Case Name: *Jones & Anor v Secretary of State for Housing Communities and Local Government & Anor* [2022] EWHC 520 (Admin) (11 March 2022)

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Commentary:
This case was a statutory challenge in respect of the decision of a Planning Inspector to dismiss appeals against an enforcement notice issued by Horsham District Council. The enforcement notice was issued in respect of the construction of a vehicular access without planning permission. This involved 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 appeals were pursued on grounds (c) and (d) of section 174(2) of the Town and Country Planning Act 1990 (the "TCPA 1990") on the basis that the works did not constitute a breach of planning control and that enforcement action had become impossible by the lapse of time respectively. The Inspector dismissed both appeals and held that the enforcement notice, which required reinstatement, should stand.

The statutory challenge was pursued in respect of the Inspector's conclusion on ground (c) only, on the following grounds: (1) that 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 (the "GPDO"); (2) that the Inspector failed to deal with a material consideration, namely a previous DL with the same legal point and facts; (3) that the Inspector's conclusions were incorrect as regards the finding that the relevant road was 'classified' and in relation to the legal status of the access; (4) 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 and; (5) that 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, this being an obvious alternative to overcome any planning difficulties.

The challenge was dismissed on all grounds.

As regards the GPDO, it was contended that the development fell within Class B of Part 2 of Schedule permitting the formation, laying out and construction of a means of access to a highway which is not a trunk road or classified road, where that access is required in connection with development permitted by any Class in Schedule 2 (other than Class A). This turned on whether the highway to which the access related was a 'classified road'. The judge found that the Inspector had not erred in law in finding that the road in question was a classified road (pursuant to section 12 of the Highways Act 1980 and the Department of Transport's 'Guidance on Road Classification and Primary Route Network 2012' did not override this) and had addressed the question of whether

development was permitted under the GDPO. Even if he had erred in law, the access was not required in connection with development, as prescribed by Class B, and so the Inspector would have been bound to conclude, as he did, that the work did not constitute permitted development.

The judge then addressed the appellant's contention that there was a gate in the field boundary in the position of the new gate, that the Inspector failed to take this into account and that this was relevant, because the enforcement notice essentially required 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 which was "an obvious alternative which would overcome the planning difficulties" (per the principles set out by Carnwarth LJ, as he then was, in Tapecrown Ltd v First Secretary of State [2007] 2 P&CR 7). The judge found that there was no evidence before the Inspector that, before the unauthorised development took place, there was a useable opening from the field at that point. In fact, all the evidence appears to have been to the contrary.

Furthermore, there was no appeal under ground (f) of section 174(2) of the TCPA 1990 and the Inspector was not otherwise asked to vary the enforcement notice. The judge followed Najafi v Secretary of State for Communities and Local Government [2015] EWHC 4094 (Admin) in which it was held that an Inspector does not have a duty to consider an alternative not put to him and that, 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 this case, there was clearly no obvious alternative. The removal of the hedging to construct the access had consequences for the amenity of the site.

Case summary prepared by Victoria McKeegan