



## Appeal Decision

Site visit made on 12 June 2023

**by V Bond LLB (Hons) Solicitor (Non-Practising)**

**an Inspector appointed by the Secretary of State**

**Decision date: 28 JULY 2023**

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**Appeal Ref: APP/P1940/X/21/3287314**

**Tivoli, 39 Astons Road, Moor Park HA6 2LB**

- 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 Jalal Kajani against the decision of Three Rivers District Council.
  - The application Ref 21/1272/CLPD, dated 14 May 2021, was refused by notice dated 12 July 2021.
  - 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 Installation of 6no. rising bollards within driveway, as part of boundary treatment.
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### Decision

1. The appeal is dismissed.

### Preliminary Matters

2. The application which is the subject of the appeal was for a proposed development. The appellant and Council are in agreement that bollards have been installed at the appeal site and I saw these at my site visit. The bollards installed do not though correspond either in appearance or position with those in the application documents. I base my determination on the latter which was what the Council assessed in the application.
3. The appellant did not provide with its statement copies of all case law, officer reports and the appeal decision referred to in evidence, and so it was not apparent whether the Council had had sight of these. Accordingly, copies were sent to the Council for comment. An opportunity was given to the appellant for comment upon judgments not previously seen also. Comments made and the documents cited have all been taken into account in my considerations.

### Main Issue

4. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development ('LDC') was well-founded. This will turn upon whether the proposal described in my banner heading above would have been lawful as at the date of the LDC application. Planning merits are not relevant to the assessment and the onus is on the appellant to make their case on the balance of probability.

## Reasons

5. The parties are in agreement that the appeal development represents a form of development<sup>1</sup> requiring planning permission under s55 of the Town and Country Planning Act 1990 ('1990 Act'). Subsection 191(2) of the 1990 Act then states that operational development is lawful at any time if: (a) no enforcement action can be taken in respect of those operations (whether because they did not involve development, or require planning permission, because the time for enforcement action has expired, or for any other reason). This is subject to the proviso that they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
6. Planning permission can be granted by a specific grant of planning permission, or by deemed planning permission granted under Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended ('GPDO'). This grants planning permission including for the classes of development specified as permitted development in Schedule 2.
7. The dispute then is whether the bollards proposed would be permitted development under Schedule 2, Part 2, Class A of the GDPO ('Class A') which permits '*The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure*'. The matter in contention specifically is whether the bollards are an 'other means of enclosure'; it is accepted that if they properly fall within this definition, they would otherwise comply with the limitations in Class A.
8. The proposed development is for six automatic retractable bollards of some 500mm in height and which would be positioned in rows of three either side of central planting in the front garden of the appeal property.
9. The term 'other means of enclosure' is subject to the *ejusdem generis* rule, which means that to be a 'means of enclosure', the proposal must be similar to a gate, fence or wall<sup>2</sup>. As the appellant outlines, such a comparison should not be so constrained that the term 'other means of enclosure' serves no purpose. Provided that it has *some* function of enclosure, the efficacy of the proposal in fulfilling this function is only relevant insofar as this demonstrates or fails to demonstrate its similarity to a gate, fence or wall. I note also that the only limitations in Class A relate essentially only to height, and that the wording of Class A could have been more restrictive if that had been the intention.
10. Turning then to the bollards proposed, these do not form a continuous barrier whether or not taken together with central planting in the front garden; the relatively large gaps between them mean that it is easy for a person to walk through them. The appellant comments that the bollards provide a continuous line of enclosure as against motor vehicles and that their purpose means they would likely spend the majority of their time in a raised position. I accept that, when not retracted at least, they do serve to visually, and to some extent physically, separate and protect part of the front garden and house behind and in this way have some function of enclosure.

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<sup>1</sup> An interested party has submitted that installation of these represent an engineering operation. I have relatively limited evidence as to the activities entailed in the installation but on the evidence before me, these would not be sufficiently complex to ordinarily generally be supervised by a person with engineering knowledge.

<sup>2</sup> *Ewen Developments Ltd v SSE and North Norfolk DC* [1980] JPL 404

11. As to their similarity to gates, fences and walls, the appellant emphasises the visual similarity to gate posts and fence posts. I would accept that, although there are fairly large gaps between them, since the usual purpose of bollards is to stop vehicular traffic entering a particular area, they are more similar in character to a fence, gate or wall than, for example, garden ornaments placed at similar intervals.
12. However, gates and fences are typically characterised not only by their posts but also by the panels/sections between the posts, and it is the combined effect of these which creates a character of enclosure. Further, when retracted into the ground, the proposed bollards would have extremely little, if any, character of enclosure. The same is not true of an open gate since, although not physically preventing access, its physical presence above ground even when open still gives some indication of a sense of enclosure. Equally, a dwarf wall might be easy to step over but nonetheless usually provides a continuous solid barrier. Similarly, whilst a post and wire fence usually has a lightweight appearance, lacking the solidity of a wall, it nonetheless has a permanent visual enclosing effect by virtue of it typically forming a continuous barrier which cannot be walked through.
13. Drawing all of the above matters together, I find as a matter of fact and degree that whilst the bollards have a limited function of enclosure when not retracted, for the reasons explained, they are not sufficiently similar to gates/fences and walls in their appearance, character and function such as to represent an 'other means of enclosure' under Class A.
14. I acknowledge that the proposed bollards represent a relatively modest installation in the scheme of minor operations permissible under Part 2 of the GPDO. I note also that some local planning authorities have accepted bollards as permitted development under Part 2. However, my determination is made upon the particular facts of this case, including the fact that the bollards proposed would retract into the ground. In the same way, whilst some other forms of enclosure might not be continuous, I have based my assessment on the specific details of the present proposal including the size and frequency of the gaps between the bollards.
15. I therefore find that the appeal development would not represent permitted development under Class A. Since it does not benefit from a specific grant of planning permission either, it would not be lawful.

### **Conclusion**

16. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development 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.

### **Decision**

17. The appeal is dismissed.

*V Bond*  
INSPECTOR