

Appeal Decision

Inquiry held on 20 September 2016

Site visit made on 20 September 2016

by Diane Fleming BA (Hons) MRTPI

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

Decision date: 20 October 2016

Appeal Ref: APP/C3620/X/16/3147360

Milton Heath Lodge, Westcott Road, Dorking, Surrey RH4 3NB

- 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 Mrs Lucy Waterman against the decision of Mole Valley District Council.
 - The application, Ref MO/2015/2016/PCL, dated 13 December 2015, was refused by notice dated 10 February 2016.
 - 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 the erection of a two storey front extension (not fronting highway) following the demolition of an existing outrigger.
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Decision

1. The appeal is dismissed.

Application for costs

2. At the Inquiry applications for costs were made by the Council against the appellant, and by the appellant against the Council. These applications are the subject of separate Decisions.

Procedural Matter

3. Witnesses who gave evidence about the facts of the case to the inquiry did so under oath.

Preamble

4. The appeal concerns a detached dwelling which has been enlarged in the past with a two storey side extension. The current proposal is to demolish part of the original dwelling at the front and add a two storey front extension. The appellant excavated an 'L' shaped trench approximately 2m x 2m at the front of the property on 13 April 2015. This was the location of the north east corner of the proposed extension and was dug prior to the bringing into force of the latest Town and Country Planning (General Permitted Development) Order 2015 (GPDO) on the 15 April 2015. She then submitted an LDC (proposed) application on 19 August 2015 for a two storey front extension which was refused on 12 October 2015. After which she resubmitted her LDC application with additional information. This is the LDC which is the subject of this appeal.
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Reasons

5. Section 192(2) of the Town and Country Planning Act 1990 (1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. Applying the terms of s192(2) of the 1990 Act to the appeal proposal, the Council has determined the application against the provisions set out in Schedule 2, Part 1, Class A of the 2015 GPDO. This was the version of the GPDO in force on the date on which the application was made.
6. The appellant however disagrees with the Council's approach. She submits her trench was a constructive start on the proposal. This was dug before the 2015 GPDO came into effect and therefore the LDC application ought to be determined having regard to the previous GPDO in force at the time of the constructive start.
7. She is reinforced in this view as the Council favourably determined her sister's LDC application under the previous GPDO, for a proposed two storey front extension. This decision was granted even though the application was dated after the 2015 GPDO came into force, just like the appellant's. In addition Building Control staff had observed that work had commenced on the extension under the previous GPDO.
8. Furthermore she relies on section 56(4)(b) of the 1990 Act. This states that a material operation, in order to implement a planning permission, can be the digging of a trench which is to contain the foundations, or part of the foundations, of a building.
9. The Council do not disagree that a trench was dug on 13 April 2015 and having heard Mr Delapole's¹ evidence I am satisfied that those works took place as described. However, I consider the matter of the trench is a side issue. The purpose of the LDC application is not to find out if the trench is lawful but if the whole extension would be lawful. The LDC application is determined purely on the basis of an interpretation of the facts in the context of the law, which I shall now discuss.
10. Firstly, the application was made under s192 of the 1990 Act, not s191 which deals with existing development. The completed application form is headed 'Application for an LDC for a *proposed (my emphasis)* use or development'. Applications made under s192 seek to ascertain whether *future* development would be lawful. It would appear from the appellant's submissions that this is misunderstood and by digging the trench the notional question (would future development be lawful?) posed in the LDC application was changed to whether the development, as started, would be lawful. In other words, the appellant was seeking to keep alive the planning permission granted by the previous GPDO. The application before me though, is that made under s192 for a *proposed* development which, if begun on the date of the application, would be lawful. The appellant may have begun the development on 13 April 2015 but I have no power to change the basis of the application. I have therefore determined the appeal accordingly.

¹ Contractor who dug the trench

11. Secondly, in determining an application under s192 the starting point is set out in s192(2), namely the assessment is made based on the date of the application. In this case that is 13 December 2015, not 13 April 2015 as submitted by the appellant.
12. The relevant GPDO in force on 13 December 2015 for the purpose of the assessment was that which came into operation on 15 April 2015. Article 8(1) of, and paragraphs 1 and 12 of Schedule 4 to the 2015 GPDO revoked the previous 1995 GPDO and the 2008 Amendment Order². When a development order is revoked section 61D of the 1990 Act governs what happens to a planning permission granted by the order. S61D(i) states that a development order may include provisions permitting the completion of development. This is on the basis that planning permission is granted by the order, in respect of the development and the planning permission is withdrawn at a time after the development is started but before it is completed. The 2015 GPDO made no such provisions in relation to Class A permitted development rights.
13. The appellant accepts what is said by s61D. However, she also argues that as the 2015 GPDO makes no mention of transitional arrangements it does not automatically follow that this overrides the 'well established principle in planning law' that digging a trench can keep a planning permission alive.
14. I consider the appellant's approach to the interpretation of the law fails to address a number of points. This includes the distinction between a planning permission granted by a development order and a planning permission granted by the 1990 Act. The former is continuous while the order is in operation and there is no requirement to begin works at a particular time. The latter is subject to a condition that limits the duration of the planning permission which is why applicants, for various reasons, sometimes carry out an element of implementation to keep the permission alive. The legislation also enables a planning permission granted by the 1990 Act to be revoked as well as the revocation of a development order. The former may be exercised after the development has started but before the development is completed and the latter can also be exercised without transitional arrangements, even if the development has been started but is not complete. In effect, it does not matter if there has been a constructive start with a trench, the revocation of the development order revokes the continuous permission.
15. Therefore the development falls to be considered against the 2015 GPDO. The only disagreement between the parties if the proposal is to be considered against the 2015 GPDO is over the curtilage of the dwelling. This is because the proposed extension would be sited over a driveway. This is a relevant consideration for development that falls to be considered under Schedule 2, Part 1, which is titled 'Development within the curtilage of a dwellinghouse'. The Council queried whether the drive running alongside the eastern elevation of the dwelling was part of the curtilage as it was the former access to the larger Milton Heath House.
16. The appeal site was severed from the estate a number of years ago. It was not entirely clear what rights of passage over the drive were granted to subsequent parties and whether they had been exercised. However, at the site visit I saw that the drive within the ownership of the appellant is separated from the remaining drive running up to the 'big house' by an old five bar gate. The

² Town and Country Planning (General Permitted Development)(Amendment)(No 2)(England) Order 2008

surface of the drive beyond the gate was in a poor state of repair and the grass from the adjacent field had grown over it. It appeared to have been unused by vehicles for some time. The appellant built a double garage to one side of the drive within her property around 1996 and this is used as a dog grooming parlour which necessitates regularly crossing the drive from the cottage to the parlour. It seems to me therefore that the drive within the ownership of the appellant has become part of the curtilage of the property through its use and the passage of time. As such, I find that the proposed development would accord with the limitations set out in Schedule 2, Part 1, A.1.(b) of the 2015 GPDO.

17. However, even though the proposed extension would comply with paragraph A.1.(b), it would not comply with paragraph A.1.(e) of the 2015 GPDO as it would extend beyond the principle elevation of the dwelling. This is not disputed by the parties and accordingly overall the proposed extension would not benefit from the permitted development set out in Schedule 2, Part 1, Class A.

Conclusion

18. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of a two storey front extension (not fronting highway) following the demolition of the existing outrigger was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

D Fleming

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Phillip Rowe BA Hons BTP (Planning),
Planning Consultant

Instructed by the appellant

He called:
Mr Mark Delapole

FOR THE LOCAL PLANNING AUTHORITY:

Mr Robin Green,
Of Counsel

Instructed by the Council's Solicitor

He called:
Mr Ian Phillips BA Hons
MRTPI

Documents submitted to the Inquiry

1. Copies of the Council's notification letters
2. Copy of the agreed Statement of Common Ground
3. Copy of email dated 31 March 2015 from appellant to Council Solicitor
4. Copy of officer report and application details for property occupied by sister of the appellant.

