



Appeal Decision

Site visit made on 20 February 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 29 May 2020

Appeal Ref: APP/C3620/X/19/3234236

North Downs House, Old Reigate Road, Dorking RH4 1NT

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development [hereafter referred to as "LDC"].
 - The appeal is made by Mr & Mrs G Muir against the decision of Mole Valley District Council.
 - The application Ref MO/2018/2050/PCL, dated 26 November 2018 was refused by notice dated 1 February 2019.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as '*Single storey rear extension*'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The relevant date for the determination of lawfulness is the date of the LDC application, i.e. 26 November 2018. The matter to be decided upon, therefore, is whether the development, if carried out at that date, would have been lawful. The determination is to be made against the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) as subsisted at the time of the application which, hereafter, I shall refer to as "the GPDO".

Main Issue

3. The legislation, under Article 3, Schedule 2, Part 1, Class A of the GPDO, grants planning permission for the enlargement, improvement or other alteration of a dwellinghouse.
4. The Council considers that the proposed single storey extension would fall within the parameters of Class A and, having firstly assessed the development purely in terms of Class A's provisos and limitations, I concur with this approach. However, the two main parties differ in opinion over whether the site's planning history disqualifies the existing dwelling from enjoying normal householder permitted development entitlement.
5. My decision will involve an assessment in the above regard and, on this basis, the main issue in this appeal is whether the Council's decision to refuse the

LDC was well founded, based strictly on the evidential facts and relevant planning law.

Reasons

Condition precedent

6. A proposed development would be considered lawful if it is permitted under the GPDO or it is fully compliant with a planning permission.
7. The dispute in this case relates to the terms and conditions of a previous planning permission (MO/83/1014), for a replacement dwelling at the site, granted in 1983.
8. The said permission has attached three conditions requiring, prima facie, that before development commences, a landscaping scheme (condition 4), a planting scheme incorporating a new hedgerow and several trees (condition 9), and details and/or samples of the external materials to be used (condition 5), shall be submitted to the local planning authority for subsequent written approval.
9. Although the dwelling was erected there is no evidence to show that any of the above conditions were discharged. Accordingly, given this, the matter as to whether the approved development was lawfully implemented arises, and this is particularly important given that a further condition (6) imposed serves to remove PD rights by prohibiting any extensions being added to the dwelling.
10. It was established in *R (Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin) that a development as a whole will only be unlawful if the condition breached goes to the heart of the planning permission. It is clear from this judgement that if the condition at issue is concerned with some aspect of the development which is of fundamental importance, then it may be seen as a 'condition precedent', the breach of which may render the entire development unlawful.
11. The appellant takes the view that conditions 4, 5 and 9 all go to the heart of the planning permission granted and, given that their requirements were apparently ignored and the development was implemented regardless, the dwelling was not built pursuant to the permission. Consequently, the appellant considers that the permission was not lawfully implemented.
12. The Council, however, in considering that the conditions do not go to the heart of the permission, takes the opposite view and thereby reasons that condition 6 holds good. Accordingly, the Council considers that PD rights remain prohibited at the site by way of the 1983 permission.
13. In this particular case I find that all three conditions are worded so that it was clear that their requirements needed to be discharged before the approved development went ahead. Accordingly, they must all be categorised as constituting pre-commencement conditions.
14. The importance of Condition 9 becomes apparent from the site's location. It is situated in an exposed location within the Surrey Hills Area of Outstanding Natural Beauty, and the reason given for the condition's imposition on the decision notice is stated as:

'To provide a screen along the exposed boundary of the site that has already largely been excavated in order to reduce the visual impact of the development as soon as possible.'

15. The above wording is unusual and implies, with some apparent urgency, that 'a new hedgerow and several trees', as part of a planting scheme is to be agreed with the local planning authority. The fact that this condition is additional to the planting scheme required by way of the separate standard landscaping condition elevates its importance and I regard it as particularly significant to the planning permission granted.
16. The Council, though, takes issue with its own condition, saying that it is not precise and also indicates that the hedgerow and trees are shown on the approved plans. However, the relevant plan site plan shows only a few brief annotations in this regard which can in no way be seen as amounting to an agreed planting scheme. The condition also indicates that the agreed scheme shall be implemented and maintained, and I am satisfied that its requirements, if addressed, would have been workable and effective.
17. I acknowledge that the requirement for details to be submitted and approved in respect of external materials and general landscaping is both reasonable and necessary in such circumstances and, moreover, these details are commonly requested by way of pre-commencement conditions imposed on planning permissions involving new dwellings. However, I consider that conditions 4 and 5 in this regard, relative to condition 9, are of lesser importance given the site's contextual setting.
18. Whilst, therefore, a judgement as to whether the breach of conditions 4 and 5 goes to the heart of the permission is more finely balanced I consider that condition 9 penetrates the heart of the 1983 permission and thereby represents a condition precedent in this instance.
19. Clearly, the fact that all three conditions were ignored compounds the totality of the breach but, even so, I consider that the failure to address the requirements of condition 9 alone means that the entire development was implemented unlawfully. Given this, the 1983 permission granted has lapsed and condition 6, removing PD rights, no longer holds relevance.
20. I must therefore conclude on this point that the residential development implemented was unauthorised but, as I am not aware of any enforcement action having been taken by the Council, the replacement dwelling has, due to the passage of time, now seemingly acquired immunity from such action.

Permitted development

21. In order to be permitted development, a proposal must meet all the limitations and conditions, and it is therefore essential that any proposed household development is considered in the context of the permitted development rules as a whole in order to determine whether it benefits from PD rights and therefore does not require an application for planning permission.
22. Article 3(5) of the GPDO provides that the planning permissions granted by Schedule 2 of the GPDO 2015 do not apply if the building operation or use is unlawful. This aims to prevent unlawful development from acquiring PD rights, so that, for example, an unlawful dwellinghouse could not be extended under Part 1, Class A.

23. By reason of the above, although from the evidence the unlawful development is now immune from remedial action under planning law, no householder permitted development rights can be claimed in connection with the dwelling built. As a result, the rear extension to the dwelling proposed in the LDC cannot be permitted by the GPDO.
24. Instead, the proposed development is that for which express planning permission is required, and that could only be granted on application made to the local planning authority in the first instance. Accordingly, should the appellant wish to further the proposal a dialogue would best need to be opened with the Council.

Conclusion

25. For the reasons given above I conclude, on the evidence available, that the Council's refusal to grant a LDC was well founded, and the appeal does not succeed. I shall therefore exercise my powers under section 195 (3) of the 1990 Act as amended.

Timothy C King

INSPECTOR