



Appeal Decisions

Site visit made on 7 October 2026

by Grahame J. Kean B.A. (Hons) Solicitor, MRTPI, MIPRoW

an Inspector appointed by the Secretary of State

Decision date: 9th October 2026

Appeal A Ref: APP/Z4718/C/26/3377669

Appeal B Ref: APP/Z4718/C/26/3377670

Moorcroft, 35 Moorside, Cleckheaton BD19 6JT

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - Appeal A is made by Mrs Susan Fox.
 - Appeal B is made by Mr Geoffrey Fox.
 - The appeals are made against an enforcement notice issued by Kirklees Metropolitan Council.
 - The notice was issued on 17 December 2025.
 - The breach of planning control as alleged in the notice is: without the benefit of planning permission, the erection of a fence adjacent to the highway (Moorside Paddock).
 - The requirements of the notice are to dismantle and remove the metal fence from the site (shown in the approximate location on the fence plan below, in blue).
 - The period for compliance with the requirement is 30 days after this notice takes effect.
 - The appeals are proceeding on the grounds set out in section 174(2)(b), (c), (f), (g) of the Town and Country Planning Act 1990 (as amended).
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Decision

1. The appeals are allowed and the enforcement notice is quashed.

Applications for costs

2. An application for an award of costs was made by Mr and Mrs Fox against Kirklees Metropolitan Council. This application is the subject of a separate decision.

Ground (b)

3. The appeals on this ground must show that the matters comprised in the allegation of breach of planning control in the notice, have not occurred as a matter of fact.
4. The appellants point out, quite correctly as I saw on site, that the fencing does not extend across the boundary of 2 Moorside Paddock, as delineated on the plan attached to the notice.
5. The appeals on this ground succeed only to that extent. The notice would not be quashed because, without injustice to either party, it could be corrected to remove the superfluous part of the blue line on the plan. However, since the appeals are allowed as explained below, the notice will be quashed in any event.

Ground (c)

6. An appeal on this ground is that the alleged unlawful development is not in breach of planning control, for example because planning permission exists for it or is not required. The onus is on the appellants to demonstrate this on the balance of probability.

7. In some circumstances fences and other means of enclosure benefit from planning permission that is granted automatically by the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (Order). Class A of Part 2 of Schedule 2 to the Order provides that the following development is permitted development:

“A. The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.”
8. Class A is subject to limitations. One such is that development is not permitted if:

“a) the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would, after the carrying out of the development, exceed— (ii)..... 1 metre above ground level; b) the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level;”
9. The central task for the Council was to consider whether or not the fencing in situ was adjacent to a highway. In a diligent and comprehensive analysis of the position by the appellants, through their solicitor agent, this main issue is highlighted, namely whether Moorside Paddock is a highway for these purposes.
10. Statutory instruments such as the Order are classed as legislation in addition to statutes. Principles of interpretation of planning legislation were considered in the Braintree¹ case where Sir Keith Lindblom SPT observed:

“The principles...are no different, and no differently applied, when the legislation being construed is in the sphere of land use planning... The court's function is to ascertain the meaning of the statutory words, having regard to the purpose of the provisions in question. It must interpret the language of the statute, so far as it can, in a way that best gives effect to that purpose. To establish what Parliament intended, it must have in mind the relevant context...”
11. The task of interpreting and applying some parts of planning legislation where the word “highway” is used, calls for caution because the established common law concept of a highway, the right for the public at large to pass and repass along a given way, may not always apply. For example, the technical guidance which the Council cites is not, as it implies is the case, applicable to the Order in its entirety.
12. Nevertheless, the Council has pointed out, which underlies its reasoning, Schedule 2, Part 1 has an interpretation section. Paragraph I of Part 1 states that *“highway” includes an unadopted street or a private way*. On that basis, the Council says that Moorside Paddock may not be a highway according to the common law definition, but it is at least a private way to which the fencing is clearly adjacent.
13. I pause to record certain matters of fact about the appeals, having considered the information provided by both parties and inspected the site. The fencing in question is over 1 metre but no more than 2 metres in height. Moorside Paddock is unlikely to be a highway in the sense that public rights of passage obtain along its length or any part of it. It is likely to be a private way where the fencing is clearly “adjacent” to it, for the purposes of applying the relevant limitations in the Order.

¹ Braintree District Council v Secretary of State for the Home Department and another [2023] EWCA Civ 727 at paragraph 47.

14. Therefore, the critical issue is whether the definition of highway in Part 1 of Schedule 2 to the Order, applies equally to Part 2. In my opinion it does not.
15. Article 2 of the Order is the interpretation section for the whole statutory instrument. If the legislature intended the word “highway” to be given a common meaning throughout the Order, whether consonant with ordinary legal usage or a special meaning, it would have given it a meaning in Article 2, but it did not².
16. Furthermore, the definition in Part 1 paragraph I of the Order is preceded by wording clarifying in terms that it applies *“For the purposes of Part 1”*. In the field of statutory interpretation, the maxim *expressio unius est exclusio alterius* appears to be relevant, which simply means to express one thing is to exclude another. In other words, the legislature in Part 1 expanded the definition of highway to include matters not normally included, so by specifically choosing to expand the definition in Part 1, the legislature is presumed to have intended not to expand it in Part 2.
17. As Lord Hodge observed in the Supreme Court decision of Swindon³, the word “highway” was capable of bearing differing meanings, *“although its usual meaning is of a way over which there are public rights of way...”* The point had been discussed in the Court of Appeal⁴ below where Lewison LJ said:

“In ordinary legal usage a highway is a way over which the public have rights of passage. They may be rights on foot only (a footpath), on foot or with animals (a bridleway or driftway); or on foot, with animals and with vehicles (a carriageway). These definitions are replicated in s.329(1) of the Highways Act 1980; and are applied to planning legislation (except in so far as the context otherwise requires) by s.336(1) of the Town and Country Planning Act 1990.” (My emphasis).
18. It should be noted however, that whilst s336(1) gives “highway” the same meaning as in the Highways Act 1980, the latter provides no functional explanation, with the result that the legal definition relies on the established common law meaning.
19. Following the Town and Country Planning Act 1947 permitted development was contained in the Town and Country Planning (General Development) Order 1948 (1948 Order) which permitted gates, fences etc to be erected provided they were not more than seven feet in height and not affording access to or abutting on a highway⁵. Then, as now the general interpretation article, Article 2 of the 1948 Order contained no definition of highway. Article 2 did define a private way as a road or footpath which is not a highway repairable by the inhabitants at large. Interestingly, one contemporaneous commentator⁶ noted in connection with that definition that: *“the physical aspect of the land, not the nature of the rights existing over it, seems to be the important point.”*
20. Part 2 of Schedule 2 deals with “minor development”. No special provision is made for explaining the meaning of “highway” in Part 2, as opposed to Part 1. The context is different. The character and appearance of a dwelling can be affected by development within its curtilage. In Part 1 therefore, special attention is paid to

² Interestingly, Article 2 does ascribe a meaning to “private way”, ie “a highway not maintainable at the public expense and any other way other than a highway.” These, arguably contradictory, concepts of a private way include some highways, ie those carrying public rights of passage, albeit not maintainable at public expense, but not others. Some roads that are not adopted and ostensibly private may of course ultimately be found to be (public) highways as and when their status is brought into question.

³ DB Symmetry Ltd and another v Swindon Borough Council [2022] UKSC 33, at paragraph 69.

⁴ DB Symmetry Ltd and another v Swindon Borough Council [2020] EWCA Civ 1331, at paragraph 23.

⁵ First Schedule, Class II.

⁶ Supplement to the Law of Town and Country Planning, J P Howard Roberts, CBE. 1949, at p II(48).

certain forms of development that front, not just a highway as it is understood in ordinary legal usage, but also an unadopted street or private way.

21. I conclude from the foregoing that the ordinary legal usage definition of a highway applies in considering whether the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is precluded from being permitted development under the limitation in Class A, Part 2 of Schedule 2 to the Order, which pertains to "*a highway used by vehicular traffic.*"
22. If there were any real doubt as to the ordinary relevant meaning of "highway" recourse may be had to dictionaries (see Lindblom LJ in the Mawbey case⁷ concerning the meaning of "mast" in the Order). In fact, dictionary definitions tend not to lead primarily on the technical/legal meaning of the word highway, but they do emphasise generally the public nature of a way described as a highway⁸.
23. I am satisfied on the evidence currently available that Moorside Paddock does not have the public characteristics of a way that fits such definitions. Rather it is a private driveway that does not carry through traffic, serves a handful of dwellings and has a relatively enclosed character. Nor is it on the evidence now before me a way likely to be open to the public at large, thereupon to pass and repass at will.
24. Accordingly, the fencing in question is permitted development and there being no breach of planning control, the appeals on this ground must succeed.

Conclusion

25. For the reasons given above, I conclude that the appeals should succeed on ground (c). The enforcement notice will be quashed.
26. In these circumstances, the appeals on grounds (f) and (g) do not fall to be considered.

Grahame J. Kean

INSPECTOR

⁷*R. (on the application of Nigel Mawbey) v London Borough of Lewisham Council* [2019] EWCA Civ 1016 [2020] 1 P. & C.R. 2, at paragraph 22: "...This is a well-established technique of statutory construction, recognized in *Bennion on Statutory Interpretation* (at section 24.23): "Dictionaries may be consulted to ascertain the meaning of terms ..."

⁸ Highway, N." Oxford English Dictionary, Oxford UP, September 2026, <https://doi.org/10.1093/OED/9545433232>.