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# Appeal Decision

**by Elizabeth Jones BSc (Hons) MTCP MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 15 December 2020**

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**Appeal Ref: APP/D3125/X/20/3257288**

**4 Birdlip Close, Witney OX28 5GE**

- 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 Mr Carl Gaden against the decision of West Oxfordshire District Council.
  - The application Ref 19/03518/CLP, dated 18 December 2019, was refused by notice dated 2 March 2020.
  - The application was made under section 192(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 erection of a 2 metre high close boarded fence in locations shown on drawing 015\_100p02.
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## Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful development describing the proposed operation which is considered to be lawful.

## Procedural Matters

2. Following review of the case it appeared that the appeal could be determined without a site visit without causing prejudice to any party. This is because the case turns on legal points and the parties have submitted sufficient documentary evidence to understand the nature of the site. Both the appellant and the Council were contacted and given the opportunity to comment. No comments were received.
3. In an LDC appeal, the planning merits of the proposal are not relevant. My decision rests on the application of relevant planning law and judicial authority to the facts of the case. Therefore, arguments concerning potential impacts on the character and appearance of the area cannot be considered.

## Main Issue

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

## Reasons

5. 4 Birdlip Close is a dwellinghouse located within a Cul-de-Sac on a residential estate. The rear garden is enclosed by a stone wall. Alongside the north western boundary there is an area of land approximately 2.5 metres in width

- which is partially laid to grass with shrub planting (hereafter referred to as 'landscaping strip'), alongside which runs a public footpath.
6. The appellant proposes to erect a two metre high fence on the boundary of the landscaping strip as shown in drawing number 015\_100p02. The proposed fence would enclose the landscaping strip on two sides. The appellant considers that the fence would comply with Class A of Part 2 of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).
  7. Amongst other things, Class A, Part 2 of Schedule 2 of the GPDO sets out that the "erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure" is permitted development (PD) subject to various restrictions in height and location. It is not disputed that the proposed fence would meet the requirements of paragraph A.1. of Class A of the GPDO.
  8. Planning permission was granted for this part of the residential estate in 1992 (the 1992 permission)<sup>1</sup>. The application plans indicate that the landscaping strip was amenity land designated for landscaping. Condition 3 of the 1992 permission restricted the erection of any fence, gate or wall permitted under Class A within the curtilage of the dwellinghouse forward of any wall of that dwellinghouse which has a frontage onto a road or footpath.
  9. The Council refused the LDC because the fence would not comply with Condition 3 of the 1992 permission. After the LDC decision notice was issued, the Council notified the appellant via email<sup>2</sup> that its reason for refusal was incorrect and that the LDC should have been refused because the erection of the fence would enclose the landscaping strip and thus amount to a material change of use of the land.
  10. The appellant confirms that the landscaping strip, although in his ownership, is not within the residential curtilage of No 4. The existing garden wall of No 4 demarcates the private rear garden from most of landscaping strip. Moreover, the submissions indicate that the land was laid to grass with some shrub planting in line with the 1992 permission and has remained as a landscaping strip since. From all I have seen and read, as a matter of fact and degree, there is nothing to deduce that the landscaping strip is within the curtilage of the dwellinghouse. Accordingly, condition 3 of the 1992 permission does not bite and the fence as proposed would be permitted development.
  11. Having regard to the planning history of the property<sup>3</sup> and the previous appeal decision<sup>4</sup> I acknowledge the Council's concerns about the future use of the landscaping strip. However, the appeal before me is for operational development only; the proposed erection of a fence, and that is the basis on which I have made my decision. Furthermore, despite what the other Inspector described as the change of use having taken effect, they were not giving a lawful determination about whether there had been a material change of use that constituted development for the purposes of the 1990 Act. Moreover, the previous appeal is not directly comparable with the current appeal because

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<sup>1</sup> Planning Permission Ref: 1530/91.

<sup>2</sup> Email from Council dated 23 March 20120.

<sup>3</sup> Appendices 4a, 4b, 4c.

<sup>4</sup> APP/D3125/W/19/3229888.

unlike an LDC appeal, an appeal against a refusal to grant planning permission takes into account the planning merits.

12. My attention has been drawn to case law<sup>5</sup> which refers to what regard should be had when deciding whether a change of use is material as a matter of fact and degree. It does not assist in deciding whether operational development, in this case a fence, is lawful. Thus, I do not consider the case law is directly comparable with the appeal before me.
13. In LDC cases the burden of proof rests with the appellant and the appropriate test is the balance of probabilities. Having regard to the appellant's submissions, it is my view, that the proposed erection of a 2 metre high close boarded fence in locations shown on drawing 015\_100p02 would be permitted development falling within Class A of Part 2 of the GPDO. Consequently, it would be lawful. Whether or not a subsequent change of use takes place on the intervening land in the future would be a matter for the Council to consider. It has no bearing on this appeal.

### **Conclusion**

14. For the reasons given above I conclude, on the evidence available, that the Council's refusal to grant a certificate of lawful use or development in respect of a 2 metre high close boarded fence in locations shown on drawing 015\_100p02 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.

*Elizabeth Jones*

INSPECTOR

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<sup>5</sup> Appendix 6 of the Council's Statement. The Queen on the Application of Royal Borough of Kensington and Chelsea v Secretary of State for Communities and Local Government, David Reis and Gianna Tong [2016] EWHC 1785 (Admin).



## Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192  
(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 18 December 2019 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed 2 metre high close boarded fence in locations shown on drawing 015\_100p02 is permitted development falling within Class A of Part 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 for which planning permission is granted by Article 3 (1) of the Order.

Signed

*Elizabeth Jones*

Inspector

Date: 15 December 2020

Reference: APP/D3125/X/20/3257288

### **First Schedule**

Erection of a 2 metre high close boarded fence in locations shown on drawing 015\_100p02.

### **Second Schedule**

Land at 4 Birdlip Close, Witney OX28 5GE

## NOTES

This certificate is issued solely for the purpose of Section 192 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 would have been 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 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



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## Plan

This is the plan referred to in the Lawful Development Certificate dated: 15 December 2020

by **Elizabeth Jones BSc (Hons) MTCP MRTPI**

**Land at: 4 Birdlip Close, Witney OX28 5GE**

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Scale: Not to scale

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