



7<sup>th</sup> June 2019

Shona Archer  
Enforcement Manager  
Planning Enforcement  
Chichester District Council  
East Pallant House  
1 East Pallant  
Chichester  
PO19 1TY

Sent via email: SArcher@chichester.gov.uk

Dear Ms Archer,

**Re: PS/18/00283/CONBC | Installation of entrance gates and piers adjacent to the highway | Kogala, The Drive, Ifold, Loxwood, Billingshurst, West Sussex, RH14 0TD**

Thank you for your email dated 29<sup>th</sup> May in which you set out Planning Enforcement's reasoning and decision not to take enforcement action in relation to the above referred to matter.

The Parish Council, in cooperation with Ifold Estates Ltd, have considered the rationale and wish to make the following representations.

The pivotal question is to determine the lawfulness of the development. The legislation governing this installation is Schedule 2, Part 2, Class A, A.1(a)(ii) of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). This section states:

A.1 Development is not permitted by Class A 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—

*[(i) not cited as irrelevant]*

(ii) in any other case, **1 metre** above ground level

*(Emphasis added)*

The **height** of the entrance gates and piers are uncontentious; it is a matter of fact that they are in excess of 1 meter above ground level.

Your email to Mrs Burrell dated 9th May states "...it is the consideration of '**adjacent**' which has been the subject of enquiry by planning enforcement." At that time, you concluded enforcement action was

not necessary as the distance of the brick pillars and wooden gates, “some 11 metres from the edge of the highway” and their location “in the access to the housing development” flanked by close boarded garden fencing meant that the height of the enclosure “can be 2 metres in height, as permitted by the Town and Country Planning [General Permitted Development] Order 2015 ( as amended).”

There appears to be some confusion regarding the exact distance the installation is set back from the highway. In your email dated 29th May you approximate the distance as “some 3 meters...from the back edge of The Drive”. However, the Parish Council submits that focussing on the installation’s distance from The Drive in isolation, in order to determine adjacency, is an incomplete consideration and that demarcation is also a relevant factor.

The Parish Council draws your attention to the enclosed Appeal Decision of Anthony J Wharton in respect of application APP/L3625/X/16/3165616, Whistlers, 3 Can Hatch, Burgh Heath, Surrey, KT206DS. In this case the Inspector states, at paragraph 12, *“The word ‘adjacent’ is not defined in the Planning Act and the courts have held that legislators were not likely to have intended ‘a one size fits all approach’.”* The Inspector goes on to say at paragraph 13 *“...the position established by the courts is that the word ‘adjacent’ does not necessarily mean that the fence has to be abutting or touching the highway.”* *“...the thrust of case law and other appeal decisions is that a wall or fence or a pier and gates can be set back from a highway, but still be ‘adjacent’ to it, as a matter of fact and degree, provided that the enclosure is clearly to define the boundary of the property concerned from the highway and is perceived to do so...”* (para 14).

It is the Parish Council’s view that the express purpose of installing imposing entrance gates to the new development at Kogala, now known as Hawthorn Close, is to define the boundary of the new development from The Drive. The size and type of the fencing, gates and piers serves as an impenetrable barrier/boundary between the road frontage and the dwellings on the other side. It has created a gated community, which is marketed on the strength of its exclusivity created by the divide between the development and the other properties on The Drive. For these reasons, the Parish Council submit that the installation is adjacent to the highway, although being set back from The Drive.

The Drive’s status as a **highway** is fundamental to considering the question of lawfulness. The term ‘highway’ is not specifically defined in legislation but understood by the common law meaning of the word as a way over which members of the public have a right to pass and repass. The Drive<sup>1</sup> is in fact a footpath, which is defined by s.329(1) Highways Act 1980 as *“a highway over which the public have a right of way on foot only”*. Therefore, whilst The Drive is a privately owned and maintained way, it is also a highway by virtue of the fact that it is a footpath and the public at large can use it as of right.

As a matter of fact, The Drive (highway) is used by vehicular traffic. Residents and visitors to Ifold have a private right-of-way to use vehicles on the highway, which would otherwise be prohibited. The Parish Council submits that the fact that Schedule 2, Part 2, Class A, A.1(a)(ii) specifically refers to a ‘highway’ is significant. Had the legislator intended the passage of vehicles to be essential to the public right of way, they would have used the term ‘carriageway’<sup>2</sup> and would not have needed to qualify the term

---

<sup>1</sup> As a point of note for future reference, Chalk Road is a Bridleway.

<sup>2</sup> “Carriageway” means a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles. s.329(1) Highways Act 1980

with “used by vehicular traffic”. The express use of the term ‘highway’ recognises that the way may not, in of itself, be designated for public (or any) vehicular use, such as a footpath; however, by adding “used by vehicular traffic” recognises that, as a matter of fact, it is used by vehicles regardless of designation.

Therefore, when considering the facts of this matter in respect of all the elements of Schedule 2, Part 2, Class A, A.1(a)(ii) the Parish Council submits that the installation of entrance gates and piers above 1 meter adjacent to The Drive, Ifold is not lawful under permitted development and should have been subject to a planning application.

The Parish Council respectfully submits that Planning Enforcement has considered the matter on three separate occasions<sup>3</sup> and, on each occasion, the reasons for rejecting enforcement action has focused on different considerations, therefore demonstrating uncertainty regarding the legal position.

The Parish Council draws your attention to paragraph 8 of the enclosed Appeal Decision of Alan Woolnough in respect of application APP/L3815/X/13/2209008, Helmieh, Chichester Road, Selsey, Chichester, West Sussex PO20 9ED. Inspector Woolnough states “*the Appellant has conflated determinants of lawfulness with considerations that might inform whether his scheme would be deserving of a grant of express planning permission.*” He goes onto say, “*these include a desire for privacy, protection from traffic and pollution, impact on the street scene and comparison with other frontage treatments in the locality. However, such factors can have no bearing on whether the development is lawful and cannot therefore be taken into account in determining the appeal.*”

The Parish Council submits that Inspector Woolnough’s comments are directly applicable in this case. Planning Enforcement have taken into consideration matters which are irrelevant for determining the lawfulness of the installation, namely visual amenity and local precedent:

*I can advise you that under delegated authority it has been resolved that it would not be expedient to take enforcement action. In this case it was considered that because of the distance set back and negative visibility from the highway they did not cause an unacceptable level of harm to the visual amenity or neighbourhood. Therefore the justification for enforcement action did not exist.*

*Sue Payne, Planning Officer, 1<sup>st</sup> May 2019*

*Even in the event that the means of enclosure erected was not considered to be a ‘permitted development’ planning enforcement would have considered the expediency of taking enforcement action having regard to any adverse impact that may arise from gates and walls. In this case, the development is obscured from the views of users of the road, and those passing-by, as it is set back from the front boundaries of the adjoining dwelling houses. The gateway is therefore not immediately obvious in the street scene and so does not, it is considered, give rise to any harm to the visual amenities of the area or the amenities of the neighbouring properties. For these reasons, a decision to*

---

<sup>3</sup> Decision of Sue Payne, Planning Officer on 1st May; Shona Archer, Enforcement Manager on 9th and 29th May

*take formal enforcement action would not have been a proportionate response to the breach of planning control identified.*

*Shona Archer, Enforcement Manager, 9<sup>th</sup> May 2019*

*This arrangement is not unique in this location. Also accessed from The Drive is Wildacre Close and Sycamore Close that have a five-bar gate at the entrance to these private ways each serving the dwelling houses that are set back off The Drive and flanked by close boarded fencing. I make no comment on whether these arrangements create a 'gated community' but the principle of demarking the 'new' development with a gated entrance and 'labelling' the way is clearly an established practice within the estate.*

*Shona Archer, Enforcement Manager, 9<sup>th</sup> May 2019*

The Parish Council respectfully asks that Planning Enforcement take legal advice on this matter to determine the lawfulness of the installation and re-evaluate the position not to take enforcement action. If you would find a further site visit useful, representatives of the Parish Council and Ifold Estates Ltd would welcome the opportunity to meet with you to discuss the matter further.

Yours sincerely



Catherine Nutting'

Clerk & RFO to Plaistow and Ifold Parish Council

Clerk & RFO: Miss Catherine Nutting  
Tel: 01403 581081 | Email: [clerk@plaistowandifold.org.uk](mailto:clerk@plaistowandifold.org.uk)  
7, Glebelands, Loxwood, West Sussex, RH14 0SW