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# Appeal Decision

Site visit made on 8 October 2024

**by M. P. Howell BA (Hons) Dip TP MRTPI**

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

**Decision date: 11<sup>TH</sup> NOVEMBER 2024**

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**Appeal Ref: APP/P5870/X/24/3339298**

**Land at 27 Burdon Lane, Cheam, Sutton SM2 7PP**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mr David Briault (Boathouse Properties Ltd) against the decision of the Council of the London Borough of Sutton.
  - The application ref DM2022/02269, dated 19 December 2022, was refused by notice dated 2 March 2023.
  - The application was made under section 191(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 the formation of a vehicle access, comprising an existing dropped kerb and vehicular crossover.
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## Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the formation of a vehicle access, comprising an existing dropped kerb and vehicular crossover, which is found to be lawful.

## Applications for costs

2. An application for costs was made by the Council of the London Borough of Sutton against Mr David Briault (Boathouse Properties Ltd). This application is the subject of a separate decision.

## Preliminary Matters

3. The address is referred to on the Application Form and Decision Notice as 27 Burdon Lane, Sutton SM2 7PP. However, the appellant has indicated that 27 Burdon Lane is omitted from the site edged red, as the residential property is within separate ownership. In view of this, the address of the proposal has been altered to 'Land at 27 Burdon Lane, Cheam, Sutton SM2 7PP', and this is reflected in the banner heading above.
4. The Application Form submitted with the LDC indicated that the appellant is seeking lawfulness for an existing use of land. However, from the submissions it was understood that the appellant wanted confirmation that the existing access had been continually used to enter land to the side and rear of 27 Burdon Lane. Although it is acknowledged that an access can be used, an access itself is typically regarded as a building or engineering operation and not a use of land. Therefore, an application under section 191 of the Town and Country Planning Act 1990 (1990 Act) could not provide the confirmation the appellant was seeking on the use of the access.

5. Nonetheless, there is scope within a section 191 application to amend the description of a proposal to grant an LDC for matters which can be found to be lawful. It was suggested the LDC description was amended to simply include the building and engineering operations to form the vehicle access. The appellant agreed to amend the description, which has been reflected in the banner heading above.
6. Accordingly, the LDC appeal relates to the building and engineering operations to form the vehicle access. For the avoidance of doubt, the location of the access has been highlighted in blue on the attached plan to the Decision. The effect of section 191(2) of the 1990 Act is that operational development would be lawful if no enforcement action can be taken because the time for taking such action has expired. The pertinent date is the date of the application, which in this case is 19 December 2022. The relevant 4-year date would, therefore, be 19 December 2018. The relevant test is the balance of probability, not the more onerous test of beyond reasonable doubt.
7. The Planning Practice Guidance (PPG) advises that where the Council has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.<sup>1</sup>

#### Main Issue

8. The main issue is whether the Council's decision to refuse to grant an LDC was well founded.

#### Reasons

##### *Evidence*

9. The LDC application included the Application Form; a Location Plan; a cover letter from the appellant's agent and a supporting document by Judge Architects Ltd, reference MJ/17.13.
10. The cover letter indicates that the LDC relates to the existing vehicle crossover between the public highway and the property and land at 27 Burdon Lane via a dropped kerb. The document by Judge Architects Ltd, reference MJ/17.13, provides three photographs of the access, dated 6 December 2017, and extracts from five Google StreetView images, dated September 2008, May 2012, July 2015, March 2018 and July 2022. The cover letter goes on to indicate that the photographs and Google StreetView images confirm the vehicle access has been in situ for more than 4 years.
11. The appeal submissions included additional information in the form of two Statutory Declarations, one by Mr William George Scott dated 16 November 2023, and another from Mr David Briault dated 28 November 2023. The Statutory Declarations are signed and cosigned by a solicitor, ensuring they accord with the provisions of the Statutory Declarations Act 1835. They were submitted by the appellant in an attempt to overcome the Council's reasons for refusal. I will hereafter refer to them as SD1 and SD2 respectively.

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<sup>1</sup> Paragraph: 006 Reference ID: 17c-006-20140306

12. SD1 is a statement from Mr William George Scott, a trustee responsible for 27 Burdon Lane and the land edged in red between 29 January 2011 and 30 July 2016. He indicates how he and contractors used the vehicle access to gain access to 27 Burdon Lane and the land to the rear during this time.
13. SD2 is a statement from the appellant, indicating his ownership of 27 Burdon Lane and the land to the rear from 21 December 2017. It goes on to state that the residential property of 27 Burdon Lane was sold on 17 September 2019, but the appellant retained the land to the side and rear. Since the property was subdivided from the land, the appellant has continued to use the access to access the land to the side and rear of the residential property.

#### *Assessment*

14. The Council accepts that there is sufficient evidence, on the balance of probability, that the dropped kerb and vehicle crossover has been in situ for more than 4 years. I do not disagree with the Council's position on this matter. The photographs that were submitted with the application, and the extracts from the Google Streetview images, indicate that the vehicle access, comprising an existing dropped kerb and vehicular crossover, has been in situ since at least 2008. Some changes have been made to erect a new wall either side, and to lay some block paving, but the position of the vehicle access and dropped kerb has remained the same.
15. Section 191(2)(a) and (b) sets out that operations are lawful at any time if: a) No enforcement action may 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 b) They do not constitute a contravention of any enforcement notice then in force.
16. As the vehicle access was formed more than 4 years prior to the date of the application and I have not been presented with any evidence to suggest that the vehicle access contravenes any enforcement notice currently in force, the development complies with the provisions of Section 191(2)(a) and (b) of the 1990 Act. The building and engineering operations to form the vehicle access, comprising the dropped kerb and vehicle crossover are, therefore, lawful.

#### *Other Matters*

17. I acknowledge that the Council went on to consider whether the vehicle access had been used to access land to the rear of 27 Burdon Lane for a continuous period of 10 years. There are also third party representations that are largely concerned with the evidence submitted to demonstrate the vehicle access has been continually used to access the land to the rear for an extended period.
18. However, as set out in the preliminary matters, a vehicle access is not a use of land, and it is not necessary to show its continuous use to demonstrate it to be a lawful building operation. The use of the access over time could be relevant if demonstrating a continuous use of the land it is accessing. However, it was confirmed that the application does not seek to demonstrate any existing use of the land to the side and rear of No 27. Consequently, any legal right of access onto land to the rear is a civil matter between the landowners and is not relevant to the determination of the appeal.

## **Conclusion**

19. For the reasons given above, I conclude, on the evidence now available, that the Council's refusal to grant an LDC in respect of a vehicle access, comprising an existing dropped kerb and vehicular crossover was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act (as amended).

*M. P. Howell*

INSPECTOR

## Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191  
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)  
ORDER 2015: ARTICLE 39

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**IT IS HEREBY CERTIFIED** that on 19 December 2023 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red and hatched in blue on the plan attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The building and engineering operations carried out to form the vehicle access, comprising a dropped kerb and vehicle crossover, commenced more than four years prior to the date of the application for the Lawful Development Certificate.

Signed

*M. P. Howell*

Inspector

Date: **11 NOVEMBER 2024**

Reference: APP/P5870/X/24/3339298

### ***First Schedule***

Formation of a vehicle access, comprising an existing dropped kerb and vehicular crossover.

### ***Second Schedule***

Land at 27 Burdon Lane, Cheam, Sutton SM2 7PP

IMPORTANT NOTES – SEE OVER

## NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use or operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



## Plan

This is the plan referred to in the Lawful Development Certificate dated: **11 NOVEMBER 2024**

**by M. P. Howell BA (Hons) Dip TP MRTPI**

**Land at 27 Burdon Lane, Cheam, SM2 7PP**

**Reference: APP/P5870/X/24/3339298**

Scale: Not to Scale

