



Appeal Decision

Site visit made on 16 December 2022

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 29 March 2023

Appeal Ref: APP/P2935/X/22/3297166

Michaelhaven Planetrees, Wall, Hexham, Northumberland NE46 4EQ

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Miss Kerry Michael against Northumberland County Council.
 - The application Ref: 21/04426/CLEXIS is dated 9 November 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as 'We are seeking the grant of this Lawful Development application in relation to the existing vehicular access that leads from the B6318 onto the site. This vehicular access was created by the previous landowner and used for allowing access from the road to the track on the adjacent site. A confirmatory statement from the previous landowner is included. I purchased the land in June 2021 and have included an image from just prior to that date showing the vehicular access existed prior. The creation of the access took place more than 10 years ago – and during this time no complaints were received, and no enforcement action was taken, as a result, the access is considered lawful and this application should be granted'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. 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. The absence of enforcement action on the part of the Council is not material.
3. 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

4. The main issue is whether the Council's deemed refusal to grant an LDC was well-founded.

Reasons

5. A certificate of lawful use or development is not a planning permission. Its purpose is to enable owners and others to ascertain whether specific uses, operations or other activities are or would be lawful. Lawfulness is equated with immunity from enforcement action.
6. Furthermore, the question of lawfulness or otherwise relates specifically to the date of the LDC application. The appellant is seeking to establish the lawfulness of 'the existing vehicular access that leads from the B6318 onto the site', in other words, as it existed on 9 November 2021, the date of the application.
7. The Council state that they were first notified of works to form a vehicle access in July 2021. At that time, the access led to a site comprising a number of yurts, which have since been removed.
8. On 18 October 2021, the appellant submitted a planning application, ref: 21/03394/FUL, for the erection of three permanent timber cabins for holiday accommodation, a new timber storage shed, a timber toilet/shower block and a fence. She states that she did not include the access in this application because she believed it to have accrued lawfulness due to the passage of time.

The evidence

9. The appellant submits a series of photographs in support of her case. Photograph 1 shows an access in snow, comprising a timber gate set back from the road, a timber fence to the side, some stone walling and a tree. Photograph 3 shows this same arrangement from inside the site.
10. Photograph 2 is taken from inside the site, showing the house opposite, and a muddy track leading directly from the road. Photographs 4, 5 and 6 show the same track from the road from different angles, with the close boarded fence included.
11. The appellant refers to information from previous landowners stating that the access was created and brought into use more than ten years ago. However, no witness statements from these individuals are before me, which limits the weight I can attach to this evidence.
12. At their Appendix 1, the Council supply two dash cam photographs taken by the Highways Team. These are dated 30 November 2020 and 6 January 2021 respectively. These are at an oblique angle, but seem to show the arrangement where the timber gate is set back from the road with the open timber fence to the side. I note that a blue and white for sale sign is visible in both images, which appears similar to the blue and white sign in the appellant's Photograph 1. The photograph on the next page is undated but shows the muddy track and the site cleared.
13. Lastly within this document, the Council submit Google Earth images dated 2009. There is no obvious entrance on the first 2009 image, but the second one shows a gate in a position near the road, with significant overgrowth in front that would suggest the access was not in use at that time.
14. At their Appendix 3, the Council submit undated Google images from neighbouring residents. The first image shows a timber gate close to the road,

similar to the Council's 2009 image. The second image is taken at an oblique angle. There is plant growth and some walling visible, but it is difficult to make out if the gate is present.

15. The next images are screenshots, the first dated 9 May 2020 and showing a similar image of the timber gate nearer to the road behind significant growth. The second screenshot, dated 21 July 2021, shows the site in the process of being cleared.
16. I have also taken into account the Highway Authority's statement that there has not been a formal 'vehicular access' into the field from the classified road (B6318). Whilst there may have been a gate in the hedgerow, they advise that there is no break in the edge of carriageway markings which would indicate that there was no formal or authorised vehicular access at this location.

Assessment

17. It is clear that a gate was present at the site in 2009 giving access from the road to what appears to be a field behind. The photographs strongly suggest that it was not being used in 2009 because of the plant growth and foliage in front. However, even if I accept the evidence concerning that overgrown gateway, the appeal relates to the lawfulness of the access as it was on 9 November 2021.
18. The appellant confirms that, on 25 July 2021, alterations were made to the access. She contends that no significant works took place other than the removal of the existing gate and gate posts, and a tree next to the gate. She asserts that the access only looks wider because of these factors.
19. However, this statement is not consistent with Drawing 002-007 Rev PO1, which related to the 2021 planning application, showing the 'Existing Elevation of Site Entrance from Brunton Bank'. Although dimensions are not given, it appears from this drawing that the 2021 access is notably wider than the 2009 access. By comparing the photos, it is apparent that a sizeable section of walling has also been removed. In any event, the onus of proof lies on the appellant, and she has not submitted any definitive, quantified evidence to show that the access remains exactly the same width as it was prior to the works.
20. Given the size of the tree, the works to remove its stump and level out the land are likely to have involved some significant earthworks. It is apparent from the appellant's Photograph 2 that earth was cut through on the left hand side of the frame. Based on the evidence before me, and my observations on site, the access as it existed on the relevant date of 9 November 2021 is materially different in scale and appearance from the previous forms of the gateway.
21. I am satisfied on the balance of probabilities that the works undertaken are of an extent that they amount to an operation normally undertaken by a person carrying on a business as a builder. It therefore follows that these works are development for the purposes of Section 55 of the Town and Country Planning Act 1990 as amended.
22. Furthermore, it is clear from the evidence that the highway adjacent to the access is a B road. It therefore follows that the operations cannot be permitted development as they would contravene Schedule 2, Part 2, Class B of the Town

and Country (General Permitted Development) (England) Order 2015, which relates to means of access to a highway which is a classified road.

23. I note the appellant's reference to a notification from the Camping and Caravanning Club (CCC) on 30 July 2021 asking if the Council had any objection to the use of the site. She further refers to a letter from the Council stating acceptance for permitted development rights relating to the site. However, the Council state that no certificate was issued by either the CCC or subsequently by the Go Explore Camping Club. Crucially, in the absence of any documents relating to these matters, they can have little bearing on my assessment of the main issue.

Conclusion

24. The appellant seeks to show that unrestricted vehicle access to the site from the B6318 has been established through the passage of time. However, her evidence is not sufficiently precise or detailed to reach the necessary standard of proof.
25. Moreover, a certificate could only be issued for the vehicle access in question if it could be shown to have been lawful on 9 November 2021. The evidence shows that the access was not lawful as it existed on that date because it had been subject to works of operational development for which planning permission is required. There is no evidence that such permission exists.
26. In any event, any material change of use of the land would require the access to be considered against the relevant policies in terms of its suitability to accommodate that new use, including its safety. It would not be possible, as the appellant suggested with reference to the 2021 application, for the access to be excluded from any new application on the grounds that some form of access to the site had previously existed.
27. For the reasons given above, I therefore conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of the vehicle access from the highway was well-founded and that the appeal should fail.
28. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Elaine Gray

INSPECTOR