



Appeal Decision

Site visit made on 14 December 2023

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 19 January 2024

Appeal Ref: APP/C2741/X/23/3326860

4 Government House Road, York YO30 6LU

- 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 Mrs Rachel Gilbert-Cornish against the decision of City of York Council.
- The application Ref 23/00111/CPD, dated 17 January 2023, was refused by notice dated 19 June 2023.
- The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended ('the 1990 Act').
- The development for which a certificate of lawful use or development is sought is the installation of inward opening gates one metre in height in accordance with Schedule 2, Part 2, Class A GPDO 2015 for the purpose of gating across a proposed stopped up highway.

Decision: the appeal is dismissed.

Application for costs

1. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary Matters

2. The parties' cases referred at length to the case of *Shepherd v Secretary of State for the Environment* (1998) 76 P&CR 74. I sought further comments from the parties about the potential application of *R (Philcox) v Epping Forest DC* [2000] EWCA Civ 515 and in relation to any application of article 3(6) of the Town and Country Planning (General Permitted Development) (England) Order 2015 ('the Order') and have taken account of those comments received.
3. The description of the proposed development in the application form contained additional information: I have reduced this in the banner heading above to refer only to the development described.

Main Issue

4. The main issue in the appeal is whether the proposed development would have been lawful for the purposes of the 1990 Act at the date of the application.

Reasons

5. It appears from the parties' cases, and from a previous Inspector's decision relating to the appeal site, that the proposed gates would be sited across what is presently an adopted vehicular highway. The gates would be sited towards

the start of a spur road leading to no. 4 as well as to an outbuilding belonging to no. 5. The appellant has applied to the Secretary of State for Transport for a stopping-up Order pursuant to section 247 of the 1990 Act. The exact progress of the Order is not known to me, but I understand it to be common ground that no Order had been made at the date of the application.

6. The date of the application is the relevant date for considering the lawfulness of the proposal, as set out in section 192(2) of the 1990 Act. Section 191(2) of the 1990 Act sets out that, for the purposes of that Act, operations are lawful at any time if no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
7. The onus of proof in such applications lies on the appellant to demonstrate, to the standard of probability, that the proposal would have been lawful at the relevant date. The planning merits of the proposal are not relevant considerations.
8. There appears no dispute between the parties that the proposal constitutes 'development' for which planning permission is required. The issue between them is whether the proposed gates benefit from a planning permission granted by the relevant provisions of the 2015 Order.
9. The Council say that the proposal cannot benefit from the provisions of the 2015 Order because to erect the gates would result in the obstruction of the highway which would amount to an offence under other legislation. The appellant confirms she has no intention of erecting the gates prior to any stopping-up Order having been made by the Secretary of State, but the relevant date for consideration here necessarily pre-dates the making of any such Order for the reasons set out above.
10. The first issue in dispute is therefore whether any prohibitions on obstructing a vehicular highway found in the Highways Act 1980 (or otherwise) could amount to a reason why the proposal would not be lawful for the purposes of the 1990 Act.
11. The *Philcox* litigation concerned an application for a certificate of existing lawful use or development, where the development in question had been carried on for more than 10 years (meaning it was immune from planning enforcement action) but nonetheless amounted to a criminal offence under environmental protection legislation. The Court of Appeal found that this did not affect its lawfulness for the purposes of the 1990 Act: no certificate issued under the 1990 Act confers lawfulness for *all* purposes; only for those of the 1990 Act.
12. The *Shepherd* litigation concerned the formation of a vehicular means of access over land that then formed a public footpath. The Court of Appeal found the application of the then General Development Order to be inconsistent with the protection of particular public rights that is envisaged by other parts of the planning system. The relevant publicity requirements required site displays and local advertisements of any applications affecting public rights of way that the Court did not accept could be overridden by the application of permitted development rights. It was however accepted that deemed permissions might exist that affect other classes of highways.

13. Neither case lies on all fours with the proposal here. The particular factual issue in *Shepherd* was that the means of access proposed would have resulted in the vehicular use of a way that was then a public footpath, creating potential conflict with the pedestrian users of that way. It would not have obstructed the way, but would have changed the characteristics of its use. In *Philcox* the case concerned a use that had been carried on for a number of years and the particular issue was whether a use that was unlawful for other reasons could nonetheless found a lawful development certificate for planning purposes.
14. Here, irrespective of the lawfulness (or otherwise) pursuant to the Highways Act 1980 of the proposal to erect a set of gates across the public highway, I do not find that it is development that would be permitted by the 2015 Order. I reiterate that I must consider the matter at the date of the application for the lawful development certificate, when no stopping-up Order had been made. Although conscious of the appellant's offer to submit a planning obligation in terms so as not to carry out the development until such an Order has been made, this could not affect the lawfulness of the proposal at the date of the application.
15. Class A of the 2015 Order permits the erection of a 'gate, fence, wall or other means of enclosure'. In order to satisfy the requirements of the Class, the gates must therefore have some function of enclosure. Free standing gates serving no function of enclosure would not be permitted by the Class: *Prengate Properties v Secretary of State for the Environment* (1973) 25 P&CR 311.
16. The obvious corollary to that is that constructing the gates would have the consequence of effectively changing the land use of the part of the existing highway that would lie beyond the gates. It would, by being accessible only to one household, lose its necessary character of being a highway, in that the public would no longer have the ability to pass and repass over it. In fact the construction of the gates would appear to be incidental to this primary outcome.
17. The previous Inspector's appeal decision refers to the application there having been made for a change of use of land from adopted highway to a private access, marked by the installation of entrance gates at the mouth of the drive. This is the reality here, and I have no reason to depart from the implicit finding of the previous Inspector (and the fact of the application having been made) that such a change would be a material one.
18. Thus, although only operational development is described in the application as made, I find that the development as proposed in fact constitutes that of a wider description consisting also of the inevitable change of use, which by depriving the public of access and in the absence of any prior stopping-up Order or other consent for the obstruction would amount to a material change of use requiring planning permission. Although the Class permits the construction of some means of enclosure, it does not permit any change in the use of the land to be enclosed. That change of use is not authorised by anything described in the 2015 Order.
19. The Class restricts the height of any means of enclosure that may be constructed, generally to 1 metre above ground level where 'adjacent' to a highway used by vehicular traffic and to 2 metres otherwise. I find it highly improbable that the draughtsman of the 2015 Order intended to restrict the height of structures adjacent to the highway but not of those situated on the

highway itself. Plainly that is because Class A of Part 2 of the 2015 Order is not intended to authorise the construction of any means of enclosure on the highway.

20. If the works do fall within the description of the development authorised by Class A, then the parties do not dispute that the development would comply with the relevant height restrictions set out in Class A.
21. The 2015 Order sets out at article 3(6) that the permission granted by Schedule 2 does not (save in certain cases which do not apply here) authorise any development which creates an obstruction to the view of persons using any highway used by vehicular traffic so as to be likely to cause danger to such persons. In the ordinary course of events, a gate across the middle of a road might be expected to obstruct a user's view of the highway and to cause them danger as a result, although the particular circumstances here involve proposed gates that would be close to the existing terminus of a little-used highway. As I am dismissing the appeal for other reasons I find it unnecessary to conclude on this point.

Conclusion

22. As the gates would not have been authorised by the 2015 Order, but would have amounted to development requiring express planning permission, if they had been erected on the date of the application then they could not have been lawful as defined by section 191(2) of the 1990 Act. This is because the Council would not have been precluded from taking enforcement action against them.
23. For these reasons I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the installation of the proposed gates 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.

Formal Decision

24. The appeal is dismissed.

Laura Renaudon

INSPECTOR