



Appeal Decision

Site Visit made on 11 May 2021

by K Savage BA(Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 July 2021

Appeal Ref: APP/C2741/D/21/3266798

Herb Cottage, Main Street, Holtby, York YO19 5UD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant prior approval required under Schedule 2, Part 1, Class AA of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO).
 - The appeal is made by Mr Adrian Wilson against the decision of City of York Council.
 - The application Ref 20/01862/PAAA, dated 28 September 2020, was refused by notice dated 24 November 2020.
 - The development proposed was originally described as: 'To add an additional storey to the existing single storey dwelling on the existing footprint. The materials will match the existing dwelling - clay pantile tiles to the roof, reclaimed clamp brick walls, white uPVC triple glazed windows, black uPVC gutters/downpipes. The roof will be the same pitch as the existing roof.'
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Decision

1. The appeal is dismissed.

Background and Main Issues

2. The Council has set out three reasons for refusal. The first argues that the planning permission¹ for the dwelling on the appeal site has not been lawfully implemented, due to the failure of the appellant to discharge details of two 'conditions precedent'. As a result, the Council contends no permitted development (PD) rights exist in principle for this dwelling.
3. The second reason sets out that under this permission, Condition No 3 withdraws PD rights for development under Classes A and E of Schedule 2, Part 1 of the GPDO. The Council contends that the proposed development is an enlargement of the dwellinghouse falling within the scope of Class A, and therefore PD rights for the proposed development have been withdrawn.
4. Finally, the Council's third reason sets out that the external appearance of the dwellinghouse would be unacceptable, and that prior approval is not given.
5. Therefore, the main issues are, firstly, whether the relevant permission has been lawfully implemented and whether PD rights exist in principle. If so, the second issue is whether the relevant PD right under Class AA has been withdrawn by condition and, if not, whether the proposal would amount to PD. If so, the third main issue is whether prior approval should be given, having particular regard to the resulting external appearance of the dwellinghouse.

¹ Council Ref 17/02966/FUL

Reasons

Whether permission lawfully implemented

6. The Council argues that the failure of the appellant to discharge the requirements of Conditions Nos 4 and 6 before construction of the dwelling commences renders the development unlawful. The appellant in response refers to case law, including *Whitley*² and *Hart Aggregates*³, the latter of which held that a condition will only be a condition precedent where it expressly prohibits the commencement of development and goes to the heart of the planning permission. If so, and the development is in contravention of a 'condition precedent', it cannot properly be described as commencing in accordance with the planning permission. This is the 'Whitley principle'.
7. The planning permission in question was granted with Condition No 4 requiring full details of all means of enclosure to the site boundaries to be submitted to and approved in writing by the Local Planning Authority '*prior to occupation*'. Such wording means that the condition is simply not a condition precedent, as it does not prevent other works being undertaken beforehand to implement the development permitted. I find this is not a basis to say that the implementation of the planning permission was unlawful.
8. Condition No 6 is worded 'prior to the development commencing' and seeks details of the cycle parking areas, including means of enclosure. However, cycle storage is an inherently ancillary element which need not preclude development starting until details are secured, particularly as in this case it was clear that there was ample space within the site to locate cycle storage. I am satisfied that this condition, despite its wording, does not go to the heart of the permission and is not a true condition precedent.
9. This aside, I note that details of conditions 4, 5, 6 and 7 of permission Ref 17/02966/FUL have been approved on 5 January 2021⁴. The evidence before me does not otherwise indicate that the development undertaken under permission Ref 17/02966/FUL was unlawful, and I therefore have no firm reasons to conclude that it was or is unlawful or that as a result, the PD rights normally applicable under the GPDO do not apply in this case. Given this, I proceed to consider the Council's second reason for refusal.

Whether PD rights exist

10. The appellant has sought prior approval under Schedule 2, Part 1, Class AA of the GPDO. This class enables the enlargement of a dwellinghouse by the construction of additional storeys. The Council imposed a condition on the aforementioned planning permission which states:

Notwithstanding the provisions of Article 3 of the Town and Country Planning (General Permitted Development) Order 2015 (or any Order revoking or re-enacting that Order), development of the type described in Classes A and E of Schedule 2 Part 1 of that Order shall not be erected or constructed.

11. The Council states that the reason given for the condition was that it wished to 'exercise control over any future extensions or alterations', having regard to

² FG Whitley & Sons v Secretary of State for Wales (1992) 64 P&CR 296

³ R (on the application of Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)

⁴ Under Council Ref AOD/20/00324

the openness of the Green Belt. Class A of Schedule 2, Part 1 relates to the '*enlargement, improvement or other alteration of a dwellinghouse*'. Class AA was inserted into Schedule 2, Part 1 of the GPDO with effect from 31 August 2020⁵ and relates to the '*enlargement of a dwellinghouse by construction of additional storeys*'. The Council argues that the development permitted under Class AA falls within the 'type' of development described under Class A, being a form of enlargement of a dwellinghouse, and so the PD right under Class AA is precluded by the extant condition attached to permission Ref 17/02966/FUL.

12. In essence, the Council's argument appears to be that Class AA is part of Class A, either as a sub-class or addendum. However, so far as I am aware, there is nothing within the GPDO or any guidance which indicates this to be the case. On the contrary, Class AA is attended by its own conditions, limitations and prior approval procedure, separate from Class A. The name 'Class AA' is simply standard nomenclature used in the GPDO to insert a new section in the appropriate place, i.e. between Classes A and B of Part 1 in this case. It does not imply it is a sub-class of Class A, and no evidence has been presented by the Council that indicates to me that it should be interpreted as such.
13. I note advice from the Council's legal services that there is nothing in case law which suggests it is not possible to rescind future PD rights. However, the Planning Practice Guidance (PPG) is clear that conditions restricting the future use of permitted development rights need to be precisely defined, by reference to the relevant provisions in the GPDO, so that it is clear exactly which rights have been limited or withdrawn. I also note the appellant's reference to various legal authorities relating to the interpretation of conditions. In this case, the condition refers to development 'of the type *described* in Class A'. In simple terms, I take that to mean development as per the description of Class A as set out in the GPDO, namely 'the enlargement, improvement or other alteration of a dwellinghouse'. The fact that a separate class has been introduced to enable additional storeys is a clear indicator that Class A does not encompass such development, in the same way it does not encompass roof enlargements which fall under Class B, or porches which fall under Class D. Therefore, I find that the proposed development in this case is not development 'of the type described in Class A.'
14. Moreover, the Council's argument that it intended to limit *any* extensions is undermined by the fact that the condition does not remove PD rights to extend the building under Classes B, C and D. Ultimately, the Council's approach seeks to implicitly widen the interpretation of the PD rights which have been withdrawn by the condition in question, and in doing so the condition becomes imprecise and contrary to the PPG guidance, with consequent difficulty in interpretation and enforceability.
15. For these reasons, I am satisfied that the PD rights set out under Class AA have not been withdrawn by condition. It is common ground between the main parties that the proposal would satisfy the limitations set out under Paragraph AA.1.(a-k) and the conditions at Paragraph AA.2(2)(a-d). Nothing else in evidence leads me to conclude there would be conflict with any of these limitations. The proposal therefore constitutes permitted development under Class AA, subject to the consideration of the prior approval matters.

⁵ By the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 and the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020

Whether prior approval should be given

16. Paragraph AA.2.(3)(a) sets out four matters for which the developer must apply to the local planning authority for prior approval. The Council refused prior approval only in respect of matter (ii) the external appearance of the dwellinghouse, including the design and architectural features of (aa) the principal elevation of the dwellinghouse, and (bb) any side elevation of the dwellinghouse that fronts a highway.
17. The appellant contends that the assessment under matter (ii) of Paragraph AA.2.(3)(a) is restricted to the two specific examples (aa) and (bb) in so far as they relate to the external appearance of the dwelling itself, and the decision maker is not entitled to consider other factors, in particular the effect of the enlarged building within the street scene. However, the list within matter (ii) is prefaced by the word *including*, which indicates that it is not a closed list, and that other factors may be taken into account. Moreover, whether the external appearance of a dwelling is acceptable is inherently linked to how it would be seen in relation to neighbouring buildings and the wider streetscape or landscape, as it may be. Appearance is not, therefore, a matter to be assessed in a vacuum, as what may be acceptable on one site may not be acceptable on another. I therefore consider that it is reasonable, in the planning judgment under matter (ii), to take account of the effect of the proposed external appearance of the dwelling on the wider character and appearance of the area.
18. The existing dwelling is a modest, low profile bungalow standing side-on to the main road. It marks the end of the continuous built form on this side of Main Street, with another low bungalow next door, Sycamore Cottage. Both are well screened from the roadside by thick hedgerows which leave only the roofs visible. The lower ridge heights of these two dwellinghouses help to reduce their presence in what is a more open part of Main Street with fewer trees to embed the dwellings in the landscape. This openness is also apparent to the rear, where there are clear views of the appeal building from the public footpath which leads from Main Street and runs alongside the large paddock behind Sycamore Cottage.
19. In contrast, the proposed extension would significantly increase the visibility of the dwellinghouse in its surroundings. The proposed storey would be wholly visible above the hedgerows both from the roadside and the public footpath to the rear. This height would contrast starkly with the low profile of Sycamore Cottage next door, and would result in an exposed and conspicuous building. Moreover, the requirements of Class AA mean that there would be no windows in the upper storeys of the side elevations. As a result, the enlarged building would present imposing, blank elevations to either side which would exacerbate its discordant scale and form.
20. Added to this, the street facing elevation would have an awkward, top-heavy arrangement of windows with three at first floor level and just one small window at ground floor level, a reversal of the bottom-heavy arrangements to the side elevations. The result of this disjointed fenestration would be a building lacking architectural composition and balance to its elevations which would severely detract from its overall appearance.
21. The enlarged building would be seen from the road in both directions, and would obscure views of the tower of Holy Trinity Church on approach into the village from the west. Although the proposal would use matching red brick and

orange clay pantiles which would accord with the requirements of the Holtby Village Design Statement (2005), this would not overcome the harmful scale and incongruous appearance of the resulting dwellinghouse.

22. The appellant points to other buildings in the surroundings, including new build dwellings at Newsome House Barns, as being comparable to the appeal proposal. However, I saw these buildings to have a different scale and character, being detached from the main built-up area of the village, having a barn-like aesthetic and forming their own cluster of development. In views from the east, these dwellings are also framed by the tree line which embeds them into the landscape in a manner that would not occur at the appeal site. They do not alter my view in respect of the effect on the appeal proposal.
23. For these reasons, I conclude that the external appearance of the dwellinghouse would harm the character and appearance of the area. I am provided with no development plan policies by the Council, but in so far as it is relevant the proposal would conflict with the advice of the National Planning Policy Framework, which seeks to achieve well-designed places. The proposal, therefore, is not acceptable in respect of prior approval matter (ii) of Paragraph AA.2.(3)(a) of Class AA.

Conclusion

24. For the reasons given, I conclude that the appeal should be dismissed.

K Savage

INSPECTOR