



Appeal Decision

Site visit made on 28 October 2019

by Thomas Bristow BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 November 2019

Appeal Ref: APP/Z5630/W/19/3231812

34 Gibbon Road, Kingston Upon Thames KT2 6AB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 as amended against a failure to give notice within the prescribed period of a decision on an application for consent, agreement or approval to details required by conditions of a planning permission.
 - The appeal is made by Mr Emile Al-Kirkhy of Omega Technologies Group against the Council of the Royal Borough of Kingston-upon-Thames.
 - The application Ref 17/12959/COND, dated 21 November 2017, sought approval of details pursuant to conditions 4, 7, 8 and 11 attached to planning permission Ref 15/12501/HOU granted on 4 May 2016.
 - The development proposed is the erection of a single storey detached building for ancillary use as a residential annexe in rear garden.
 - The details for which approval is sought are:
 - In respect of condition 4: details of datum levels (plans CD-101, 96912.0001)
 - In respect of condition 7: details of foundations and surfacing (plans CD-103, CD -104, CD-105, CD-106)
 - In respect of condition 8: details of east side boundary fence (plan CD-106)
 - In respect of condition 11: details of the removal of an existing hedge (plan CD-107).
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Decision

1. The appeal is allowed and the details submitted pursuant to conditions 4, 7, 8 and 11 attached to planning permission Ref 15/12501/HOU, granted on 4 May 2016, in accordance with the application dated Ref 17/12959/COND and the plans submitted with it, as given in the banner heading above, are approved.

Planning context

2. In 2016 the Council granted planning permission for the erection of a single storey detached building for ancillary use as a residential annexe in the rear garden of No 34 Gibbon Road (Ref 15/12501/HOU, the 'original permission'). That was subject to 11 conditions. Condition 2 specified the approved plans.¹ That followed an unsuccessful appeal in 2015 (an appeal against enforcement action was also made in respect of No 34, but has now been withdrawn).²
3. Application Ref 17/12959/COND, dated 21 November 2017, the subject of this appeal (the 'proposal' or 'subsequent application'), sought approval of details pursuant to conditions Nos 4, 7, 8 and 11 attached to the original permission.

¹ TP-100, TP-102 Rev-01, the supporting Design and Access Statement, Tree Report, Block Plan and Proposed Roof Plan & Elevations (although a reference number for the latter is not given, I understand that is plan TP-101).

² Respectively appeal Ref APP/Z5630/D/15/3002119 and APP/Z5630/C/18/3217036.

Those conditions were primarily justified by the Council on the basis of securing compliance with policies of the Core Strategy (adopted April 2012, the 'CS'). Condition 11, however, was justified on the basis of complementing original condition 6 to ensure the building would be used solely for ancillary use.

4. In so far as relevant in this case, the applicable provisions of CS policy DM10 in respect of character and local amenity are aligned with paragraphs 127(c) and (f) of the National Planning Policy Framework ('NPPF'). The appellant does not aver that there is inconsistency in that regard, nor that any of the requirements of the above conditions are inappropriate (I note the provisions of NPPF paragraph 55 in that respect).
5. The subsequent application was acknowledged by the Council via letter dated 11 December 2017. The Planning Practice Guidance ('PPG') explains how statute requires that an appeal under section 73 of the Town and Country Planning Act 1990 as amended (the '1990 Act') shall consider only the relevant disputed conditions. Whilst this appeal falls under section 78 of the 1990 Act, that is nonetheless a fair approach to apply here given the above context.³

Procedural matters

6. The details and plans in respect of which approval is sought are set out in the banner heading. Some contain extraneous information, i.e. that which is unrelated to conditions 4, 7, 8 and 11 and the rationale for those conditions. Given my reasoning above, I have treated such information as purely contextual or illustrative rather than determinative (or a means of substituting an alternative scheme). Conditions 4, 7 and 11 are pre-commencement conditions within the terms of article 35(1)(a)(ii) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 as amended (the 'DMPO'), in respect of which reasons for those conditions being pre-commencement must be stated, as with all other reasons for conditions, clearly and precisely.
7. Some site clearance, importing of materials, and digging out of footings has taken place within the rear garden of No 34, the latter consistent with the plans put forward in relation to condition 7. As reasoned above, however, condition 1 is not within the scope of application Ref 17/12959/COND, and compliance therewith is a matter which falls to be resolved between the main parties as necessary.
8. There is no evidence before me that the Council have actively considered the information submitted by the appellant in support of application Ref 17/12959/COND, over a period now just shy of two years. The correspondence trail submitted by the appellant indicates that he has repeatedly attempted to establish the Council's position, via extensive correspondence. On the information before me, the Council has at no point given reasons for their

³ Reference ID: 21a-031-20180615. I note, in contrast, that conditions 1, 2, 3, 5, 6, 9 and 10 attached to the original permission either do not directly require that further details are agreed by the Council (or relate to other information).

failure to consider the application, whatever those reasons may be.⁴ Despite my request for comment, the Council have not submitted anything substantive at appeal. In that context it is challenging to establish what, if anything, is in dispute between the main parties.

Main issue

9. Against the context set out above, I consider that the main issue is whether or not the information submitted via application Ref 17/12959/COND in relation to conditions 4, 7, 8 and 11 is adequate, accurate and consistent with the terms of the original application (and thereby secures a policy compliant proposal). I address those points condition by condition.

Reasons

Condition 4

10. Condition 4 of the original permission is: 'Notwithstanding the details shown on the approved plans, no development shall commence until a plan detailing the existing datum levels of the site at the boundaries with neighbouring properties has been submitted to and approved in writing by the local planning authority. Thereafter the development hereby approved shall be constructed in such a way so that no part of it shall be greater than 2.5m above the recorded land levels at the boundaries with neighbouring properties'.
11. Section plan TP-101 supporting the original permission illustrates how the building would be set at a level approximately 0.5m below existing ground level. Although the height of the building in itself is shown as three metres, relative to the ground level of neighbouring properties it would therefore appear lesser; the section plan illustrating how that would result in a declining ground level relative to the rear elevation of No 34.
12. The submitted plans related to condition 4 are CD-101 and 96912.001. I have noted above how footings have been dug out. Nevertheless, broadly, the ground level where the building proposed would be situated does not appear to have been meaningfully altered recently. That area is mostly of solid compacted earth. In places it is overgrown with vegetation which would have taken some time to become established. The ground level is consistent with that of the gravel boards at the base of the fences either side of the gardens of Nos 32 and 36 (the height of which is accurately marked on plans CD-101 and 96912.001). Brickwork courses of the rear boundary wall were consistently weathered, rather than suggesting levels had changed over time. Both plans CD-101 and 96912.001 show that the ground here is more-or-less flat, as opposed to the change proposed via original plan TP-101.⁵
13. I am therefore of the view that those plans are adequate and accurate, relative to their purpose as a benchmark for future assessment of building height. They would supplement, rather than replace, the plans approved in respect of

⁴ The only correspondence before me from the Council is an acknowledgement of the need to prioritise work in this respect dated 11 April 2019.

⁵ Albeit that the domestic surface finishes of shingle, chippings and AstroTurf have largely been cleared.

condition 2 of the original permission. As stated above, the approved plans in respect of condition 2 show that the building would reach a maximum height of 2.5m relative to neighbouring ground level.

Condition 7

14. Condition 7 of the original permission is: 'The development shall be completed in accordance with the following details which shall have been submitted to and approved in writing by the local planning authority, before building operations commence:
 - a. Further details of foundations of the annexe building
 - b. Details of permeable/ porous surfaces and the decking around the Picea Tree.'
15. Importantly, the justification for condition 7 is given as safeguarding the wellbeing of the Picea, and thereby the character and appearance of the area. Any foundations would, in any event, have to comply with the relevant provisions of building regulations.⁶ Moreover condition 2 of the original permission required that development must be undertaken in accordance the 'Tree Report'. That, as I understand it, is a reference to the Arboricultural Report prepared by Harper Tree Consulting dated 5 February 2011. The Picea (spruce) is therein identified as specimen 'T1', and falls within the garden of No 32 close to the boundary with No 34.
16. The plans related to condition 7 are CD-103, CD-104, CD-105 and CD-106. All, barring CD-106, a schematic of foundations, decking and fencing, show the footprint, foundations and decking of the proposed building making room for the root protection area of T1 defined in the Arboricultural Report. That, barring the slightest of transgressions, is in line with the approach to safeguarding the wellbeing of T1 in the Arboricultural Report. Moreover condition 10 of the original permission requires the agreement of, and adherence to, a detailed arboricultural method statement during construction. That overlaps with the provisions of condition 7, and in combination with the details submitted pursuant to condition 7, would in my view would ensure appropriate protection for T1.⁷
17. As accurately observed by a nearby resident, the plans related to condition 7 appear to show a taller building than originally approved. Plan TP-101 shows that the proposed building would appear as 2.5m high above neighbouring ground level, however plan CD-103, in particular, shows a building depicted with a height of 3.5m above finished floor level (which, with a set-down of approximately 0.5m would appear instead as 3m near site boundaries).⁸ The height of the building proposed in the plans related to condition 7 are therefore inconsistent with the original permission.

⁶ A number of the plans contain technical details as might typically be expected of construction drawings related to section 2E of Building Regulations Approved Document A: Structure.

⁷ With regard to the duty placed upon me by section 197 of the 1990 Act.

⁸ There is also some variance in that figure depending on which elements of the structure are to be included or discounted; plan CD-104, for example shows a height of 3.775m if taken from the foundation level.

18. Nevertheless that is not critical. The rationale for condition 7 is the protection of T1. Plans CD-103, CD-104, CD-105 and CD-106 are intended to fulfil that purpose. They are not intended, nor within the confines of that condition could, update the scheme as originally agreed or substitute a new set of plans in place of what has been approved. As noted above conditions 2 and 4 both require that the proposal is for a building appearing as 2.5m in height from neighbouring ground level. In that context I have treated the height of the building shown on the plans submitted in respect of condition 7 as extraneous, compared to the purpose of those plans seeking to accord due protection to T1. I therefore conclude that the information in support of condition 7 is adequate, accurate and consistent with the terms of the original application (other than in respect of building height).

Condition 8

19. Plan CD-106 shows two sections of fencing proposed to the south-east and east of the proposed building. At 2.052m in height they would be slightly below the height of the original scheme. Nevertheless they would still provide significant screening from the perspective of No 36 and within its garden, exceeding the height of the fence current in place. There would only be glimpsed views through the spacing between the larch battens proposed, which may in time to be further impeded by planting or other fencing. The fence proposed represents a modern and sensitive design which, to my mind, strikes an appropriate balance between ensuring privacy, preventing an overbearing presence, and softening the appearance of the building by virtue of the use of natural materials with a fine texture. I therefore conclude that the details shown on plan CD-106 are adequate, accurate and consistent with the terms of the original application.

Condition 11

20. Based on my site visit observations plan CD-107 accurately illustrates the hedge which stands between No 34 and the appeal site, which condition 11 of the original permission describes as 'dissecting the garden space'. The proposed site plan shows how that hedge would be removed, thereby allowing for open access between the outside space immediately to the rear of the host property and area closer to the appeal site. Whilst not in itself determinative, it is nevertheless legitimate to consider physical connection as assisting in ensuring that the proposed building remains in ancillary use as intended.
21. However, as with details submitted in respect of condition 7, plan CD-107 goes beyond the terms of condition 11. It indicates proposed landscaping and the location of what appear to be replacement trees. Again in that latter respect, and in the absence of a requirement via condition, I have treated that information as indicative. It would also not be reasonable to hold the appellant to such a condition, which was not necessary originally. I therefore conclude, in so far as it relevant to the removal of the existing hedge, plan CD-107 is adequate, accurate and consistent with the terms of the original application.

Summary and conclusion

22. I have found that the details shown on the plans submitted in respect of application 17/12959/COND are adequate, suitably accurate and consistent with the terms of the original application (notwithstanding occasional extraneous information or inconsistencies as set out above). Consequently, and given my reasoning in paragraph four of this decision, I conclude that the appeal should be allowed and the submitted plans approved.
23. However if development has been commenced, there is the question as to whether that would mean that pre-commencement conditions could not be complied with (regardless of the information subsequently submitted). In the specific circumstances here, my view is that would not be so.
24. Conditions 4, 7, 8 and 11 do not go to the heart of the issues on which the acceptability of the original scheme turned. The information submitted via the subsequent application does not substitute for plans originally approved. It is the clearly stated intention of the appellant to implement an identical proposal to the original scheme. It is difficult to see how any appreciable harm would result now from implementing the proposal.
25. Moreover, as set out above, the appellant has actively and persistently sought to address the requirements of relevant conditions. There is no evidence that the Council gave substantive consideration to the details submitted over an approximate period of two years. It would seem to me to be unfair to effectively penalise the appellant for such inaction.
26. Moreover neither in the officer report related to the original application, nor in the decision notice, does there appear to be specific justification for conditions 4 or 7 being necessarily pre-commencement within the terms of the DMPO. The rationale for condition 11 in that respect is, furthermore, that such details are required before commencement 'because they [existing trees] upset on its construction'. That is neither clear nor precise.
27. I do not suggest that conditions 4, 7, 8 and 11 are unnecessary or invalid (paragraphs four and nine of this decision set out to the contrary). However section 79(1) of the 1990 Act enables me to deal with the application as if it has been made to me in the first instance, which appears to be very much the case here in the absence of anything of substance from the Council. In that context it is not unreasonable to consider that although the aims of those conditions are sound, the means by which they operate are not; each could, in my view, have been alternatively phrased so as to enable at least a start to be made without awaiting further approval(s).⁹

⁹ In respect of condition 4 work could have proceeded up to a certain point before confirmation of finished floor levels was required (with reference to plan TP-101). In respect of condition 7 work outside the root protection area of T1 could have been undertaken before further details of foundations and surfacing needed to have been submitted. And condition 11 could have been a practical matter to be addressed through construction and resolved before the proposed building was first brought into use as such.

28. For the above reasons, having taken account of the development plan as a whole, the approach in the NPPF, the terms of the original permission, relevant statutory provisions, and all other relevant material considerations, I conclude that the appeal should be allowed.

Thomas Bristow

INSPECTOR