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## Appeal Decision

Site visit made on 26 July 2011

by **Anthony J Wharton BArch RIBA RIAS MRTPI**

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

Decision date: 18 August 2011

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### Appeal Ref: **APP/H0738/X/11/2151738**

### **Staypleton House, Parsons Walk, Norton, Stockton-On-Tees, TS20 1TZ**

- 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 Stuart Dick against the decision of Stockton-On-Tees Borough Council.
  - The application Ref 11/0230/CPL dated 31 January 2011 was refused by notice dated 4 April 2011.
  - 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 for an enclosure fence.
  - An application for costs was made by the appellant against the Council. This is dealt with in a separate decision.
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### Decision

1. The appeal is allowed and I attach a certificate of lawful use or development. This describes the proposed operations to be carried out on the land that I consider would have been lawful at the time of the application.

### Clarification

2. The description of the proposal as set out above is as described in part 8 of the application. The Council refused the application on the basis that it had been for 'the erection of a 2 metre high close-boarded fence enclosure'. This is set out in the first schedule of the refusal and it is on this basis that I have dealt with this appeal.

### Reasons

3. Section 195(2) requires an assessment to be made as to whether the Council's refusal of the application is, or is not, well founded. The assessment is based on whether or not the proposed operations were lawful at the time of the application. The planning merits of the proposed enclosure are not relevant and there is no planning application before me.

4. The Council refused the application on the basis that the land has a 'nil use' and therefore, that the proposed erection of the two metre high fence is not considered to be permitted development under Schedule 2, Article 3, Part 2 (Minor Operations) of The Town and Country Planning (General Permitted Development)

Order 1995. In Class A, A. of this section of the Order, permission is granted for 'the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure'. Development not permitted under this part of the Order is then set out in A.1 (a); (b); (c) and (d).

5. In this case the proposed enclosure does not come within any of these 'non-permitted' criteria. The proposal meets all of the conditions set out in A.1. This is accepted by the Council. There is no dispute that the land is designated as open space as part of a larger area of urban open space. This larger area of land is crossed by a designated footpath. The appeal land is in the ownership of the appellant and it is not used by him, or anyone else for that matter, other than as part of the larger area of urban open space. There is no evidence to indicate that the proposed enclosed area would affect the line of the public footpath. Although the definitive map extract is not very clear, it is shown to follow the northern boundary of the open land which aligns with the churchyard and cemetery. The proposed enclosure would not block the footpath.

6. I do not consider that the appeal land is 'abandoned'. The owners simply do not use it, other than for a use relating to its open land status. Nor, in my view, is the use of the land unlawful. The permission granted for a fence by the Order, for 'Minor Operations', is a stand-alone permission and is not granted in connection with any existing use, or a nil use. The Council is not contending an unlawful change of use and it is the factual use of the land which should be considered. The owner of the land has not materially changed its use and has not abandoned any previous lawful use.

7. Permitted Development (PD) rights under this part of the Order do not depend on the designation of the land for any particular use and there is nothing in the Order, or elsewhere, to indicate that a 'nil use' can affect PD rights in relation to 'Minor Operations'. The proposal meets all of the conditions of the Order; there is no Article 4 Direction in force and there is no evidence of any other conditions or covenants relating to, or restricting, the use of the land.

8. I have considered whether or not the proposed development would need to be publicly notified under Article 8 of the Town and Country Planning (General Development Procedure) Order 1995, in respect of applications affecting a right of way that is predominantly used by the public on foot. However, the Council has not provided any firm evidence that the proposed minor works would affect or block the footpath. The evidence provided by the appellant on the other hand, clearly indicates that the footpath would not be blocked or affected in any way. The submitted plan clearly shows the footpath route being kept open and clear of any gateway or other obstruction. As a matter of fact and degree, therefore, I do not consider that the proposed minor works can be said to 'affect' the footpath and I do not consider that simply placing a fence alongside part of footpath would require the provisions of Article 8 to be applied.

9. On all of the evidence before me I can only conclude that the Council's decision to refuse the application for a certificate was not well founded. Therefore, I allow the appeal and as required by section 195(2), I have granted the appellant a certificate. This, together with a plan, is attached to this decision.

*Anthony J Wharton*

Inspector



The Planning  
Inspectorate

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## Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191  
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)  
ORDER 2010: ARTICLE 35

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**IT IS HEREBY CERTIFIED** that on 31 January 2011, the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and shown on the plan (surrounding the area hatched black) attached to this certificate, would have been lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The operations were permitted by the Town and Country Planning (General Permitted Development) Order 1995 under Schedule 2, Part 2, Class A.

Signed

*Anthony J Wharton*  
Inspector

Date: 18 August 2011

Appeal Reference: APP/H0738/X/11/2151738

### **First Schedule**

'the erection of a 2 metre high close-boarded fence enclosure'.

### **Second Schedule**

Land near Staypleton House, Parsons Walk, Norton, Stockton on Tees, TS20 1TZ.

### **Notes:**

This certificate is issued solely for the purpose of Section 191 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 were 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.





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## Costs Decision

Site visit made on 26 July 2011

by **Anthony J Wharton BArch RIBA RIAS MRTPI**

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

Decision date: 18 August 2011

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**Costs application in relation to Appeal Ref: APP/H0738/X/11/2151738  
Land near Staypleton House, Parsons Walk, Norton, Stockton-on-Tees  
TS20 1TZ**

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
  - The application is made by Mr Stuart Dick for a full award of costs against Stockton-on-Tees Borough Council.
  - The appeal was against the refusal of an application for a certificate of lawful use or development for the erection of a 2 metre high close boarded fence enclosure.
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### Decision and Costs Order

1. I allow the application and in exercise of the powers in section 250(5) of the Local Government Act 1972 and Schedule 6 to The Town and Country Planning Act 1990, and all other powers enabling me in this behalf, I order Stockton-on-Tees Borough Council to pay to Mr Stuart Dick the costs of the appeal proceedings, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned the appeal described above.

2. The applicant is now invited to submit to Stockton-on-Tees Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. The enclosed guidance note describes how to apply for a detailed assessment by the Supreme Court Costs Office if the parties cannot agree the amount.

### Reasons

3. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and, thereby caused another party to incur unnecessary or wasted expense in the appeal process. The Circular also states that the costs regime is aimed at ensuring, amongst other things, that local planning authorities rely on reasons for refusal which stand up to scrutiny, as well as producing evidence at the appeal stage to substantiate these reasons.

4. In this case the Council's sole reason for refusal was on the basis that the land had a 'nil use' and could not, therefore, benefit from Permitted Development Rights. In my view, the Council has imported an inappropriate element into their reason for refusing the application. The certificate applied for did not relate to a change of use of the land. As referred to in my decision, any permission granted by the GPDO under 'Minor Operations' is a stand alone permission and is not granted in connection with any existing use, unlike in other parts of the GPDO.

5. Again, I repeat part of my decision. Permitted Development (PD) rights under this part of the Order do not depend on the designation of the land for any particular use and there is nothing in the Order, or elsewhere, to indicate that a 'nil use' can affect PD rights in relation to 'Minor Operations'. The proposal meets all of the conditions of the Order; there is no Article 4 Direction in force and there is no evidence of any other conditions or covenants relating to, or restricting, the use of the land. On that basis therefore, I consider that the authority acted in an unreasonable manner in relying on this reason for refusal. The reason does not stand up to scrutiny. Furthermore, the Council relied on the officer's report at Appeal stage and did not produce any further appropriate evidence to substantiate the reason for refusal.

6. I have noted that, before the appeal was submitted, the appellant's agent brought certain matters to the attention of the authority, including the submission of details relating to another appeal. In particular, attention was brought to the fact that permission granted by this part of the order is a stand-alone permission and does not rely on any use of the land. Whilst acknowledging that the details of the other appeal were different, this reinforces my view that the case now before me need not have come to appeal. The Council's view that a 'nil use' negated PD rights for 'Minor Operations' is wrong. In pursuing that argument it has resulted in the appeal process continuing and this caused unnecessary loss and expense for the appellant.

7. I find, therefore, that the Council has behaved unreasonably within the meaning of the Circular. The reason for refusal does not stand up to scrutiny and no further appropriate evidence was submitted at the appeal stage. This behaviour has led to unnecessary loss and expense for the appellant. It follows that a full award of costs is warranted and the decision is set out above.

*Anthony J Wharton*

Inspector