

**KIRKLEES METROPOLITAN COUNCIL
INVESTMENT & REGENERATION SERVICE**

DEVELOPMENT MANAGEMENT

Town and Country Planning Act 1990 (as amended) Section 191/192

**DELEGATED DECISION FOR APPLICATION FOR CERTIFICATE OF
LAWFUL DEVELOPMENT**

Reference no.: 2023/CL/91028/W

Site: 36, Victoria Street, Holmfirth, HD9 7DE

Description: Certificate of lawfulness for proposed erection of
fence and decking area (within a Conservation Area)

Case Officer: Kevin Walton

Decision Reference: Lawful Development Certificate refused.

**I hereby authorise the refusal of this application for the reasons set out
in the officer's report and recommendation annexed below in respect of
the above matter.**

Teresa Harlow

AUTHORISED OFFICER

Date 22-Nov-2023

Officer Report – 2023/91028

Certificate of Lawfulness for Proposed Erection of Fence and Decking Area

Site: 36 Victoria Street, Holmfirth, HD9 7DE

1. Description of Proposal

Site

- 1.1 The application relates to 36 Victoria Street which is situated within the centre of Holmfirth town centre in a prominent location directly adjacent to the junction of Huddersfield Road and Victoria Street. The building is a two storey stone built former bank now operating as café on the ground floor and education service on the first.
- 1.2 To the south west of the Victoria Street frontage to the building is a forecourt within the ownership of the applicant consisting of a stone flagged area with a number of steps leading onto the footway of Victoria Street.

Proposal

- 1.3 The applicant is seeking confirmation that the erection of a perimeter wall and decked area on the forecourt would be lawful for the purposes of planning control.
- 1.4 The proposed works consists of a one metre high fence measured from the forecourt ground level but then rising in height as the ground level drops to the ground level at the toe of the stone steps. The development also includes the construction of a raised platform to extend the forecourt over the existing stone steps.
- 1.5 The applicant states within the application form that it is the intention to form a private area for use by the diners of the restaurant.

2. Lawful Use Certificates

- 2.1 Section 192(1) (a) of the Town and Country Planning Act 1990 (“the Act”) permits any person who wishes to ascertain whether any operations or proposed use of buildings or other land would be lawful to make an application to the Local Planning Authority.
- 2.1 Section 191(2) of the Act provides that operations are lawful if at any time if no enforcement action may be taken in respect of them and they do not constitute a contravention of any the requirements of any enforcement notice then in force.

3. The Relevant Test

- 3.1 The burden of proof lies firmly with the Applicant and the relevant test for whether the use can be deemed lawful is the “balance of probability”.
- 3.1 The Applicant’s evidence does not need to be corroborated by “independent” evidence. If the Local Planning Authority have no evidence of their own, or 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.¹

4. Limitations

- 4.1 A LDC must contain precise details of what use or operations are found to be lawful, why and when. These details will not be legally equivalent to a planning condition or limitation. They will be a point of reference specifying what was lawful at a particular date, against which any subsequent change may be assessed.

5. Relevant Planning History

None

6. Evidence submitted in support of the Application

- 6.1 The applicant submits a plan indicated the height and design of the decking structure with annotation stating “*Planning permission not generally required for fences over 1m high*”. The applicant also states in the application form that in the applicant’s view the use of the forecourt for outside dining would be lawful and was advised by the LPA to seek a lawful development certificate for the proposed operational development.
- 6.2 The applicant submits the text of correspondence received from Development Management setting out the provisions Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended), further stating the “*erection of a fence no more than 1 m in height, measured from the ground level adjacent to the point the fence is erected, might be permitted development*”. No further information or evidence has been provided.
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7. Negotiations

- 7.1 An email was sent to the applicant on the 25 September 2023 raising concern over the increasing height of the proposed fence as ground levels drop along Victoria Street resulting in the height of the fence exceeding 1 metre above ground level. As such the plans should be amended to show the height of any part of the fence does not exceed 1 metre above ground level. The applicant was also advised that the raised decking above the stone steps may not be able to benefit from a permitted development right.
- 7.2 It was suggested the applicant may wish to amend the plans or withdraw from the application and consider alternative options including the submission of a full planning application. No contact was received as a result of this correspondence and therefore the application proceeds to be determined on the information submitted.

8. Representations

None

9. Assessment

- 9.1 The proposed erection of the fence and decked area is considered to amount to a building operations and as such are considered to be development as defined by section 55 of the Town and Country Planning Act 1990[“the Act”].
- 9.2 Section 57 of the Act provides that planning permission is required for development of land other than the exceptions as set out in section 57. The proposed development subject to this application does not fall within any of the exceptions of section 57 and as such requires planning permission.
- 9.3 The Local Planning Authority has no record of planning permission expressly granted for the proposed works although it is possible that planning permission may be granted by virtue of a Development Order under the provisions of section 60 of the Act. In this case, the Town and Country Planning(General Permitted Development)(England) Order 2015(as amended) is the relevant Order [“GPDO”]. Article 3(1) grants a general planning permission for any works described in Schedule 2 of the GPDO subject to compliance with any limitation or conditions as set out in the Schedule.

Fence

- 9.4 Class A, Part 2 of Schedule 2 of the GPDO provides for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure subject to the limitations paragraph

A.1 of Class A. Of relevance is sub-paragraph A.1(a)(ii) which provides that development is not permitted by Class A if the fence is adjacent to a highway used by vehicular traffic and is over 1 metre above ground level.

- 9.5 In this instance Huddersfield Road and Victoria Street are adopted and thus public highways that are clearly used by vehicular traffic. It is also considered that the footways associated with these highways form part of the public highway and the carriageway is used by vehicular traffic. Given the proposed fence abuts the footway there is no doubt the fence is adjacent to a highway that is used by vehicular traffic.
- 9.6 It is noted that Article 2(2) of the GPDO states that the height of a building should be measured from the highest part of the surface of the ground immediately adjacent to the building in which it may be argued that the height of the proposed fence should be measured from the height of the ground level on the forecourt and not the height of Victoria Street. However, it is also noted that in Article 2 the definition of "building" does not include any gate, fence, wall or other means of enclosure. Consequently and without any other statutory provision, it is considered appropriate place to measure the height of the proposed fence is from the ground level at any point along the line of the fence.
- 9.7 In such circumstances and as indicated on the submitted plan, while the height of the proposed fence on the forecourt does not exceed 1 metre above the ground level on the forecourt, parts of the fence would no doubt exceed 1 metre on the parts abutting Victoria Street as the ground levels drop. In light of this, it is not possible to conclude the proposed fence does not exceed the limitations as set out in Class A, Part 2 of Schedule 2 of the GPDO and therefore the proposed fence cannot benefit from a general planning permission granted by virtue of Article 3(1) of the GPDO. In the absence of any other planning permission, the proposed fence cannot be lawful for the purposes of planning control.

Decking

- 9.8 Class E, Part 7 of Schedule 2 of the GPDO provides for the development of hardsurfaces within the curtilage of cafes/restaurants subject to the any new surfaced area created after 2010 not exceeding 50 square metres or for development within the curtilage of a listed building.
- 9.9 In this instance it may be argued that the creation of decking directly upon the existing stone flagged forecourt could amount to the provision of a hardsurface. However, it is noted that the decking is proposed to extend over the existing stone steps thus creating a void under the decking which must be supported by means other than the forecourt flags. It is therefore considered this element of the proposed decking amounts to the erection of a structure rather than an operation to

create a hardsurface upon the existing ground level. Consequently it is considered the provision of Class E, Part 7 of Schedule 2 of the GPDO does not extend to this part of the decked area and thus cannot benefit from a general planning permission granted by virtue of Article 3(1) of the GPDO. In the absence of any other planning permission, the proposed decking cannot be lawful for the purposes of planning control.

10. Conclusion

10.1 Upon assessment it is considered the erection of the fence and decked area at 36 Victoria Street does not benefit from any expressed planning permission and neither can the development benefit from any deemed planning permission granted under the provisions of the GPDO. In the absence of any planning permission the development of the land consisting of the erection of a fence and decked area is not lawful for the purposes of planning control.

Recommendation – REFUSE

Decision Authorisation - Delegated Powers

Application Number: 2023/91028

Officer Recommendation: Refuse

Decision Text

It is considered the erection of the fence and decked area as shown on plans listed below do not benefit from any general planning permission under the provisions of Class A, Part 2 & Class E, Part 7 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). In the absence of any other planning permission for the erection of a fence and decked area the development of the land is not lawful for the purposes of planning control.

Plans and specifications schedule:-

Plan Type	Reference	Version	Date Received
Location Plan	-	-	3 April 2023
Proposed Plan	-	-	3 April 2023
Application Form	-	-	3 April 2023

Pursuant to article 35 (2) of the Town and Country Planning (Development Management Procedure) Order 2015 and guidance in the National Planning Policy Framework, the Local Authority have, where possible, made a

preapplication advice service available, complied with the Kirklees Development Management Charter 2015 and otherwise actively engaged with the applicant in dealing with the application. Notwithstanding that the applicant was advised during the course of the application of potential amendments to the scheme, in the absence of any amendments the application was determined on the submitted information.

Report Dated:

Coal Advice - Lo 21/11/2023