Neutral Citation Number: [2022] EWHC 520 (Admin)

Case No: CO/1334/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11/03/2022

Before

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

- -

Between :

KENNETH VICTOR PRICHARD JONES

DAGMAR PRICHARD JONES

- and -

(1) **SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT**

(2) **HORSHAM DISTRICT COUNCIL**

- -

- -

Keven Leigh (instructed by **RIAA Barker Gillette (UK) LLP**) for the **Appellants**

Matthew Henderson (instructed by **Government Legal Department**) for the **1st Respondent**

No appearance for the **2nd Respondent**

Hearing date: 20 October 2021

- -

Approved Judgment

Mr C M G Ockelton :

1.
This is an appeal pursuant to s 289 of the Town and Country Planning Act 1990 against the decision of a Planning Inspector on 15 March 2021 dismissing appeals against an enforcement notice issued by the second Respondent, Horsham District Council, on 7 July 2020. Permission was granted by Lang J on limited grounds. At the hearing Mr Leigh and Mr Henderson made oral submissions; following the hearing they submitted a joint note and Mr Leigh submitted further submissions. The second Respondent indicated in writing that it endorsed the first Respondent's case.

2.

The site is land adjacent to the highway at Old Guildford Road West, Broadbridge Heath, West Sussex RH12 3JR extending over the verge and into an adjacent field. The development with which these proceedings are concerned was described in the enforcement notice as follows:

“Without planning permission, the construction on the land of a vehicular means of access by removal of the boundary planting and the deposit of material to form a hard surface access track and concrete apron as a crossover onto the highway.”

3.
In detail, the reasons for the notice are given in it as follows:

“The land is located to the north of the Lawson Hunt Industrial Park in a truncated road that now forms a cul de sac off the Old Guildford Road which runs along the northern side of Broadbridge Heath. The road in question comprises part of the grass verge and vegetated boundary of the adjacent Field Place Estate. The road is an unnumbered “C” classified road.

Prior to the access being formed, the area was densely planted with mature shrubs forming part of the natural boundary treatment situated between the highway and the adjoining countryside/ farmland.

The landowner has removed approx. 10m of vegetation and created a crossover onto the highway comprising a 10m x 8m bellmouth surfaced with concrete and compacted material. A pair of chain-link gates have been erected in the gap formed by the removal of the vegetation.”

4.
The enforcement notice was serviced on both appellants; both of them appealed, with the result that, formally, the Inspector had two appeals before him; but they were in identical terms. Appeals on ground (a) of the grounds set out in s 174(2) of the 1990 Act lapsed for failure to pay the relevant fee. The appeals were pursued on grounds (c) and (d). The Inspector made a site visit, before determining the appeal by written representation.

5.
In relation to ground (c) that the works did not constitute a breach of planning control, the Inspector said this:

“2. For an appeal to succeed on ground (c) the onus is on the appellants to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. This could be because the matters alleged do not constitute development, planning permission has already been granted for the matters alleged in the enforcement notice or they are permitted development.

3. The enforcement notice alleges a breach of planning control in respect of the construction of a vehicular means of access by the removal of boundary planting and the deposit of material to form a hard surface access track and concrete apron as a crossover onto the highway (the engineering operations).

4. The appellants contend that there was an existing gateway in this location, which may have been historic, but that it has been in place since before 1983, when the appellants acquired the property/ became the farming tenants. However, even if I were to accept the totality of the evidence concerning that very overgrown gateway, the Council have not enforced against that gateway, but rather, the more recent engineering operations described above.

5. I am satisfied on the balance of probabilities from my own site visit that the works undertaken, which I could see related to the removal of vegetation to facilitate a large concrete hard surface from the edge of the highway, leading to a set of two metal gates, as well as further hardstanding, is of such an extent that it amounts to an operation normally undertaken by a person carrying on business as a builder. It therefore follows that the engineering operations are development for the purposes of Section 55 of the Town and Country Planning Act 1990, as amended, and based on the evidence before me are materially different from the said historic gateway, given the extent of works undertaken. It is therefore not a matter of repair and maintenance.

6. The appellants provide very little evidence to demonstrate on the balance of probabilities that the engineering operations are permitted development. The Council, including the highways department, have provided evidence which demonstrates on the balance of probabilities that the highway is a 'C' classified road. It therefore follows that the engineering operations cannot be permitted development as it would contravene Schedule 2, Part 2, Class B of the Town and Country (General Permitted Development) (England) Order 2015, because the engineering operations irrespective of any agricultural contentions amount to the formation, laying out and construction of a means of access to a highway which is classified road.

7. There is very little evidence before me to demonstrate on the balance of probabilities why the engineering operations now enforced against would not require planning permission. There has also been no planning permission brought to my attention for the engineering operations and a prior approval for a new agricultural access track starting in this location has been previously refused by the Council.

8. As a matter of fact and degree the appellants have therefore not discharged the necessary burden of proof to demonstrate on the balance of probabilities that there has not been a breach of planning control.

9. The appeal on ground (c) accordingly must fail."

6.
In relation to ground (d), that enforcement had become impossible by the lapse of time, the Inspector also dismissed the appeal, having found, on the evidence before him, that the Appellants had not demonstrated that the work was complete by 7 July 2016, which was the relevant date for the calculation he had to make in relation to that ground. The Inspector's conclusion on ground (d) is not now challenged.

7.
Having dismissed both appeals, the Inspector concluded that the enforcement notice, which required reinstatement, including a programme of sowing grass and replanting the hedge, should stand.

8.
The grounds of appeal upon which permission has been granted comprise four of the original grounds of appeal submitted against the Inspector's decision, and a further ground. The amended grounds are as follows:

"1. The Inspector erred in law in failing to deal with a specific issue raised in the appeals. Namely whether the development was permitted by the General Permitted Development Order 2015.

2. The Inspector failed to deal with a material consideration, namely a previous DL with the same legal point and facts. The Inspector failed to explain why he disagreed with it, if that is what he was

doing, or he failed to take it into account and thereby made a decision that was diametrically opposed to a previous DL that considered the same legal point.

3. A classified road under the DOT guidance falling within A (or B) is a road linking two places. The road adjacent to the gated access onto the appellant's land, the Old Guildford Road West (OGRW), is a dead-end serving only a local industrial estate, the Lawson-Hunt Industrial Park, and also used as a local informal car parking area. As such:

a. The OGRW is not continuous and thereby cannot fulfil any function of a classified road described in the said guidance contrary to paragraphs 1.2, 1.3, 1.9, 1.13, 3.5 and Appendix A. The OGRW is no longer factually a primary route network or part of it. Instead the county council, as highway authority, redesignated this part of the former A281 to the OGRW and gave it a C classification in accordance with the said guidance, paragraphs 1.19 and 3.5.

b. The proper inference to draw (as a matter of law based on the facts) is that the old part of the A281 now comprising the OGRW ceased to be classified by the Minister because it cannot serve a primary route network purpose and/or because it has been redesignated by the country highway authority (formally or de facto by its remaining and actual use).

c. Further and in any event the access in issue is to the appellant's field and the replacement/ alteration of it is irrelevant for the purposes of the General Permitted Development Order 2015 (GPDO). The restriction to what access is permitted by the GPDO connected with some other development permitted by the Schedule is not exclusive or exhaustive. The use of the field is lawful and the access serves it not the gate. It is wrong in law therefore, if it be the suggestion, that the GPDO does not permit the access to be created to serve the lawful use of the field.

4. Further, and in any event, having acknowledged that there was on balance a pre-existing gate, the Inspector failed to take account of this fact, or failed to explain why he could ignore it, when upholding the enforcement notice to the extent that it would require the filling-in of that lawful opening.

5. Further, and in any event, the Inspector failed to vary the enforcement notice so that the steps for compliance left the pre-existing and lawful opening capable of being used. Reducing the impact of the EN was an obvious alternative to its requirements as issued."

The General Permitted Development Order

9.
At the centre of the Appellants' claim that the Inspector ought to have allowed the appeal under ground (c) are certain provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015. That order grants planning permission for the forms of permitted development set out in Schedule 2. The relevant classes of permitted development in Schedule 2 are Classes A and B in Part 2 of Schedule 2 which materially provides as follows:

"A. The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

[Paragraph A.1. provides that development under Class A is not permitted in certain circumstances, particularly relating to the height of the structure in question.]

B. The formation, laying out and construction of a means of access to a highway which is not a trunk road or a classified road, where that access is required in connection with development permitted by any Class in this Schedule (other than by Class A of this part).”

10.
Article 2 of the Order defines “classified road” as follows:

“”classified road”’ means a highway or proposed highway which -

(a)
is a classified road or a principal road by virtue of section 12(1) of the Highways Act 1980 (General Provision as to Principal and Classified Roads); or

(b)
is classified by the Secretary of State for the purposes of any enactment by virtue of Section 12(3) of that act.”

11.
Section 12 of the Highways Act 1980 is, so far as material, as follows:

“(1) Subject to subsection (3) below, all such highways or proposed highways as immediately before the commencement of this Act –

(a)
were principal roads for the purposes of any enactment or instrument which refers to roads or highways classified by the Minister as principal roads, either by virtue of having been so classified under section 27(2) of the Local Government Act 1966 (which is replaced by subsection (3) below), or by virtue of being treated as such in accordance with section 40(1) of the Local Government Act 1974,

(b)
were (whether or not they also fall within paragraph (a) above) classified roads for the purposes of any enactment or instrument which refers to roads classified by the Minister (but does not specifically refer to their classification as principal roads), either by virtue of having been so classified under section 27(2) of the said Act of 1966, or by virtue of being treated as such in accordance with section 40(1) of the said Act of 1974, or

(c)
were classified roads for the purposes of any enactment or instrument by virtue of being treated as such in accordance with section 27(4) of the said Act of 1966,

continue to be, and to be known as, principal roads or, as the case may be, classified roads (or both principal roads and classified roads of a category other than principal roads, in the case of highways falling within both paragraph (a) and paragraph (b) above) for the purposes specified in subsection (2) below.

(2)
So far as a highway that continues to be a principal or classified road in accordance with subsection (1) above was, immediately before the commencement of this Act, a classified road for the purposes of any enactment repealed and replaced by this Act; it is a classified road for the purposes of the corresponding provision of this Act; and so far as any such highway was immediately before the commencement of this Act a principal or classified road for the purposes of any other enactment, or any instrument, it so continues for the purposes of that enactment or instrument.

(3)
The Minister may for the purposes of –

(a)
any provision of this Act which refers to classified roads, or

(b)
any other enactment or any instrument (whether passed or made before or after the passing of this Act) which refers to highways classified by the Minister,

classify highways or proposed highways, being highways or proposed highways for which local highway authorities are the highway authorities, in such manner as he may from time to time determine after consultation with the highway authorities concerned [….]"

The Road

12.
It is clear that in order to succeed in the appeal, the Appellants needed to establish that the road is not a classified road, because, Class B would permit the development only if the road is not a classified road. The first ground before me is that the Inspector's response to their arguments under that head fail to deal with the question whether the development was permitted. There is not the slightest merit in that ground as pleaded: the Inspector's reasons and conclusion, as set out above, clearly meet the requirements of South Bucks District Council v Porter (No.2) [2004] UKHL 33. Given the way in which the matter had been put to him, the Inspector's conclusion, at paragraphs 6 to 9 of the decision, is perfectly clear as a determination of the question whether the development was permitted as being within the terms of the General Permitted Development Order.

13.
In his skeleton argument, and in his oral submissions, Mr Leigh sought to use this ground, or perhaps all of the first three grounds, in order to establish that the Inspector erred in law in concluding that the road was a classified road, or, possibly, in his structuring of the question that he needed to ask. Despite the various and subtle ways in which Mr Leigh structured his argument, I am entirely unpersuaded.

14.
The question whether Old Guildford Road West is a classified road within the meaning of the General Permitted Development Order demands, first, an understanding of the relevant legislative provisions, and, secondly, an investigation of their application to the circumstances of the case. The meaning of the relevant provisions of the Highways Act and of the General Permitted Development Order are matters of law. That very proposition of itself is sufficient to dispose of Mr Leigh's second ground. An Inspector's decision in another appeal, about another road, is not a source of law; and the Inspector in the present case had no need to take it into account for that purpose. Indeed, he would have erred in law if he had taken it into account. Mr Leigh has made a number of assertions about classified and unclassified roads in general: they are unsupported, and do not take into account the statutory definition, which is sufficiently clear, and which has in any event been the subject of exhaustive inquiry by Buxton LJ (with whom the other members of the Court agreed) in Hill v Secretary of State for Transport Local Government and the Regions [2003] EWCA Civ 1904. A road is a classified road for the purposes of Section 12 of the Highways Act in the circumstances there set out. There is not a separate and overriding principle that only A and B roads are classified roads, or that any reclassification process is necessary in order for a classified road to remain a classified road. On the

contrary, it is not, as the parties before me acknowledge, easy to see a way in which a classified road can cease to be classified.

15.
Mr Leigh's reliance on a note in the Encyclopaedia of Planning Law and Practice, volume 6, 3B-1003.2 takes him nowhere either. The note indicates that "for practical purposes the category ["classified road"] includes all A and B roads which are not trunk roads", but it neither says nor implies that no other roads are classified roads. Nor, looking more particularly at the facts of the present case, and responding to Mr Leigh's assertions, is there any rule that an unnumbered road is not classified, that a road which has been blocked up is not classified, or that a road which has, so far as its apparent function is concerned, been replaced by another road, ceases to be classified. Bearing in mind the difficulty in identifying any way in which a road ceases to be classified, Mr Leigh appeared to be attempting to show that the characteristics of Old Guildford Road West were in some way inconsistent with the necessary characteristics of a classified road. That is not the appropriate exercise. There appear to be no general characteristics shared by all classified roads, save for the single necessary and sufficient condition that they fall within the definition in Section 12 of the Highways Act.

16.
The sole remaining question then is whether the road falls within that definition, that is to say whether it has been subject to characterisation as a classified road. On that matter, the only evidence before the Inspector was the evidence of the Highways Department, as provided by the Respondent Council before him. He was obviously entitled to rely on that evidence in determining the issue, bearing in mind also the Appellant's burden of proof.

17.
In a lengthy note submitted after the hearing, Mr Leigh raises a number of further points. He elaborates further on the submission that Old Guildford Road West had ceased to be classified, and he adds a further argument that its classification was a classification only by the Highway Authority and not by the Minister. Mr Henderson has not raised any objection to those submissions being taken into account, and has not responded to them.

18.
They face a number of difficulties. The first is that these arguments were not put to the Inspector. What was put to the Inspector was a short argument based on the previous decision letter, to which I shall return shortly. Neither of the points now raised was the subject of any specific argument, save in the passing reference to the road as a "Class C county road". The use of the word "county" in this context is not, I think, found elsewhere in the material before the Inspector; and there was no argument before him that this description, although apparently unsupported by any evidence, was either correct or important. Nor do these arguments appear in Mr Leigh's reformulated grounds of appeal following the grant of permission by Lang J. Ground 2, which is the only one which might refer to this issue, is clearly phrased as a reasons challenge, not a challenge to the Inspector's conclusion on the central issue of law raised in the case.

19.
In any event, the submissions add nothing to the Claimant's case. In the other decision letter, the Inspector was concerned with a road which was described, apparently by the Council, as "a Class C county road". At paragraph 8 of his decision, the Inspector said this, by reference to the then applicable legislation:

“Article 1 of the GPDO defines “classified road” by reference to sections 12(1) and 12(3) of the Highways Act 1980. Further information on the definition is given on page 39016 [sic] of the Encyclopaedia of Planning Law and Practice. For practical purposes, the category includes all Class A and B roads which are not trunk roads. Wellhead Road is therefore not a classified road for the purposes of this part of the GPDO.”

20.
The Inspector appears to draw the non sequitur to which I alluded above; and the word “therefore” is clearly inapposite. His decision precedes the decision of the Court of Appeal in Hill and, crucially, the description of the road as a Class C county road was evidently part of the material before him. In the present case, the only relevant evidence (as distinct from assertion) before the Inspector was that the road in question had in the past been an A road, and that the Local Authority regarded it as a classified road. There is no doubt that if it was at the time regarded as important to determine whether the classification still derived from the Minister, that enquiry could have been made at the time of the appeal to the Inspector. It was not made then and has not been made now. The only basis upon which it could be said that Old Guildford Road West is not a classified road for the present purposes would be by showing its declassification which, as I have said, has not been done.

21.
It follows that, briefly though he dealt with the issue, the Inspector’s approach was correct. He had no need to refer to a decision which related to a “Class C county road” which had never been said to have had any other classification. The question whether the road was classified was, in law, answered in the affirmative by the Council’s evidence of the classification of the road.

22.
I therefore reject grounds 1 and 2.

23.
Even if there were anything in either of those grounds, the Appellants’ appeals would be doomed to fail in relation to Class B, because the new work on the verge did not meet the requirement of Class B that the “access is required in connection with development permitted by any Class in this Schedule (other than by Class A of this part)”. The work to the opening in the field boundary, if it was development, was development under Class A; no other development has been identified. In light of Mr Leigh’s protest that the use of the field was lawful, it is necessary to labour this point somewhat: the reference in the Order is not to use but to development. The lawful use of the field for agricultural purposes is not itself development.

24.
It follows that the Inspector would have been bound to conclude, as he did, that the work did not constitute permitted development, even if there had been anything in the arguments relating to the classification of the road.

25.
The Appellants’ new ground 3 rehearses some of the same arguments under a different head. It draws on the Department of Transport’s “Guidance on Road Classification and Primary Route Network” published on 13 March 2012 and available on the Department’s website. Ground 3 fails, in my judgment, at a number of levels. First, the argument now relied on was not put to the Inspector. The Inspector cannot be criticized for failing to deal with an argument that was not put to him; and the Court’s role is not to decide afresh whether the road is a classified road. Secondly, the material upon which reliance is placed is guidance. It is incapable of overriding the terms of a Statute and a

Statutory Instrument. Thirdly, the guidance sets out a new structure which Local Authorities may or will use to classify roads: it does not require roads to be classified or reclassified in accordance with its strictures. Fourthly, the guidance does not appear to contain anything which would prevent Old Guildford Road West from being and remaining a classified road. Admittedly it is not part of the primary route network, with which the parts of the guidance cited by Mr Leigh are largely concerned; but the guidance itself refers to the existence of classified unnumbered roads, which may have the function of linking (for example) a housing estate to the road network. Contrary to Mr Leigh's assertion, there is no suggestion in the guidance that only a through road can be a classified road.

26.
For the foregoing reasons I reject grounds 3(a) and (b). Ground 3(c) I have in substance already dealt with; the assertion in that ground that "the restriction to what access is permitted by the GPDO connected with some other development permitted by the Schedule is not exclusive or exhaustive" is simply wrong. Nothing in the wording of Class B or any authorities to which I have been referred suggests that a development analogous to Class B but not falling within the terms of that Class, is to be regarded as permitted by that (or any other) Class.

The gate

27.
The Appellants' position is that there was a gate in the field boundary in the position that the new gate is. They say that the Inspector failed to take that into account and that it was relevant, because the enforcement notice essentially requires the permanent closing off of that historic access to the field. The Inspector should therefore have, at the very least, varied the notice so as to enable the opening to continue to be used.

28.
So far as concerns the opening itself, it is clear that the Inspector had the Appellant's evidence in mind: he specifically refers to it. There was, however, no evidence before him that, before the unauthorised development took place, there was a useable opening from the field at that point. Indeed all the evidence appears to have been to the contrary. The position before the development was, therefore, not that there was a gateway but that there apparently had been a gateway there. There was nothing that carried any claim to preservation as a means of access; and there was a continuous hedge which was damaged by the development. To that extent, to describe the gate as needing to be "left … capable of being used", as the Appellants' do in ground 5, rather misses the point.

29.
That is of some importance, because of the submissions made by the Appellants in relation to the enforcement notice. There was no appeal under ground (f) and the Inspector was not otherwise asked to vary the enforcement notice. The appellants say that he nevertheless should have varied it: there was "an obvious alternative which would overcome the planning difficulties" which the Inspector was entitled to consider, within the principles set out by Carnwarth LJ (as he then was) in Tapecrown Ltd v First Secretary of State [2007] 2 P&CR 7 at [44]-[46]. But, as explained in Najafi v Secretary of State for Communities and Local Government [2015] EWHC 4094 (Admin), an Inspector does not have a duty to consider an alternative not put to him. If an alternative is not put to him but he perceives an obvious means of remedying the planning difficulties by lesser enforcement, he may consider it, but is not bound to do so. In the present case it is clear that the Inspector saw no obvious alternative. Indeed, there was no obvious alternative. The removal of the hedging, described in the notice as an area "densely planted with mature shrubs forming part of the natural boundary" in order to construct

the driveway had consequences for the amenity of the site. It is quite wrong to suggest that leaving the area wholly unplanted would “obviously” deal with the planning difficulties. Indeed, it is striking that in his submissions on this ground, Mr Leigh did not identify what precisely was the alternative that the Inspector should have considered as an appropriate modification to the enforcement notice. The truth of the matter is that the development was not permitted, and that the enforcement notice has never been shown to be other than appropriate to restore the previous position, including that feature of it which consisted of a former opening which was by then impassable.

30.
For these reasons I reject grounds 4 and 5, which relate to the gate.

31.
For the foregoing reasons I shall dismiss this appeal.