
From:
Sent: 28 November 2020 10:11
To: Neil Bearcroft <Neil.Bearcroft@kirklees.gov.uk>
Subject: 402 Birkby Road

Hi Neil

Further to our telephone discussion, I understand that your view is that the access drive to No 402 and the other properties is not a highway for the purposes of planning.

I mentioned this in the last objection and offered to supply further information on this question.

Firstly I refer to the Planning Portal which states:

Highway – is a public right of way such as a public road, public footpath and bridleway. For the purposes of the Order it also includes unadopted streets or private ways.

I then refer to the House of Commons Briefing Paper Number CBP 402 10 April 2018 which states:

Halsbury's Laws states:

A highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance. A highway may be dedicated subject to certain restrictions or obstructions; and it may be limited to a recognised class of traffic, that is it need not be a way for vehicles, as, if they are open to the public generally, footpaths, bridleways and driftways are highways. It is, however, an essential characteristic of a highway that every member of the public should have a right to use it for the appropriate class of traffic; there can be no dedication to a limited section of the public, such as the inhabitants of a parish.

In this case, the access drive is available to all persons who wish to access the properties that lead from it. This includes visitors, delivery persons and members of the public. Those rights are not prevented or restricted through the length of the drive and as such it falls within the definition of the highway in law. There are no signs which prevent or restrict access other than for parking and for the area of land outside Nos 404 and 406 which does not form part of the access drive.

This approach is reiterated in the Planning Inspectorate Inspector's Manual which sets out the following: (my bolding)

INSPECTORS Guide 2

69 S336(1) of the TCPA90 provides that, for the purposes of the TCPA90, 'highway' has the same meaning as in [s328] of the Highways Act 1980.

It states that, except where the context requires, 'highway' means the whole or any part of a highway other than a ferry or waterway and that where such a highway passes over a bridge or through a tunnel, that bridge or tunnel is to be taken to be part of the highway.

70 Common law has established that a highway is a defined route over which the public can pass and repass without hindrance or charge. The use must be "as of right", meaning without force, secrecy or permission. The public right to pass and repass as of right may be limited to a particular class of user or mode of transport.

71 In the absence of any contrary statutory definition, a privately-owned or maintained or an unmaintained way may be a highway if the public can use it "as of right". This applies to the GPDO 2015 except in relation to Part 1, but is not the case, given s328, for a ferry or waterway.

72 For the purposes of Part 1, 'highway' is defined in paragraph 1 as including an unadopted street or a private way. Since those terms are not qualified, paragraph 1 would appear to include unadopted streets or private ways where the public do not have a right of use.

This interpretation would also apply for Part 2 Class A rights since there is no definition of highway included in that section either.

In order for the access drive to be a private road that is not a highway, it would need to be gated or restricted in some way that makes it clear to all parties that the road is not accessible to others either on foot or by vehicle. Since this is not the case, it seems that there can be no doubt that the access drive in question qualifies as a highway for the purposes of planning.

It follows therefore that for the purposes of development under Part Two, i.e. the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure, that the status of the drive is an important factor.

In this case, whilst the current gate and gateposts exceed the Permitted Development limits and thus require Planning Permission, it is the correct fall-back position that needs to be considered in the planning assessment.

It appears from the submission that the fence shown on the proposals and that currently exists on the site has not been included in the application. The height of the fence is measured from the highest part of the adjacent land which is the existing garden level in No 402. It may be that the existing fence does not exceed 2m in height and may have been assessed as Permitted Development and is therefore not included in the applications, however this is actually not the correct case.

Under the correct interpretation of the status of the access drive which is as a highway for the purposes of planning, the Permitted Development limit would be 1m. Therefore the proposal is currently significantly higher than this and this is a material factor in the planning considerations.

You may have considered that the fence and gates as they exist on the site are close to or below the Permitted Development allowances and as such do not justify a refusal of permission. However that conclusion would be founded on an incorrect assessment of the status of the access drive and would therefore be subject to a legal challenge.

As it is the case that the side fence should only be 1m high measured from the garden side then the current fence does not benefit from PD rights and needs PP in which a proper assessment of the visual impact needs to be made.

Can I suggest that you consider this further and perhaps consult with your legal officers in order to ensure that the correct assessment is made and fully explained to the final decision makers prior to them taking any decision.

Regards