
Appeal Decisions

Site visit made on 30 November 2016

by Jean Russell MA MRTPI

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

Decision date: 6 January 2017

Appeal A: APP/N4720/C/16/3149351

Appeal B: APP/N4720/C/16/3149352

Land at 32 Duncan Avenue, Otley, LS21 3LN

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mrs Kylie Armitage (Appeal A) and Mr Thomas Armitage (Appeal B) against an enforcement notice issued by Leeds City Council.
- The enforcement notice was issued on 31 March 2016.
- The breach of planning control alleged in the notice is failure to comply with conditions numbered 1, 3 and 4 imposed on a planning permission ref: 15/00693/FU granted on 20 May 2015.
- The development to which the permission relates is a single storey and two storey side extension and porch to the front. The conditions in question state that:
 - 1) The rear first floor bedroom window hereby permitted shall be installed before the expiration of six months from the date of this permission.
 - 3) The high level first floor rear facing bedroom window shall be non-opening and retained and maintained as such for the lifetime of the development.
 - 4) Prior to the bringing into use of the conservatory/extension, a 1.8 metre high fence shall be erected on the western boundary with the neighbouring dwelling, No. 62 West Busk Lane, in a position adjacent to and for a length which is equal to the depth/width of the proposed conservatory/extension. The fence erected shall thereafter be retained and maintained as such.
- The notice alleges that the conditions not been complied with.
- The requirements of the notice are:

To comply with condition [sic] 1, 3 and 4.

The rear first floor bedroom window hereby permitted shall be installed in accordance with the attached approved drawing no 2 revision D attached to the notice and that the high level first floor rear facing window shall be non-opening and retained and maintained as such for the lifetime of the development and there after [sic].

A 1.8 metre high fence shall be erected on the western boundary with the neighbouring dwelling, No. 62 West Busk Lane, in a position adjacent to and for a length which is equal to the depth/width of the proposed conservatory/extension. The fence erected shall thereafter be retained and maintained as such.
- The period for compliance with the requirements is four months.
- The appeals are proceeding on the ground set out in section 174(2)(f) of the 1990 Act as amended.

Summary of Decisions: The appeals are dismissed and the enforcement notice is upheld as corrected in the terms set out below.

Preliminary Matters

1. Under s176(1)(a) of the 1990 Act as amended, I may correct any error, defect or misdescription in the enforcement notice provided that there be no injustice to the appellants or the Council. I gave the parties an opportunity to comment on the errors described and corrections recommended below; no responses were received.

Paragraph 1 of the Notice

2. It is stated in paragraph 1 that the notice is issued because it appears that there has been a breach of planning control within paragraph (a) of s171A(1) of the 1990 Act, but that is concerned with the carrying out of development without planning permission. S171B(1)(b) is concerned with a breach constituting a failure to comply with any condition subject to which a planning permission has been granted. Since it is clear that the notice is concerned with a breach of conditions, I can correct paragraph 1 to refer s171A(1)(b) without causing any injustice.

The Alleged Breach of Planning Control

3. As outlined above, the notice states that there has been breach of conditions nos. 1 and 3 imposed on planning permission ref: 15/00693/FU (the '2015 permission'). The conditions concern a rear-facing first floor window in the approved extension, but the Council does not suggest that the window was not installed before the expiration of six months from the date of the permission – and it has not outlined any reason for objecting to any breach of condition no. 1.
4. The Council is concerned that the rear-facing first floor window was not high level or non-opening, in breach of condition no. 3 – and, therefore, that the extension was not built in accordance with the approved plan subject to the 2015 permission, drawing 02 revision D. This means that there has been a failure to comply with condition no. 2, which required that 'the development...shall be carried out in accordance with the approved plans listed in the Plans Schedule'. The Schedule referred to the 'proposed plan showing all information' as '02D'.
5. Since the notice requires that the rear-facing first floor window is installed in accordance with drawing 02 revision D, it is plain that the Council intended to take enforcement action against a failure to comply with condition nos. 2 and 3 rather than 1 and 3. I can correct this error in the allegation without causing injustice.
6. I shall also correct the allegation so that it explains that conditions nos. 2, 3 and 4 have not been complied with **because** the window is not built in accordance with drawing 02 revision D and is not high level or non-opening; and a 1.8m high fence was not erected before the extension was brought into use. This will clarify but not expand the scope of the allegation.

The Requirements of the Notice

7. Where a notice is concerned with a breach of conditions, the requirements should ensure compliance with the conditions. Since the notice requires that the rear-facing first floor window is installed in accordance with drawing 02 revision D and that a 1.8m fence is erected, it would ensure compliance with conditions nos. 2, 3 and 4. There are minor drafting errors in the requirements but it would only be necessary to correct them if the appeals on ground (f) do not succeed.

Appeals A and B on Ground (f)

8. The appeal on ground (f) is that the is that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control, or any injury to amenity which has been caused by the breach.
9. The Council imposed conditions nos. 2 and 3 in part to ensure that the rear-facing first floor window does not harmfully overlook the adjoining residential property at 62 West Busk Lane. The conditions have not been complied with because the window is neither high level nor non-opening. It is a large picture-sized opening set at a height to provide an outlook from as well as light within the bedroom that it

- serves¹. It comprises three vertical panels with decorative cross bars; both of the end panels open outwards.
10. In considering whether the steps set out in a notice are excessive, it is necessary to ascertain the purpose of the notice. The *reason* for the notice is that the existing window causes 'potential direct overlooking' but it does not follow that the *purpose* of the notice is only to remedy that harm. Since the notice alleges that there has been a failure to comply with conditions, and requires that the land is developed in accordance with the conditions, the purpose of the notice is to remedy the breach of planning control. For the appeal on ground (f) to succeed, the appellants would need to propose alternative steps which would remedy the breach.
 11. Compliance with the notice would mean that the appellants have to remove the window, if not demolish parts of the extension, and then insert a smaller window into the bricked up and re-rendered wall. Instead, they seek to insert new glass panels, including some with frosted glass, into the existing window opening. The appellants have submitted a drawing to illustrate their proposal; the window depicted has horizontal panels with the lower ones being obscurely glazed to prevent overlooking. If I varied the notice to require installation of such a window, however, the steps would not remedy the breach because there would still be a failure to comply with conditions nos. 2 and 3.
 12. The appellants suggest that a high level window would provide insufficient light in the bedroom; the works required by the notice would be costly and detrimental to the look of the house; and the works would be stressful, particularly for the child who occupies the bedroom. Those points concern the merits of the development. If the appellants wished me to consider allowing retention of the existing window, with or without alteration, they ought to have made an appeal on ground (a) and sought planning permission. Since they have not done so, it is not possible for me to consider questions of amenity raised by them – or indeed their neighbours.
 13. The Council would accept retention of the existing opening if the new panels are obscurely glazed to at least 1.7m above finished floor level, but this concession does not give me the scope to ignore the purpose of the notice. Moreover, I saw that the opening is positioned so that most of the glass is below the 1.7m point. If the notice required obscure glazing to that height, the window would not look like that shown in the appellant's drawing; the clear top panel would be narrower. I have not been given details of any window design that is acceptable to all – and I cannot vary the notice to require that another scheme is negotiated, because the notice must tell the appellants what they must do with reasonable certainty.
 14. The appellants do not object to the requirement of the notice to construct a 1.8m fence, and indeed they had done this work by the date of my visit. However, there had been a breach of condition no. 4 by the date that the notice was issued, and so it is right that the notice is upheld in relation to that matter, even if the condition and the related requirement of the notice now been complied with.
 15. For these reasons and with regard to all other matters raised, I conclude that the requirements of the notice are not excessive but necessary to remedy the breach of planning control that has occurred. The appeals on ground (f) fail but I shall address the question of an alternative window design further below.

Other Matters

16. I shall re-word the requirements of the notice so that they follow the wording of the conditions; this will make the notice clearer but no more onerous. I shall delete

¹ The room is also served by a second, smaller window.

the references to the 'window hereby permitted' and 'proposed' extension because the notice does not permit development and the extension is already built. The corrections will cause no injustice.

17. Drawing no. 2 revision D was not attached to the notice as it stated. The Council submitted copies of the plan but it is illegible when shrunk to A4 size. The appellants have not expressed any doubt as to what the references to 'drawing 02 revision D' mean. I can correct the notice without causing injustice so that it refers to the 2015 permission and plan but does not state that the drawing is attached.
18. My powers to vary the notice extend to varying the period for compliance. The appellants have not appealed on ground (g), which relates to that matter, and four months would normally be sufficient time to carry out the works required by the notice. However, the Council has indicated that it would be willing to negotiate the insertion of obscurely glazed panels into the existing window opening.
19. I cannot speculate as to what sort of scheme the appellants might put to the Council, or what effects it might have on the living conditions of the adjoining occupiers. There can be no guarantee that any planning application would be approved. Even so, it would be reasonable and proportionate to give the appellants time to put a proposal to the Council and hold off building works until the process is completed, in order to minimise disruption to the child who occupies the bedroom. I shall vary the notice so that the period for compliance is six months.

DECISIONS

20. The enforcement notice is corrected and varied by:

- i. Deleting '(a)' and substituting '(b)' in line two of paragraph 1.
- ii. Deleting the text of paragraph 3 in its entirety and substituting:

'Planning permission (ref: 15/00693/FU) was granted on 20 May 2015 for a single storey and two storey side extension and porch to front at 32 Duncan Avenue, Otley subject to conditions. It appears to the Council that the permission has been implemented but the following conditions have not been complied with:

Condition 2 is "the development hereby permitted shall be carried out in accordance with the approved plans listed in the Plans Schedule". This condition has not been complied with because the rear-facing first floor bedroom window is not installed in accordance with the approved drawing 02 revision D.

Condition 3 is "the high level first floor rear facing bedroom window shall be non-opening and retained and maintained as such for the lifetime of the development". This condition has not been complied with because the rear-facing first floor bedroom window is not high level or non-opening.

Condition 4 is "prior to the bringing into use of the conservatory/extension, a 1.8 metre high fence shall be erected on the western boundary with the neighbouring dwelling, 62 West Busk Lane, in a position adjacent to and for a length which is equal to the depth/width of the proposed conservatory/extension. The fence erected shall thereafter be retained and maintained as such." This condition has not been complied with because a 1.8m fence was not erected as required before the extension was brought into use'.

- iii. Deleting the text of paragraph 5 in its entirety and substituting

'a) Modify the single storey and two storey extension so that the rear-facing first floor window is installed in accordance with the planning permission ref: 15/00693/FU and the approved drawing 02 revision D, and high level and non-opening; and

b) Erect a 1.8 metre high fence on the western boundary of the land in a position adjacent to and for a length which is equal to the depth/width of the extension'.

iv. Deleting four months and substituting six months as the period for compliance.

21. Subject to these corrections, the appeals are dismissed and the enforcement notice is upheld.

Jean Russell

INSPECTOR