating to the need for a fence/gate and the fact that the HA did not carry out any check measurements on the site. However, as indicated by the Council, there is no planning permission in place for the current access and the appellant has accepted that the opening now on site, as well as the larger parking area, have been created fairly recently and that consent is required.

39. I have referred above to the fact that, in my view, the principle of the access and that some use of the land for the parking of a vehicle has taken place over the years. If the evidence had indicated that the original access and parking area had been in place on the date of the LDC application, for the required continuous 10 year period, then that development would have been lawful.

40. However, this is not the case and the recent alterations to the access have resulted in a completely new scheme. Clearly this has not been in existence for a necessary 10 year period. Thus, on the date of this LDC application, the evidence indicates that the earlier scheme had been superseded by the current layout and could not possibly have been lawful.

41. It is also the case that, even if it was appropriate to consider the LDC application based simply upon the narrower access and the previous parking area, it has not been demonstrated, on the balance of probability, that this previous scheme had been used for the necessary continuous period of 10 years.

Conclusion

42. In conclusion it follows, in my view, that at the time of the LDC application, neither the previous situation nor the current layout could have been lawful. There is insufficient precise and unambiguous evidence that the previous scheme had existed for the necessary continuous 10 year period and the current scheme has resulted in a breach of planning control, as there is no permission in place.

43. I conclude, therefore, that the Council's decision to refuse to issue a LDC was sound and that the appeal must fail. In order to regularise the situation it will be necessary for a full planning application to be submitted.

Other Matters

44. In reaching my conclusion I have taken into account all of the other matters raised by the appellant, the Council and others. These include the planning history; the officer report; the Highway Authority comments; the evidence of the previous owner and other neighbours; the LDC application submissions; the appeal statements and all of the photographic evidence. However, none of these carries sufficient weight to alter my conclusions. Nor is any other factor of such significance so as to change my decision that a LDC cannot be issued in this case for *The creation of a vehicular access and use of the land for parking a car.*

Formal Decision

45. The appeal is dismissed and a Lawful Development Certificate is not issued.

Anthony J Wharton

Inspector