The Planning Inspectorate

Appeal Decision

Site Inspection on 13 March 2017

by Graham Self MA MSc FRTPI

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

Decision date: 17 March 2017

Appeal Reference APP/J1725/X/16/3159793
Site at: 1 Beaulieu Place, Gosport, Hampshire PO13 0QP

- The appeal is made by Miss S Fielder under Section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against the refusal by Gosport Borough Council to grant a certificate of lawfulness.
- The application (Reference No. 16/00381/LDCE) dated 28 July 2016 was refused on 26 September 2016.
- The application was made under Section 191 of the Town and Country Planning Act 1990 as amended (see also "Procedural Matters" below.
- The application sought a certificate of lawfulness for: "Construction of single-storey side extension".

Summary of Decision: The appeal fails.

Procedural Matters

1. Section 191 refers to an existing development. Certificates of lawfulness for *proposed* development come under Section 192. The council's decision notice and the officer's report (submitted by the council with the standard questionnaire) are headed: "Section 192 Application". The decision notice also refers to the "proposed" extension.

2. From the available evidence I cannot tell precisely when construction of the extension started and finished, but construction (at least work on foundations) appears to have started in early May 2016. According to the application form (Item 10), building work on the extension was substantially completed on 1 June 2016. If so, the council's references to Section 192 would be erroneous. I have decided to treat the application as a Section 191 application as specified by the appellant but the outcome of the appeal would be the same if the application were to be treated as having been made under Section 192.

Reasons

3. The dispute in this case is centred upon a condition which was imposed with a planning permission issued in 1962 for the erection of 56 houses and seven bungalows, including the bungalow at the appeal site.[1] Condition 9 of the permission stated:

[1] The permission was evidently granted to Metropolitan Railway Country Estates Ltd and covered Stage A of Phase 1 of development known as the Rowner Estate.

> "Notwithstanding the provisions of the Town and Country Planning (General Development) Orders 1950 & 1960, no structures of any type shall be erected on the land other than at the rear of dwelling houses without the prior consent of the Local Planning Authority."

4. In many situations relating to dwellings, the erection of a single-storey side extension might be "permitted development" under what is now the Town and Country Planning (General Permitted Development) (England) Order (abbreviated below to "GPDO"). The 2015 version of this Order as amended was extant when the extension was evidently constructed in 2016. The GPDO has been amended several times over the years, and no doubt will be amended and possibly re-named in the future.

5. Article 3(4) of the GPDO provides that nothing in the Order permits development contrary to any condition imposed with a planning permission. This means that permitted development rights can be taken away by conditions on planning permissions.

6. The basis of the appellant's case is that the condition imposed in 1962 did not prevent the side extension being permitted under the 2015 GPDO. The appellant contends that the condition was flawed because there was no General Development Order dated 1950 or 1960, that the condition is not sufficiently precise or related to a statutory instrument to be enforceable, that the condition did not make any allowance for what happens when the relevant Orders are rescinded or modified, and that the condition ceased to have any effect when the 1960 Order was revoked.

7. Part of the appellant's case also relates to the language of the condition, which sought to restrict "structures of any type", whereas both the old and current permitted development Orders referred to the enlargement or improvement of a dwellinghouse with no reference to "structures" at all. For that reason the appellant considers the condition not to be robust or specific enough to be enforceable.

8. I deal with some basic points first. The construction of the side extension was clearly "development" as defined in Section 55 of the 1990 Act. Planning permission was required for the development. The issue is then whether planning permission was granted by the GPDO extant at the time the development was started. Subject to an issue relating to the site boundary on which I comment later, the extension would apparently not breach any of the "excluding" criteria relating to matters such as height or proportion of curtilage covered by buildings as set out in Class A of Part 1 of Schedule 2 of the GPDO.

9. The extension is a structure or erection for the purposes of planning law and comes within the meaning of the phrase "no structures of any type". Therefore I do not accept the appellant's argument about the language of the condition. As the council point out, there was a statutory instrument dated 1950 which itself provided that it may be cited as the Town and Country Planning General Development Order 1950. The "1960 Order" mentioned in Condition 9 seems to have been a reference to a 1959 Order which was amended in 1960. This was revoked in 1963. So the reference to the 1960 Order was inaccurate. Modern conditions aimed at removing permitted development rights normally not only refer to the relevant current GPDO but also contain a clause along the lines: "…or any Order revoking or re-enacting that Order". No such clause was included in the 1962 condition.

10. In view of the points just mentioned the 1962 condition was flawed by modern standards. However, the condition does at least refer to the General Development Order in the "notwithstanding" clause, and it is clear that the purpose of the condition was to take away permitted development rights to build structures in front of or at the sides of the dwellings. The second part of the 1962 condition referring to structures of any type is also wide enough and clear enough to override the provisions of the 2015 GPDO which would otherwise have granted permission for the side extension.

11. In reaching my decision I have taken account of the court judgments quoted on behalf of both the appellant and the council. The principle I am applying is that the mere grant of a permission (in this case the 1962 permission) cannot in itself constitute a condition inconsistent with development permitted by a General Development Order, and that in order to exclude the application of a General Development Order, there has to be something more.[2] The "something more" in this instance is the reference to the General Development Orders combined with the specific statement in the 1962 condition that no structures of any type shall be erected on the land other than at the rear of dwellinghouses without the prior consent of the planning authority.

12. In summary, I find that Condition 9 of the 1962 planning permission was in force and valid when the extension was constructed, that it removed normal permitted development rights for side extensions, and that as a result the development was not permitted by the GPDO. Planning permission was not obtained by any other means. Therefore the development was unlawful. I conclude that the council's refusal to grant a certificate of lawfulness was well founded.

13. I have noted the representations from two local residents, although they mostly concern what may be termed planning merits rather than the sort of legal points relevant to an application for a certificate of lawfulness. This appeal does not relate to an application for planning permission. An occupier of a property in Carisbrooke Road contends that the extension looks neat and tidy, and he asks: "what is exactly the problem with this side extension?" I have given the answer above - the "problem" is that the construction of the extension was unauthorised development. Whether the extension looks neat and tidy has no bearing on the issue of lawfulness.

14. The other representation is from a neighbouring occupier who describes the distress caused by various effects of the development, including damage to his property. During my inspection I saw that some of the brickwork on the south-west corner of the bungalow at 3 Beaulieu Place appeared to have been cut through, leaving cut half-bricks where the front wall previously continued southwards to form a boundary wall. The possible legal implications of that action are outside the scope of this appeal - I only have powers under planning legislation to judge whether the development is lawful. Any further proceedings under planning legislation would normally be a matter for the Borough Council.

15. I referred above to a site boundary issue. From what I have seen and read it seems possible that the extension as built (including its roof and appendages) may not be wholly within the curtilage of 1 Beaulieu Place. Because my inspection was unaccompanied I could not enter private land to make detailed measurements or verify ownership boundaries, so this is not a matter I can determine (and anyway I did not need to for the purpose of deciding this appeal). As far as I could see, the guttering on the extension touches or almost touches

[2] These words are taken from the Court of Appeal judgment (Vice-Chancellor Sir David Nicholls concurring) in *Dunoon Developments Ltd v SSE* [1992] JPL 936.

the tiles edging the roof of the adjacent bungalow. If part of the extension is outside Number 1's curtilage, the development would not have been permitted by the GPDO irrespective of the 1962 condition.

Formal Decision

16. I dismiss the appeal.

G F Self

Inspector