



Appeal Decision

Site visit made on 21 July 2020

by JP Roberts BSc(Hons) LLB(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 August 2020

Appeal Ref: APP/L1765/C/18/3214144

Barclays, Main Road, Littleton, Winchester SO22 6QS

- 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 Michael Culhane against an enforcement notice issued by Winchester City Council.
 - The enforcement notice was issued on 18 September 2018.
 - The breach of planning control as alleged in the notice is:
Without planning permission the erection of a detached building comprising of two flats and a double garage ("the Building") in the approximate position hatched blue on the attached plan.
 - The requirements of the notice are:
 1. *Cease the residential use of the flats as independent dwellings within the building.*
 2. *Disconnect all services and utilities from the building.*
 3. *Demolish the building and remove all associated waste materials from the land.*
 - The periods for compliance with the requirements are:
Step 1 – one month.
Steps 2 and 3: six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a),(b),(f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be corrected by the deletion of the words "erection of a detached building comprising of" and their substitution with the words "alteration and extension of a double garage to provide" and varied by the deletion of requirement 3 of the notice, and its substitution with the words "Alter the building to restore to its condition as a double garage before the breach took place, as shown on the plan attached to this decision, and remove all associated materials arising from the alterations from the land." I also direct that the enforcement notice be varied to delete the two periods for compliance and to replace with them with a single period of 8 months. Subject to these corrections and variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal on ground (b) – that the matters alleged in the notice have not occurred

2. Planning permission was granted by the Council on 16 June 2016 for the extension and re-modelling of an existing double garage to create a triple garage with home studio/office space above. The approved works show a building which is externally similar to the building as constructed but with a

- different arrangement of doors and windows. Internally the arrangement as built is more markedly different from what was approved; a self-contained unit of accommodation has been provided on the ground floor, in place of a store and enlarged garage, and a separate unit of accommodation has been provided on the first floor in place of the approved office/studio.
3. The planning permission granted was for a triple garage and a home office/studio. That is not what has been constructed; instead a double garage has been created, with two units of accommodation, one on each floor. Although the appearance of the building is very similar to what was approved, the provision of the double garage and two units of accommodation is materially different from what was approved.
 4. However, the appellant contends that the allegation is incorrect and that the resultant building results from the extension of an existing building. On my visit I saw that parts of the original garage remain; the whole of the rear wall of the garage is visible, and a part of the side wall is visible from the interior of the garage where it has not been covered over with fire-resistant boarding. The original concrete garage floor remains in situ. It is a question of fact and degree as to whether new work is so extensive, and the remaining structure so minimal, that a new building could be said to be created. However, I do not consider that this is the case here; the new building has been built above and to the side of the original garage, and thus the new works constitute alterations and extensions of the double garage, rather than the erection of a new building.
 5. Thus, the allegation is incorrect, but I consider that no injustice would be caused to the appellant if I were to correct the notice to refer to the alteration and extension of the garage.
 6. The appellant also argues that what has been provided is not two flats, but two units of holiday accommodation. The distinction between dwellings and holiday cottages has been the subject of several court cases, the leading case being *Sheila Moore v Secretary of State for Communities and Local Government and Suffolk Coastal District Council* [2012] EWCA Civ 1202. The Court of Appeal held that it was not correct to say either that using a dwelling for commercial holiday lettings would never amount to a material change of use or that it would always amount to a material change of use. Rather, in each case it would be a matter of fact and degree and would depend on the characteristics of the use as holiday accommodation.
 7. In this case, the two units are small, wholly self-contained units of accommodation, most likely to be let out to couples, occupying them as a single household. Their small size, and the number and type of occupiers is likely to result in occupation that would be very similar in character to that of a family home. Although the appellant's evidence suggests that there are a significant number of Airbnb bookings for each of the units, there is nothing that indicates to me that the use of the units is materially different from that of dwellinghouses.
 8. The appellant suggests that the living accommodation is ancillary to the use of the main house. However, it is hard to see how this is made out; the use as Airbnb accommodation cannot be ancillary, as there is no functional or familial relationship between the occupiers of Barclays and the units of

accommodation. I therefore consider that the allegation relating to the two flats is correct.

9. Accordingly, the appeal on ground (b) succeeds in part, and I shall correct the notice to refer to the actual breach.

Appeal on ground (a) – that planning permission should be granted

Main Issues

10. The main issues are:

- i) whether the flats would accord with the Council's housing strategy for the area;
- ii) the effect of the development on highway safety, and
- iii) the effect of the development on protected habitats of the Solent.

Reasons

Housing strategy

11. The deemed application for planning permission is restricted to the development subject of the notice as I have corrected it, rather than the way the appellant has formulated it in his grounds of appeal.
12. The site lies in the countryside as defined in Policy MTRA4 of the Winchester District Local Plan (DLP) Part 1, where only specified types of development will be permitted, which do not include new dwellings. The flats are therefore in conflict with that policy. Policy DM11 of the Winchester DLP, Part 2 also provides that new permanent dwellings will generally only be permitted in the countryside to support existing agricultural/forestry activities on well established agricultural or forestry enterprises. The two flats conflict with this policy.
13. The notice alleges a conflict with Policy DM3 of the Winchester DLP Part 2, but that deals with the extension and replacement of smaller dwellings, which does not apply here. Accordingly, there is no conflict with this policy.
14. Whilst I am treating the deemed application as one for flats, it is nevertheless appropriate for me to consider whether a condition restricting their use to holiday accommodation would be appropriate, as this is how the flats have been used, and is how the appellant intends them to be used.
15. The Council accepts that Policy MTR4A provides a general presumption in favour of holiday accommodation but says that, ideally, business uses should be within existing buildings via conversions, but I do not agree that this is how the policy should be interpreted. The policy includes, as one of the exceptions to the approach of restraint, proposals for the reuse of existing rural buildings for employment, tourist accommodation, community use or affordable housing. But it also includes a separate category of small-scale sites for low key tourist accommodation appropriate to the site, location and the setting, subject to meeting a number of development management criteria, all of which would be met in this case. Neither the policy nor the supporting text say anything further about a sequential approach.

16. I consider that the accommodation involved here is small-scale and low key, and, having regard to the tacit acceptance by the Council of a building of similar size and appearance, that it is appropriate to the site, location and setting. Thus, holiday accommodation would not conflict with Policy MTR4A.
17. I therefore conclude that the two flats, subject to a holiday use restriction, would not conflict with the Council's housing strategy or with the policies referred to above.

The effect on highway safety

18. Occupiers of the flats use the single access off Main Road shared by the occupiers of Barclays, immediately adjacent the access to St Swithun's Cottage, the neighbouring dwelling to the north.
19. I saw on my visit that whilst visibility to the north was good, visibility to the south was impeded by vegetation growing on the roadside bank. Low growing shrubbery on the bank had been recently cut back and a taller laurel showed evidence of recent branch removal. Even so, the visibility to the nearside carriageway edge was still restricted and at 2.4m back from the carriageway edge, I judged it to be significantly less than the 43m which the Highway Authority argues is necessary to meet the advice in Manual for Streets.
20. The appellants contend that a reduced "X distance" of 2m is appropriate in this case. Manual for Streets 2 says that a 2m X distance may be considered in some slow speed situations when flows on the minor arm are low, as is the case here, advice which it says is applicable to lightly trafficked rural lanes. It warns of the prospect of vehicles protruding into the carriageway, but as there is good visibility to the right, it allows adequate time for approaching vehicles to slow or come to a stop. Thus, I consider that in this case, such protrusions would be unlikely to result in any material harm to highway safety.
21. The Highway Authority is concerned that a northbound car overtaking a bike or pedestrian would be positioned on the nearside carriageway and would not be seen from the access. From what I saw on my visit, during which I drove into and out of the access, adequate and safe visibility could be obtained from the 2m "X" distance, certainly allowing an emerging driver to see to the middle of the carriageway, and so even an overtaking car could be seen in adequate time to stop.
22. The access is an existing one, immediately next to another access, both of which would be visible to approaching drivers. There is no history of accidents involving this access, or of vehicles joining Main Road from other accesses, and I am mindful of the advice in Manual for Streets which says that unless there is local evidence to the contrary, a reduction in visibility below recommended levels will not necessarily lead to a significant problem.
23. Occupiers of holiday cottages would be likely to be especially cautious emerging from an access onto a road with which they are not familiar, and thus, in all the circumstances, I am satisfied that the access arrangements would be satisfactory and would not materially affect highway safety, or conflict with Policy DM18 of the Winchester DLP Part 2, which deals with access and parking.

Effect on protected habitats

24. The site lies some distance to the north of the Solent waters, which includes the Solent and Southampton Water Special Protection Area (SPA), which is also a Ramsar site, of international importance. I am the competent authority for the purposes of the Conservation of Habitats and Species Regulations 2017 (as amended) (the Regulations).
25. The Council has referred me to Natural England's (NE) standing advice to local planning authorities dated 19 June 2019 which, in summary, explains that additional residential development may have the effect of depositing additional nitrates into the Solent. Through the acidifying and eutrophying effects of nitrogen deposition this would have, in combination with other plans and projects, significant effects on the habitat sites. The Council advises that all sewage works in the Winchester district discharge into the Solent, and thus the additional sewage and surface water discharges from the development would, in combination with other plans and projects, have the potential to harm the protected sites.
26. The appellant argues that, firstly, the holiday let use commenced before the publication of the NE's advice, and therefore the advice should not apply. However, the use is unlawful, and I am required to determine the deemed application for planning permission in the light of the circumstances applying at the time of my decision. Accordingly, the potential effect on the protected habitats is something that I am required to take into account.
27. Secondly, the appellant contends that the Council is mis-applying NE's advice, claiming that it applies only to large developments over 200 dwellings, and only to those within the Partnership for South Hampshire Area. Whilst that may have been the case with NE's previous advice, it is now clear from the 2019 letter that in NE's view, all new developments that would have inevitable waste water implications for the Solent, are capable of having a significant effect on the designated sites. As the two flats in this case would generate additional sewage loads with implications for the water quality of the Solent, I need to undertake an Appropriate Assessment to be satisfied that the proposal would not have a significant effect on the integrity of the sites.
28. However, I have no evidence to inform an appropriate assessment; the appellant has provided none, and no potential mitigation measures have been proposed. Nor is it possible for a condition to be imposed, as I do not know whether it is necessary, or whether mitigatory measures can be taken without the need for off-site financial contributions, and a condition to require a planning obligation to be entered into would not accord with Government policy.
29. Accordingly, I cannot be certain that the proposal, in combination with other plans and projects, would not have a harmful effect on the integrity of the habitat sites, and therefore in accordance with the Regulations, I am unable to grant planning permission, there being no considerations of overriding public interest, as defined under Regulation 64.
30. Accordingly, on this issue I find that the development has the potential to have a significant adverse effect on the protected habitats. I have not been referred

to any relevant development plan policies, but the development is contrary to national policy as set out in paragraph 175 of the National Planning Policy Framework.

Other matters

31. The site lies within the setting of a Grade II listed building, the neighbouring St Swithun's Cottage and within the Littleton Conservation Area. The building is of a domestic design and appearance within a residential area, and is far enough away from the listed cottage not to harm its setting. The Council accepts that there is no detriment caused to the significance of the neighbouring listed building or to the conservation area, and I see no reason to disagree.
32. The Council also argues that the layout is cramped, contrived and poorly designed. However, for use by holiday makers, I find that the layout is satisfactory, and that the remaining garden area for Barclays is both ample and practical.
33. The requirements of the enforcement notice, as varied, engage with the rights of the appellant to respect for property, under Article 1 of the First Protocol, which is a Convention right enshrined into UK law by the Human Rights Act 1998. However, this right is not absolute, and interference may be justified in the public interest. In this case, upholding national planning policy, and the importance of protecting habitats of European importance are matters of legitimate public interest. There are no lesser steps which could be taken to meet the policy objectives, and whilst I recognise that the interference with the appellant's rights would be significant, the burden of complying with the enforcement notice would be necessary and would not be disproportionate.

Overall conclusion on ground (a)

34. Although I find that, subject to the imposition of a holiday occupancy restriction, the use as two flats would not conflict with the Council's housing strategy, and that there would be no material harm to highway safety, the failure to demonstrate that there would not be potential harm to protected habitats is a compelling reason to refuse planning permission. Accordingly, the appeal on ground (a) fails.

Appeal on ground (f) – that the requirements exceed what is necessary to remedy the breach

35. It follows from what I have said in relation to ground (b), that the requirements of the notice do more than is necessary to remedy the breach; demolition of the whole building would amount to over-enforcement. Instead, it is appropriate to require that the building should be altered to return it to its condition before the unlawful development took place, that is to say, to the double garage which existed previously. I shall vary the notice to this effect, and to this limited extent the appeal succeeds on this ground.

Appeal on ground (g) – that the period for compliance falls short of what should reasonably be allowed

36. Putting on one side the merits of the appellant's case about the adequacy of the compliance periods, it seems to me that having regard to my findings on the ground (a) appeal that there is a realistic prospect that planning permission

may be forthcoming, if the requirements of the Habitats Regulations are met. Accordingly, I consider it appropriate to vary the notice to provide a single compliance period of 8 months, which would allow the appellant sufficient time to research the nitrogen implications of the proposal, to make an application for planning permission, and for the Council to arrive at a decision.

37. I consider that such a period would be sufficient for the appellant to cancel future bookings and to carry out the remedial work. I shall vary the notice accordingly.

Conclusions

38. For the reasons given above, I conclude that the appeal on ground (b) succeeds in part, and I shall correct the notice accordingly. The appeal on grounds (f) and (g) also succeeds in part, and I shall vary the notice as indicated above. The appeal on ground (a) fails, and the application for planning permission deemed to have been made under s.177(5) is dismissed, and, subject to correction and variation, the enforcement notice is upheld.

JP Roberts

INSPECTOR



Plan

This is the plan referred to in my decision dated: 13 August 2020

by **JP Roberts BSc(Hons) LLB(Hons) MRTPI**

Land at: Barclays, Main Road, Littleton, Winchester SO22 6QS

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Not to scale

