



Appeal Decision

Site visit made on 13 February 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 03 June 2020

Appeal Ref: APP/B0230/C/19/3229824

Land at 6 Winton Close, Luton, Bedfordshire LU2 7BJ

- 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 Mohammed Taj Ghaus against an enforcement notice issued by Luton Borough Council.
 - The enforcement notice was issued on 18 April 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, the erection of a second floor rear dormer extension on the Land, ("Extension")
 - The requirements of the notice are to:
 1. Demolish the extension.
 2. Remove all associated building materials and rubble and waste materials arising from compliance with step (1) above from the Land.
 - The period for compliance is three calendar months after this Notice takes effect.
 - The appeal 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 the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Summary of Decision

1. The enforcement notice is varied. Subject to this variation the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matter

2. There is some confusion as to whether the appellant still wishes to continue with the Ground (c) appeal. When lodged, it was indicated on the appeal form that a submission under Ground (c) was being made to show that the rear dormer roof extension did not require planning permission. However, subsequent to the initial grounds being outlined it would appear that this line of reasoning was not furthered. The appellant's main Statement of Case, makes no reference to such and, although the Council in its Statement addresses the Ground (c) case advanced, the appellant's final comments states "Nevertheless, the Appellant no longer relies on ground c."
3. I have not seen any official notification that the Ground (c) appeal was being withdrawn. Nonetheless, so that the appellant's case is covered in full, as originally advanced, and in order that no aspect of the case is left unaddressed, I have made an assessment and reached a decision on the Ground (c) appeal.

Background

4. The appeal site, involving a two-storey dwellinghouse, has a protracted recent planning history. There have been a number of planning applications since April 2016 when planning permission was granted for the erection of a two-storey front and single-storey side extension, with the raising of the dwelling's main roof by 290mm, and also the heightening of the roof to the single storey rear extension (ref 16/00031/FUL).
5. This scheme was subsequently implemented, whilst a flat-roofed dormer roof extension to the rear roof slope was also erected at the time. A retrospective planning application was then submitted in an attempt to lawfully retain the latter element. This was subsequently refused planning permission and then was unsuccessfully appealed (*APP/B0230/W/17/3187949*) by decision letter dated 27 April 2018.
6. The above appeal decision letter covered a series of developments to the dwelling, both proposed and retrospective. One of these partly involved a smaller, modified rear dormer extension, but this was also dismissed (*APP/B0230/D/18/3197253*).
7. The appointed Inspector's reasoning was that the dormer, as built, and also the modified proposal, has/would have a harmful effect on the appearance of the area, and would conflict with policies LLP1, LLP19 and LLP25 of the Council's Local Plan.
8. The rear dormer extension remains in situ and, in light of the above decisions, the Council saw fit to issue an enforcement notice requiring for its removal.
9. Just prior to the notice being issued the Council, on 2 April 2019, granted planning permission (ref 19/00436/FULHH) for 'Alterations to front elevation and front roof arrangement to form hipped roof.'

The Appeal on Ground (c)

10. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control. The onus of proof on matters of fact is on the appellant, and is on the balance of probabilities.
11. Ground (c) assumes the fact of the original development as it occurred at the time of the enforcement notice's issue, so it can only succeed on this basis if that original development does not now amount to a breach of planning control due to a change in the planning control situation.
12. Both main parties refer to the consideration that the dormer could have been constructed under a householder's permitted development (PD) entitlement under Class B of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended, and, once substantially completed, the works relating to planning permission 16/0031/FUL, could then have been lawfully undertaken. However, the Council says that, as the rear dormer extension and front extension were implemented at the same time, and as part of a single operation, no permitted development rights can be claimed.
13. The appellant says that there is nothing in the GPDO or case law which principally restricts the right to carry out PD at the same time as operational development, previously approved, even though the resultant roof space of the

- combined extensions would be over the cubic threshold allowance under Class B.
14. The legislation indicates otherwise. As the dormer extension was erected at the same time as the works carried out to raise the height of the main roof's ridgeline, along with the development at the front of the dwelling, the dormer cannot be considered in isolation, as the development implemented constitutes the extensions in their entirety. Moreover, proviso B.1(b) of Class B, which states that development is not permitted under Class B if '*any part of the dwellinghouse would, as a result of the works, exceed the height of the highest part of the existing roof*' was contravened as the 'existing roof' must refer to that existing immediately before the carrying out, in relation to that building, of development as described in Class B. This requirement is explained in the GPDO's Interpretation section. Accordingly, although the appellant refers to the volume of the roof extension, in relation to proviso B.1(d), the cubic metres limitation is not a consideration should proviso B.1(b) be contravened.
 15. In order to be permitted development, a proposal must therefore meet all the limitations and conditions, and it is therefore essential that any proposed householder development is considered in the context of the PD rules as a whole in order to determine whether it benefits from PD rights and therefore does not require an application for planning permission. If any of the limitations, conditions, exemptions or provisos are exceeded, then the whole development is unlawful, not just that element in excess of PD rights. Judgement in this respect was brought in the case of *Garland v MHLG* [1968] 20 P&CR 93.
 16. Article 3(5) of the GPDO confirms the above and provides that the planning permissions granted by Schedule 2 of the GPDO 2015 do not apply if the building operation or use is unlawful.
 17. The appellant makes reference to the case of *Sage v SSETR & Maidstone BC* [2003] UKHL 22. However, it is not clear how this judgement helps his case. Here, it was held that when an application was made for planning permission for a single operation, it was made in respect of the whole of the operation. If a building operation is not carried out, both internally and externally, fully in accordance with the planning permission, the whole operation can be considered unlawful.
 18. In summary, no householder PD rights under Class B can, in the circumstances, be claimed in connection with the dwelling. Instead, the development at issue 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.
 19. The appeal on Ground (c) therefore does not succeed.

The Appeal on Ground (a) and the deemed planning application (DPA)

Main Issue

20. With reference to the stated reasons for serving the enforcement notice the main issue is the development's effect on both the character and appearance of the host dwelling and also the surrounding area.

Reasons

21. In light of the previous appeal decisions letter, concerned in part with the rear dormer extension, as built, the Inspector comments that it occupies almost the whole extent of the roof slope, being only slightly inset from the slope's limits. He indicates that, with its bulk being out of character with the host dwelling, it represents an incongruous addition.
22. I have not received any indication that the said dormer extension has been altered since the previous Inspector visited the site and issued his decision.
23. Although the appellant acknowledges the Inspector's decision, and includes the decision letter as an Appendix, he feels that, due to planning permission 19/00436/FULHH having since been implemented, which has removed the front gable features (as approved and constructed under permission 16/00031/FUL) and has created a hipped roof, that the circumstances have now changed which would now allow for a reassessment as to the acceptability, or otherwise, of the rear dormer extension, and its overall impact.
24. Whilst the appearance of the front of the dwelling might have been altered from that witnessed by the previous Inspector this does not alter the rear dormer's physical appearance or the materiality of its setting. Further, the Inspector's comments as to the dormer being highly visible within the surrounding area and easily seen from a number of surrounding properties remain completely pertinent. I can confirm this from my own site visit observations where I found it to be a prominent and overbearing form of development, and particularly at odds with the objectives and requirements of policies LLP19 and LLP25 of the Luton Local Plan (LP) which require, amongst other things, that domestic extensions to dwellings are relatively proportionate to the host dwelling and appropriate in terms of scale, mass and design.
25. In the above context I find that the dwelling's remodelled frontage has not resulted in a material change in circumstances that realistically affect and ameliorate the rear dormer extension's physical impact. Accordingly, I see no reason to depart from the previous Inspector's findings, reasoning and conclusions.
26. I thereby conclude that the development is both harmful to the character and appearance of the host dwelling and its surrounding area, contrary to the objectives and requirements of LP policies LLP1, LLP19 and LLP25.
27. For the above reasons, and having had regard to all matters raised, the appeal fails and the planning application deemed to have been made under section 177(5) of the 1990 Act as amended is refused.

The Appeal on Ground (f)

28. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. S173(4) provides that the purpose shall be either to remedy the breach of planning control or to remedy any injury to amenity. In this case it would appear from the requirements of the notice that its primary purpose is to remedy the breach by restoring the land to its condition prior to the breach taking place.

29. The appellant indicates that he is willing “to reconstruct the dormer under permitted development.” However, no definitive and articulated scheme that would fall within the necessary parameters is before me to this end.
30. In *Ahmed v SSCLG & Hackney LBC* [2014] EWCA Civ 566, the question for the court was whether the Inspector had erred in law by failing to consider an “obvious alternative” in accordance with the principles discussed in *Tapecrow Ltd v FSS* [2006] EWCA Civ 1744, [2007] 2 P&CR 7 and *Moore v SSCLG* [2013] JPL 192. The “obvious alternative” relied on it that case would have been the grant of planning permission for the scheme previously authorised, departure from which had resulted in the breach of planning control which was the subject of the enforcement notice. Comparing this to the current appeal the obvious difference is that there is no such obvious alternative in the form of a previously permitted scheme. Further, as mentioned, neither has any obvious alternative been put forward for which the appellant might attempt to demonstrate compliance with relevant PD limitations.
31. In *Tapecrow* the judge observed that the Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in both planning and amenity terms. However, the judge commented that it is not for the Inspector to seek out solutions; instead it is the appellant’s responsibility to deal with this in the submissions in support of the appeal. The judge continued, indicating that if the Inspector, on consideration of the submissions and in light of the site view, considers there to be an obvious alternative which would overcome the planning difficulties, and at less cost and disruption than total removal, he should feel free to consider it.
32. As regards the fallback issue the appellant also refers to the case of *Mansell v Tonbridge & Malling BC* [2017] EWCA Civ 1314. Here Lindblom LJ confirmed the legal considerations in determining the materiality of a fallback position as a planning judgement related to the basic principle that for a prospect to be a “real prospect” it does not have to be probable or likely; instead, a possibility will suffice. However, he also mentioned that in some cases a degree of clarity and commitment may be necessary, and this will always be a matter for the decision maker’s planning judgement relating to the particular circumstances of the case in hand.
33. I find in this particular instance that the somewhat convoluted planning history attached to the site requires for some meaningful clarity and commitment, and the mere indication that modifications could be made to allow the dormer extension to fall within PD limitations, with no drawings nor details before me to illustrate such a scheme, fails to satisfy this criteria. Apart from the proposed modified dormer extension, reduced in dimension, but still dismissed on appeal in April 2018, I have not had sight of any other alternative proposals in this regard.
34. The appellant also considers that there is no public benefit to require the demolition of the rear dormer extension. He comments that, as the previous Inspector was not required to adjudicate on the demolition of the dormer extension – no enforcement notice had been issued at that time – its demolition is a material consideration to now be taken into account. However, given my findings and the fact that the purpose of the enforcement notice is to remedy the breach I am satisfied that the notice’s requirement to demolish the flat-roofed dormer extension is justifiable.

35. Finally, the appellant comments that, following compliance with the enforcement notice's requirements, the dwelling would be lawful, PD rights could be engaged and the dormer could be reconstructed. My remit is to assess the current appeal, taking into account legal principles, evidential fact and the planning merits and/or impacts arising. Having taken into account these factors, and pursuant to my decision, the appellant must decide how best to proceed, and indicates a desire to open a dialogue with the Council. Accordingly, I address this matter in the Ground (g) appeal below.
36. In light of my findings the appeal under Ground (f) does not succeed.

The Appeal on Ground (g)

37. The appeal on ground (g) is that the period for compliance with the notice falls short of what is reasonable. The appellant considers that a three month period is insufficient time to carry out the steps and believes that a more reasonable period for compliance would be six months.
38. At my site visit I noted that there is a considerable amount of scaffolding attached to the front of the dwelling as a result of building works carried out and, apparently, still to be completed. Given the situation, and on the basis that a dialogue with the Council might take place on the possibilities of an alternative solution being arrived at, I am satisfied that the requested period of six months would be appropriate in the circumstances.
39. The appeal, therefore, succeeds to that extent, and I shall vary the enforcement notice, accordingly.

Overall Conclusion

40. I have found that planning permission is required to lawfully retain the development, that the DPA should be refused, and that, in the absence of any obvious and detailed alternative scheme, there is no identifiable fallback that the appellant can rely upon. However, taking everything into account, it would not be unreasonable to extend the compliance period in accordance with the appellant's request.

Formal Decision

41. It is hereby directed that the enforcement notice be varied by deleting the words "three calendar months" from its paragraph 6 and substituting them with the words "six calendar months."
42. Subject to this variation the appeal is dismissed and the enforcement notice is upheld.

Timothy C King

INSPECTOR