

Appeal Decisions

Site visit made on 9 January 2017

by Thomas Shields MA DipURP MRTPI

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

Decision date: 6 February 2017

Appeal A: APP/N4720/C/16/3159192

183 Haigh Moor Road, Tingley, Wakefield, WF3 1EN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr John North against an enforcement notice issued by Leeds City Council.
 - The enforcement notice was issued on 25 August 2016.
 - The breach of planning control as alleged in the notice is without planning permission the unauthorised erection of a detached dwelling and the concrete foundations upon which this house sits, and without planning permission the creation of a second set of concrete footings laid to the side of the aforementioned dwelling in the side garden.
 - The requirements of the notice are:
 - A) Demolish the detached dwelling in its entirety and remove all the materials from the land including the concrete foundations on which the house sits.
 - B) Infill the trenches left by the removal of the concrete foundations with earth and lay topsoil on the area of land where the dwelling has been demolished and grass seed this area with a mixed grass seed.
 - C) Remove the concrete foundations to the side of the detached dwelling in the side garden, infill the trenches left by the removal of the concrete foundations with earth, lay topsoil on this area of land and grass seed with a mixed grass seed.
 - D) Remove all the materials from the foundations from the land.
 - The period for compliance with the requirements is four months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act also falls to be considered.
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Appeal B: APP/N4720/W/16/3150722

183 Haigh Moor Road, Tingley, Wakefield, WF3 1EN

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr John North against the decision of Leeds City Council.
 - The application Ref 15/05445/FU, dated 9 September 2015, was refused by notice dated 18 January 2016.
 - The development proposed is the erection of a dwelling and realignment of plot boundary.
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Appeal A: Decision

1. It is directed that the enforcement notice be varied by -
 - deleting all of the words in Section 5, and substituting the following requirements:
 - A) Demolish the detached dwelling in its entirety and remove all the materials from the land including the concrete foundations on which the house sits. Remove the concrete foundations to the side of the detached dwelling in the side garden. Remove all resultant materials from the land.
 - B) Infill the trenches left by compliance with requirement (A) with earth and topsoil.
 - C) Following compliance with requirement (B) grass seed the exposed areas with a mixed grass seed.
 - deleting all the words in Section 6 and substituting instead the following:

“For requirements (A) and (B) 8 months”.

“For requirement (C) 12 months”.
2. Subject to these variations the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B: Decision

3. The appeal is dismissed.

Procedural matters

4. The ground (a) appeal against the enforcement notice and deemed planning application in Appeal A seek planning permission to retain the as-built dwelling house and the set of concrete footings that were intended for a garage.
5. Appeal B, against the Council’s refusal of planning permission, mirrors ground (a) of Appeal A, except that it does not relate to the second set of concrete footings. It also seeks to increase the size of the appeal site by altering the eastern plot boundary.

Reasons

Appeal A – the ground (a)/deemed planning application, and Appeal B

Appeal site and background

6. The appeal site lies within a small group of buildings in an attractive sloping landscape within an open countryside setting.
7. The dwelling subject of the appeals, No. 183, is a two storey detached dwelling constructed in stone, and was built as a replacement for an older cottage on the site which had been attached to the adjoining dwelling house, No. 181.
8. The as-built dwelling is located to the side of No. 181 with its front elevation set close to the access lane which separates it from the side boundary of the rear garden of No. 185. Adjoining the appeal site to the east is a residential

barn conversion, No. 183b, also being a Grade II Listed Building (LB). I understand that an application to Historic England to de-list the LB has been submitted but is currently undetermined.

9. There is a protracted history to the as-built dwelling. In brief; planning permission was granted in January 2015 for a detached dwelling on the site of a former cottage (ref 14/05475/FU). Following commencement of works, the Council received complaints that the building being erected was not in accordance with the planning permission. The Council investigated and subsequently concluded that the building under construction did not in reality reflect the approved plans in terms of the size and position of the building and the site area.
10. In August 2016 the Council issued the enforcement notice in respect of the as-built dwelling and the concrete foundations for a garage to the side (Appeal A). A planning application, Council reference 15/05445/FU, to retain the as-built dwelling within a larger plot was refused by the Council in January 2016 (Appeal B).
11. Subsequently, there continues to be dispute between the parties as to the existence and/or extent of inaccuracies and variances between the as-built dwelling and the dwelling approved under 14/05475/FU. For example, the appellant states that the ridge height is 0.36 metres higher than approved, and the separating distance between the front elevation windows and the boundary with No. 185 is reduced from 8 metres to 6.2 metres. The Council say the ridge is 0.52 metres higher than approved, and the separating distance to No. 185 is 5.8 metres.
12. It appears that much of the dispute stems from the plans and inaccurate Ordinance Survey drawings on which they were originally based, submitted, and approved as part of application 14/05475/FU. The discrepancies were not noticed until after planning permission had been granted and the parties now dispute whether that planning permission can be lawfully implemented. However, whether it can or not is not a matter for me to determine. That can only be determined by the grant of a Lawful Development Certificate, an application for which would be a matter for the Council to determine in the first instance.
13. It is clear to me from all of this that although the appellant disagrees with the Council with regard to particular details, he accepts that the appeal dwelling is taller, wider, and closer to the boundary with No. 185 than the approved dwelling. Hence, having regard to long established case law¹, the appeal building as constructed was built without planning permission. Indeed there is no appeal made on ground (c) that the erection of the appeal dwelling was not a breach of planning control.

Main Issues

14. The reasons for issuing the enforcement notice are effectively the same as those stated in the Council's decision notice for refusal of planning application 15/05445/FU (Appeal B). Having regard to those, and to all other evidence before me, I consider the main issues to be:

¹ Sage v Secretary of State for the Environment, Transport and the Regions & Maidstone BC [2003] UKHL 22

- the effect on the living conditions of occupiers of No. 185 with particular regard to privacy and outlook, and whether there is adequate external amenity space for the occupiers of No. 183; and
- the effect on the character and appearance of the area, and the setting of the Grade II Listed Building at No. 183b.

First main issue - Living conditions

15. The as-built dwelling is approximately 7.5 metres height to the ridge level, 9.8 metres wide, and the front elevation windows approximately 6 metres distance from the boundary wall of the rear garden to No. 185. It also sits at a higher ground level than No. 185 and directly overlooks its rear garden and rear elevation wall. Contrary to the appellant's assertions, I find that its height, width and massing, together with its position close to No. 185 has a significantly dominant and overbearing impact on the occupiers of that property. As such, it adversely and unacceptably harms their outlook.
16. While I acknowledge the appellant's submission that the first floor front bedroom windows are smaller in size than the former demolished cottage, they nonetheless provide, at much closer distance, the ability to directly overlook the garden at the rear of No. 185, and with angular views towards its rear elevation windows. While I note the existence of large utility buildings further to the rear of No. 185, the area of garden most affected is that which appears to be in domestic and residential garden use, between those utility buildings and the rear elevation of the house. As a consequence, I consider there to be a significantly harmful loss of privacy, both real and perceived, for occupiers of No. 185 with regard to the use of their garden and rear habitable rooms.
17. I acknowledge that overlooking of the rear garden and rear elevation of No. 185 is also possible by people passing by on the track that serves this small group of properties. However, it is a private track and not likely to be intensively used given the few properties it serves. To my mind, it does not result in the same nature or degree of harm to privacy as does the permanence of the first floor windows in the appeal dwelling.
18. It is suggested that one of the first floor windows could be removed and repositioned to the eastern gable so as to still provide a window to that bedroom. I consider that would result in an irregular and discordant pattern of openings in the front elevation which would be harmful to the character and appearance of the building and to the local area. Moreover, it would not overcome the harm from overlooking from the other front elevation first floor window.
19. A subtle form of obscure glazing to the two bedroom windows has also been suggested. However, any form of obscure glazing that still allows outward views would not adequately mitigate the loss of privacy to the occupiers of No. 185 from overlooking. Even if fully obscured, I consider that would not overcome the harm I have described resulting from the *perception* of being overlooked and loss of privacy. In addition, the use of obscure glazing in these particular circumstances would, to have full effect, also need to be in the form of non-opening windows. That would result in an unacceptably poor level of amenity for the occupiers of the appeal dwelling.

20. The suggested repositioning and/or obscuring of the windows would not reduce or overcome the harm I have identified to the outlook of occupiers of No. 185 resulting from the building's dominant and overbearing impact.
21. Given the location of other dwellings and gardens, and the size of the appeal site, I accept the appellant's contention that any two storey dwelling on this site is likely to result in a degree of overlooking. However, I am not convinced that an alternative dwelling would result in the same level of harm as the appeal dwelling. In this regard the appellant also refers to a 'fall-back' position which I return to later.
22. With regard to Appeal A, the outside space on site is modest, but I find it is not unacceptable in terms of providing an adequate level of external space for normal residential amenity purposes. The modest amount of space is also mitigated to some extent by the location of the appeal site being adjacent to the countryside and open space.
23. The outlook from the lounge windows to the boundary with 183b is limited, but the contextual physical relationship with No. 183b is markedly different in comparison to that with No. 185. Some of the space around the building could be made private with sensitive screening and I do not consider on that basis that there would be any unacceptable degree of overlooking between Nos. 183 and 183b. In addition, the living room is served by glazed doors and two windows which I saw provide adequate levels of daylight.
24. Overall, I find that the external space available does not result in any significant level of harm to residential amenity. Given this finding, I also find that the additional space which would be available by the proposed extended plot boundary (Appeal B) would also be adequate.
25. However, for both appeals, the provision of adequate amenity space does not mitigate the significant harm I have identified to the living conditions of occupiers of No. 185 with regard to privacy and outlook.

Second main issue - Character and appearance; setting of the Grade II LB

26. The character and appearance of the local area is formed from the small cluster of residential dwellings and other buildings I have previously referred to, together with older and redundant farm buildings, their relationship to each other as a group, and their setting between the more urbanised area to the west and the rural countryside landscape to the south and east.
27. The Council's objections are that the as-built dwelling, due to its size, scale, and inadequate separation distances is cramped within its plot, resulting in harm to the setting of the LB (albeit minimal over the level of harm that would have resulted from the approved dwelling), and greater harm to the cluster of historical buildings in the vicinity.
28. The appellant has submitted a Heritage Statement (HS) which describes the evolved character of the area, and sets out an examination of the historic significance of the buildings in the locality. I consider its findings are based on a comprehensive and robust analysis, and to which I attach due weight in reaching my decision.
29. I consider that the setting of the LB relates fundamentally to its original function as an agricultural barn and the fields and farm it served. Barns are

and were functional buildings; generally of simple utilitarian design, sometimes located within or near to other farm buildings, but in any event located in a position and with an orientation which, as far as possible, best served the operation of the farm. In this regard it is clear from the HS and plan analysis that another cottage had been located to the east of No. 183, later demolished, with the remaining gap occupied by cart sheds or shelters. As such, I do not agree with the Council's view that the barn was the "main building" viewed from the access track approach. Rather, it was simply visible from the track as one of a group of farm related buildings, and being secondary in hierarchy to more principal residential dwellings.

30. Given these factors, I am not convinced that the separation gap and absence of built form between the as-built dwelling and the LB forms part of the LB's historical significance, or that the more forward projection of the as-built dwelling results in harm to its setting. I acknowledge that the as-built dwelling is larger and more prominent than others in the group, but its design, detailing and use of materials are compatible with the rest of the group. While it has a small plot size relative to others, that does not by itself warrant dismissal of the ground (a) appeal in Appeal A. For the above reasoning I make the same findings in respect of Appeal B.
31. The appellant states that a proposal for a garage might have come forward if either of the appeals were allowed, but I cannot be certain if that would have been the case. Given their scale, location and subterranean nature I consider that the retention of the garage foundations results in no more than a minor level of harm to the character and appearance of the area, which, by itself, would not have justified dismissing Appeal A. However, the appeals have been dismissed for other reasons and in these circumstances the garage foundations serve no purpose. I return to this matter under the ground (f) appeal.
32. For all the above reasons, and having regard to section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990, I find that the as-built dwelling does not result in any significant harm to the character and appearance of the area and preserves the setting of the LB. However, this finding is substantially outweighed by the significant and unacceptable level of harm I have identified with regard to the first main issue in respect of the living conditions of occupiers of No. 185.

Other matters

33. The appellant argues that parts of the rear and western gable walls up to eaves level are in the correct position as approved by 14/05475/FU, and that the approved dwelling would have had a similar height, massing and position to the appeal dwelling, and thereby represents a 'fall-back' position.
34. Whether the approved dwelling in 14/05475/FU is capable of being lawfully carried out is disputed by the Council and, as I have explained previously, that is not a matter for me to determine. However, even if it could be implemented lawfully, the approved dwelling would be smaller and further away from No. 185 than the appeal dwelling. As such, it would not have been as harmful, or more harmful, to the residential amenity of No. 185 than the appeal dwelling. It does not therefore represent a true fall-back position in terms of justifying the retention of the as-built appeal dwelling. I return to this matter again in the ground (f) appeal.

35. I note the appellant's submission that No. 181 has benefitted from the separation with the former cottage in respect of independent sewerage, the ability to carry out proper maintenance, and rebuilding of stone boundary walls. However, I see no reason why the same benefits could not have been achieved without resulting in the harm I have identified. These matters therefore provide no additional weight in support of the appeal.
36. Although it is now of some age the Council's SPG² is a material consideration. It sets out guidance in respect of minimum amenity space provision and separation distances that should be achieved to avoid overlooking. I consider that the guidance within it should be applied flexibly, taking account of all other material considerations. In the appeals before me I have already found on their merit that the level of useable amenity space is acceptable, while the distance between first floor windows of the as-built dwelling and No. 185 results in harmful overlooking and an unacceptable loss of privacy.
37. I acknowledge the need for additional housing in the area. However, that does not override the need to ensure that any new housing is constructed so as not to unacceptably harm the living conditions of existing residential occupiers.
38. I have taken account of the detailed third party representation I have received. However, it does not lead me to reach any different conclusion on the main issues or to come to a different decision.

Conclusion on ground (a)/deemed planning application (Appeal A), and Appeal B

39. Overall, while I have found no significant harm in respect of the effect on the character and appearance of the area, the setting of the LB, and the level of external amenity space for occupiers of No. 183, that is outweighed by the significant and unacceptable level of harm I have found to the living conditions of occupiers of No. 185 with regard to their outlook and privacy.
40. As such, the development conflicts with criteria (i) and (ii) of Policy P10 of the Leeds Core Strategy (2014), and saved Policies BD5 and GP5 of the Leeds Unitary Development Plan (2006) which, taken together, seek amongst other matters to ensure that new development is appropriate to its context in terms of size, scale and layout, and avoids loss of privacy and residential amenity. These policy objectives are consistent with the provisions of the Framework³ which seeks a good standard of amenity for existing and future occupants of land and buildings.
41. For all the above reasons the appeal on ground (a)/deemed planning application in Appeal A fails, and Appeal B is dismissed.

Appeal A - the appeal on ground (f)

42. The ground of appeal is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary.
43. When a ground (f) appeal is made it is essential first to understand the purpose of the notice. Section 173(4) (a) and (b) of the Act provide that the purpose is (a) to remedy the breach of planning control that has occurred, or (b) to remedy any injury to amenity which has been caused by the breach.

² Neighbourhoods for Living (2003), pages 34 and 50

³ National Planning Policy Framework (2012)

44. The breach of planning control is the erection of a detached dwelling and its concrete foundations, and the second set of concrete footings to the side. Hence, given that the requirements require the complete removal of the development carried out and restoration of the land, the purpose of the notice clearly falls within section 173(4)(a); to remedy the breach of planning control that has occurred.
45. Given the above factors, it is clear in this case that the requirements go no further than remedying the breach of planning control and thus are not excessive.
46. However, Court judgments⁴ have established that in some circumstances consideration can also be given to any apparent “obvious alternative” remedy. In this regard the appellant argues two alternative remedies are available. They are predicated on an argument that parts of the rear and western gable walls up to eaves level are in the correct position as approved by 14/05475/FU. I turn to these suggested alternatives next.
47. The first alternative advanced⁵ is that that the as-built dwelling could be extensively modified; by the repositioning of the staircase and WC wall at ground level, removing the en-suite at first floor, reforming the tops of the gable walls, and constructing a new roof. This, it is argued, would set the front elevation back to reflect the front building line of the approved dwelling and thus would overcome the Council’s objections.
48. However, while I do not rule out that such a scheme is technically achievable, there are no detailed plans and drawings of such a scheme before me. Hence it is not clear to me whether it could properly be regarded as being part of the matters alleged in the notice, and, if it were so part of the matters alleged; whether it could be implemented without resulting in other potential harmful impacts to future occupiers, or neighbours. Moreover, having regard to both parties’ detailed arguments and evidence, it is not clear to me that parts of the rear and western gable walls are in the correct position as argued. Overall, this suggested alternative lacks the necessary degree of precision in order for me to be able to conclude it is a viable alternative.
49. The second alternative advanced is that it would still be possible to implement the approved scheme 14/05475/FU. However, as stated above I am not convinced that parts of the rear and western gable walls are in the correct position. As such, I cannot be sure that development carried out in accordance with 14/05475/FU would substantially form part of the matters alleged in the notice (the as-built dwelling). Additionally, for reasons I have outlined previously the Council argues that the planning permission is incapable of being lawfully implemented. The question of whether it can be lawfully implemented is not a matter before me and can only be determined through the LDC procedure. Given these circumstances, I am unable to conclude that it is a viable alternative remedy such that I could vary the requirements of the notice to include it.
50. Given the uncertainty on the suggested alternatives I consider that it would be reasonable to allow a longer compliance period in order for those, or any

⁴ *Tapecrown Ltd v FSS & Anr* [2006] EWCA Civ 1744;
Mahfooz Ahmed v SSCLG and London Borough of Hackney [2014] EWCA Civ 566;
Arnold v SSCLG [2015] EWHC 1197 (Admin)

⁵ Marcus Walsh letter, page 3, 14.12.2016, and Jennifer Hubbard letter, para.11, 15.12.2016

others, to be submitted and properly considered by the Council. I will return to this in the ground (g) appeal.

51. For these reasons I conclude that the requirements to remove the whole of the development in its entirety and restore the land are not excessive, and that there are no clear "obvious alternatives" such that I can vary the notice to include either or both of them as alternative remedies to the Council's requirements.

52. The appeal on ground (f) fails.

Appeal A - the appeal on ground (g)

53. The ground of appeal is that the period of time for compliance with the notice falls short of what should reasonably be allowed.

54. The notice allows four months for compliance. The appellant seeks a period of twelve months in order to give the tenants sufficient time to find alternative accommodation, and for the required works of demolition to be carried out carefully so as to enable re-use of materials and fittings.

55. I see no reason why demolition could not be physically completed earlier than twelve months from the date of this decision. However, I agree that it would be sensible and environmentally sound to re-use as much of the materials and fittings as possible. As such, it would be reasonable to allow a longer time period for that to take place.

56. The rights and freedoms within the European Convention on Human Rights (ECHR) are enacted through the Human Rights Act 1998 (HRA). In circumstances where someone stands to lose their home as a result of an appeal decision, as in this case, it is likely to be a serious *interference* with their rights under Article 8, but it does not follow that this would be a *violation* of their human rights.

57. I have already found that the requirements in the notice are not excessive. In terms of the HRA I consider that they are not a disproportionate remedy when balanced against the harm I have previously identified and the need to uphold the operation of the planning system in the wider public interest.

58. However, I recognise that an unduly short compliance period could have a greater impact than a longer period on occupiers who would lose their home. In this regard I have not been provided with details or a copy of the current occupiers' tenancy agreement, and so cannot be sure of how long is left to run on the tenancy, and there is no evidence before me of any compelling personal circumstances of the occupiers which might indicate that twelve months would be necessary for them to relocate. Given these circumstances I consider that a period of twelve months is not justified. Nonetheless, I accept that it is important to allow sufficient time for the current occupiers to secure alternative accommodation.

59. Having regard to all of the above factors I will extend the compliance period for demolition of the building, removal of foundations, infilling of trenches, and removal of resultant materials to eight months. Re-seeding, following infilling of the trenches, would be best done during the planting seasons. I will therefore separate the requirements and vary the compliance periods for re-seeding to be completed within twelve months.

60. The revised timescales would also allow the appellant to explore with the Council any alternative schemes that might be acceptable to the Council in planning terms. Failing that, there remains a legal obligation to comply with the notice's requirements.
61. I am satisfied that these requirements and timescales are a reasonable and proportionate remedy in all the circumstances and would not result in any violation of the occupiers human rights under Article 8. They would also not result in any injustice to the Council.
62. To the limited extent I have set out above the appeal on ground (g) succeeds. Therefore, using powers available to me under section 176(1) of the Act I have varied the notice by re-ordering its requirements and extending the compliance periods in Sections 5 and 6 accordingly.

Thomas Shields

INSPECTOR