
Appeal Decision

Site visit made on 8 July 2019

by D H Brier BA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 July 2019

Appeal Ref: APP/Z4718/C/18/3218533 & 3218534
33 Wilshaw Road, Meltham, Holmfirth, HD9 4DZ

- 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 & Mrs A Smith against an enforcement notice issued by Kirklees Metropolitan Borough Council.
- The enforcement notice was issued on 2 November 2018.
- The breach of planning control as alleged in the notice is the unauthorised erection of rear extensions and timber outbuilding with two octagonal roofs linked with a dual pitched roof.
- The requirements of the notice are:
 1. Within 1 month of the date the notice takes effect wholly demolish the timber outbuilding with octagonal roofs linked with a dual pitched roof and within two months of the date the notice takes effect remove all resultant debris and material.
 2. Within 4 months of the date the notice takes effect demolish all extensions that project beyond the external walls of the original dwelling house and within 6 months of the notice taking effect remove all resultant debris and material.
 3. Within 6 months of the date the notice takes effect restore the land levels to those prior to the unauthorised development commencing.
- The appeal by Mrs L Smith (ref C/18/3218534) is proceeding on the grounds set out in section 174(2) (a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under section 177(5) of the Act as amended.
- The appeal by Mr A Smith (ref C/18/3218533) is proceeding on the grounds set out in section 174(2) (c), (f) and (g) of the 1990 Act.

Summary of Decision: The appeal is dismissed and the notice is upheld with corrections.

Application for costs

1. An application for costs was made by Kirklees Metropolitan Borough Council against Mr & Mrs A Smith. This application is the subject of a separate Decision.

Background

2. The appeal property is a detached house. It lies within both the Green Belt and the Wilshaw Conservation Area.
3. The planning history of the site is set out in the Council's appeal statement. Two items are of especial relevance to the current appeal:
 - Planning permission for the demolition of garage and erection of two storey and single storey rear extension with first floor balcony and detached

garage, granted in August 2017 (reference 2017/92124). Condition 5 of that permission states *"Notwithstanding the provisions of the Town and Country Planning General Permitted Development Order 2015¹ as amended (or any Order revoking or re-enacting that Order) no development included within Classes A, B, C, D and E of Part 1 of Schedule 2 to that Order shall be carried out without the prior written consent of the Local Planning Authority."*

- Application for planning permission for demolition of garage and erection of two storey and single storey rear extension with first floor balcony and attached lower ground garage with terrace over, refused in January 2018 (ref 2017/62/93405/W). A subsequent appeal under section 78 of the 1990 Act was dismissed in May 2018 (ref APP/Z4718/D/18/3197229).
4. The appeal property has been enlarged on the lines of the scheme approved in 2017, but as well as this, a further flat roofed single storey component has been added at the rear². This addition extends across the full width of the rear of the house (11.26m according to the plan approved in 2017³) and, according to the refused drawing, is 5.3m deep⁴. The detached garage shown on the approved scheme⁵ has not been built; instead, the additional extension accommodates an integral garage.
 5. The timber outbuilding referred to in the allegation has been removed. While this indicates that the notice may well have been complied with in part, as this structure is still a component part of the development being enforced against, my decision will encompass this matter.

Unilateral Undertaking

6. A planning obligation under the provisions of section 106 in the form of a unilateral undertaking has been submitted by the appellants. The nub of the obligation is that (subject to planning permission being granted), the property owners covenant *"Not to develop the land nor allow or permit the development of the land pursuant to the previous permission for the construction of a detached garage authorised by the previous permission (and to demolish any part of the detached garage that may have been already constructed)"*.

The Enforcement Notice

7. Before proceeding to consider the individual grounds of appeal, I am concerned about a particular matter that arises from the parties' submissions in respect of the appeal on ground (f).
8. The enforcement action appears to have been prompted by the erection of the timber outbuilding and the single storey addition at the rear of the property. However, from the manner in which both the allegation and the second requirement are framed, the notice attacks not only the rear addition, but also the works carried out pursuant to the planning permission granted in 2017. The Council's justification for this approach appears to be twofold. Firstly, the view that the approved works were not substantially complete prior to the erection of the addition, so that the whole of the works do not benefit from any

¹ I take this to be an abbreviation of Town and Country Planning (General Permitted Development) (England) (Order) 2015.

² The appellants refer to this as additional terrace and undercroft garage.

³ Drawing no.17/06 02.

⁴ Drawing no.17/14 02.

⁵ Drawing no.17/06 03.

- extant planning permission. And, secondly, in these circumstances, if the requirement applied solely to the addition, and not to the rest of the works, the resultant underenforcement would mean that, unlike the approved scheme, the remaining structure would benefit from a deemed unconditional planning permission by virtue of the provisions of section 173(11) of the 1990 Act⁶.
9. In claiming that it is not unreasonable to require the full demolition of the extension, the Council also state that the appellants would continue to have the option to implement the 2017 planning permission. This may be so, but if this were to be carried through, it would effectively mean that a significant proportion of the works required to be demolished could be replaced on a like to like basis. To my mind, this approach would be perverse, absurd, disproportionate, and generally unreasonable.
 10. Having regard to condition 5 of the 2017 permission, I can understand why the Council are concerned about the possible creation of an unconditional planning permission. That said, no reason why the Council believe that the approved scheme was not substantially completed, and the works as a whole formed a continuous building operation, has been given. Indeed, this point is disputed by the appellants who indicate that the decision to create an undercroft garage with a terrace above was taken after the completion of the approved extension. In this respect, the appellants have drawn my attention to a letter from an individual who purports to be one of the builders involved. In the letter he states that "*the underground garage was added once the extension had been completed*".
 11. The appellants' claim is not backed up by any other documentary evidence, and the veracity of the builder's comments cannot be tested in an appeal determined by written representations. However, while this tends to reduce the weight to be attached to this part of the appellants' case, I am not inclined to attach a great deal of weight to the Council's unsubstantiated assertion either. What I do attach much more significance to though, is the 2018 appeal decision. In it, the Inspector observes that "*It was clear at my site visit that the construction of the permitted scheme is substantially complete*"⁷, but the additional work is referred to as "*proposed*"⁸. This strongly suggests to me that on the balance of probability the appellants' version of events is to be preferred to that of the Council.
 12. All this leads me to conclude that while the description of the application that gave rise to the section 78 appeal suggested a comprehensive scheme of works, there is a compelling case for viewing the flat roofed addition as a separate entity insofar as the enforcement action is concerned. The addition is not shown on the approved plans, and although it is attached to the main body of the extension, it did not appear to me to be an integral part of it. I regard it as potentially severable.
 13. In the light of the foregoing, and having regard to the works deemed acceptable by virtue of the 2017 planning permission, it seems to me that the circumstances of this case are such that a more pragmatic and equitable approach would be to correct the allegation so that it focuses on the flat roofed rear addition to the property and does not impinge upon the works approved in

⁶ The Council cite section 173(12), but this applies to the construction of a replacement building.

⁷ Appeal decision APP/Z4718/D/18/3197229 paragraph 8.

⁸ Ibid paragraph 14.

2017. I have the power to correct the notice, and I am satisfied that to do so in the manner indicated would not give rise to injustice to the parties. This measure would also necessitate consequent amendments to the requirements and the plan attached to the notice.

Appeal on Ground (c)

14. In order for the appeal to succeed on this ground it has to be shown that the matters alleged in the notice do not constitute a breach of planning control. Ground (c) is a legal ground of appeal, distinct from any planning merits. The Courts have held that the onus on proving it lies with the appellant(s).
15. As no case has been advanced in respect of the (now removed) outbuilding, and I have no information regarding it other than the description set out in the allegation, the onus that lies with the appellants in this respect has not been discharged. It has not been demonstrated that the erection of this structure did not constitute a breach of planning control.
16. The appellants' case includes an explanation of why the additional work was carried out. However rather than supporting the appeal on ground (c), the representations made in this respect are essentially directed at the merits of the development in question. They are not matters which carry weight in the context of the appeal on ground (c). And, given my conclusions in the previous section, the implications of the 2017 planning permission no longer have a direct bearing on the appeal on this ground either.
17. The appellants accept that the additional terrace and undercroft garage does not benefit from the 2017 permission. Nor, regardless of condition 5 attached to the 2017 permission, is it claimed that the addition constitutes permitted development under the provisions of the GPDO. Indeed, as the plans approved in 2017 indicate that the rear extension is 4m deep, the additional 5.3m attributable to the addition means that it would not fall within the parameters of Class A of Part 1 of Schedule 2 of the GPDO and so does not constitute permitted development.
18. In the light of the foregoing, in the apparent absence of any relevant planning permission, I find that the erection of the flat roofed rear addition constitutes a breach of planning control. Accordingly, therefore, the appeal on ground (c) fails.

Appeal on Ground (a) and the Deemed Application

19. The appeal is silent insofar as the merits of the (removed) timber outbuilding are concerned, nor has any information appertaining to this structure been put forward. Having regard to this, and as the reasons why enforcement action was taken against it have not been called into question, I see no basis for viewing it in a favourable light.
20. I consider the main issue is whether there has been any material change in the circumstances since the 1 May 2018 appeal decision.
21. No claim has been made that this is the case. I am mindful that since May 2018 the Kirklees Local Plan was adopted in February 2019 and prior to that a revised version of the National Planning Policy Framework (The Framework) was published in July 2018. Despite this, however, the approach towards development in the Green Belt, within Conservation Areas, and design has not

changed significantly. Likewise, judging from the previous Inspector's remarks, the main thrust of the current planning obligation remains the same. And, over and above all this, from what I saw at my site inspection, I see no reason to take issue with the findings of the previous Inspector, as set out in the section 78 appeal decision. My concerns are essentially the same and would not be overcome by conditions, including one on the lines of that suggested by the Council.

22. Two fallback positions have been identified by the appellant. The first concerns the backfilling and the erection of a detached garage related to the approved scheme. I accept that the approved freestanding garage would impact on openness to some extent, but as the mass of this structure is appreciably less than the flat roofed rear addition, I am unable to concur with the appellant's view that this fallback position amounts to a very special circumstance. It is not a matter to which I attach much weight.
23. The other fallback position concerns permitted development rights. As I have concluded that the flat roofed rear addition should be regarded as a separate entity, I consider that the rest of the extension at the rear of the house accords with the 2017 planning permission and, following on from that, condition 5, which effectively removes permitted development rights, still bites. In these circumstances I am not inclined to regard the second claimed fallback position as a weighty factor.
24. My overall conclusion is that there has not been any material change in the circumstances since the earlier appeal decision. Accordingly, therefore, the appeal on ground (a) fails and planning permission will not be granted on the deemed application.

Appeal on Ground (f)

25. This ground of appeal is directed at the requirement to remove the full rear extension. In the light of my findings regarding the extent of the notice, there is no need for me to consider this point further. Indirectly, therefore, the appeal on this ground succeeds to this extent.
26. I note that the appellants agree that if the notice is upheld, the only elements that should require removal are the rear terrace with undercroft garage and the timber outbuilding.

Appeal on Ground (g)

27. Although I propose to reduce the scope of the notice considerably, I appreciate that compliance with the notice will still have a disruptive effect on the appellants' home. However, while the personal circumstances that have been indicated are not matters I set aside lightly, I do not consider the 4 month compliance period insofar as the rear addition is concerned is unreasonably short. And, as noted above, the timber outbuilding has already been removed.
28. The appeal on ground (g) therefore fails.

Other Matters

29. I have taken into account all the other matters raised, but none are sufficient to outweigh the considerations that have led me to my conclusions.

Formal Decision

30. I direct that the enforcement notice be corrected:

A. In section 3 by the deletion of the allegation and its substitution by "The erection of a single storey flat roofed rear extension and a timber outbuilding with two octagonal roofs linked with a dual pitched roof."

B. In section 5 by the deletion of "demolish all extensions that project beyond the external walls of the original dwelling house (as hatched blue on the attached plan)" from the second requirement and its substitution by "demolish the single storey flat roofed rear extension".

C. By the deletion of the plan attached to the enforcement notice and its substitution by the plan attached to this decision.

D. By the deletion of "(shown in the vicinity of the area hatched black)" from the first requirement.

31. Subject to these corrections, I dismiss the appeal and uphold the enforcement notice. In the case of the appeal by Mrs L Smith (ref C/18/3218534), I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

D H Brier

Inspector



Plan

This is the plan referred to in my decision dated: 15 July 2019

by D H Brier BA MA MRTPI

Land at: 33 Wilshaw Road, Meltham, Holmfirth, HD9 4DZ

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