



Appeal Decision

Site visit made on 10 August 2021

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

an Inspector appointed by the Secretary of State

Decision date: 31 August 2021

Appeal Ref: APP/C3105/C/20/3261622

Land at The Digs and The Studio, Heathfield, Kidlington OX5 3DX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Graham Payne against an enforcement notice issued by Cherwell District Council.
 - The notice was issued on 1 October 2020.
 - The breach of planning control as alleged in the notice is:
Without the benefit of planning permission, the erection of two units of residential accommodation with associated residential curtilages.
 - The requirements of the notice are to:
 1. *Demolish the 2 new dwellings and remove the resultant material from the Land.*
 2. *Remove the walls, fences and other boundaries erected to create outside amenity space associated with the two new dwellings.*
 - The period for compliance with the requirements is 12 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (f), (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
-

Decision

1. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the erection of two units of residential accommodation with associated residential curtilages at The Digs and The Studio, Heathfield, Kidlington OX5 3DX as shown on the plan attached to the notice and subject to the following condition:
 - 1) Within 6 months of the date of this decision the dormer windows on the rear (southern) roof slope shall be removed, and the resultant voids in the roof shall be made good and covered with slates to match the rest of the roof, except insofar as any rooflights may be installed.

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

2. The onus of proof on this ground of appeal lies with the appellant. The matter at issue between the parties is the nature of the works which have been undertaken. The appellant argues that the works comprise the alteration and extension of a building with a lawful use as two separate dwellings, whilst the Council maintains that the works which have been undertaken are so extensive as to amount to the construction of two new dwellings.
3. The Council accepts that the building has a similar footprint to the previous building but argues that the extent of new building work, as a matter of fact

and degree, amounts to the erection of a new building. These works are said to include:

- The erection of virtually all of the wall on the southern elevation
 - The erection of a new wall on the eastern elevation
 - The erection of a new western elevation, separating the building from The White House, to which it was formerly attached.
 - A new roof
 - New porches
 - New roof dormers
4. The Council also says that the northern elevation contains only limited elements of the former structure. The Council has referred me to two judgments, *Hibbitt and Another v SSCLG and Rushcliffe BC* [2016] and *Oates v Secretary of State for Communities and Local Government* [2017]. The later decision is a Court of Appeal case which considered *Hibbitt* and upheld the principle that the retention of some of the fabric of an original building or buildings within the building that has been, or is being erected, does not preclude a finding by the decision-maker, as a matter of fact and degree, that the resulting building is, physically, a “new” building, and that the original building has ceased to exist.
5. The appellant’s evidence relies on photographs showing the building in various stages of building work. However, the photographs show that only one wall, the northern wall, was retained. The photographs do not show any of the other walls being incorporated into the resultant building. In my view, having regard to the small amount of the original building that appears to have been retained, the erection of three new walls, an increase in height of an existing wall, the construction of a new roof, 5 rear dormers and six small dormers and two porches is tantamount to the erection of a new building.
6. There is no dispute that the building is used as two dwelling houses, and thus I conclude, on the balance of probabilities that, as a matter of fact, the matters alleged in the notice have occurred. Accordingly the appeal on ground (b) fails.

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

Main Issues

7. The site lies within the Oxford Green Belt, and thus the main issues are:
- i) whether the development amounts to inappropriate development in the Green Belt;
 - ii) the effect of the development on the character and appearance of the surrounding area.

Reasons

8. Policy ESD14 of the Cherwell Local Plan 2011-2031 (CLP 2011) says that development proposals within the Green Belt will be assessed in accordance with government guidance contained in the National Planning Policy Framework (the Framework) and National Planning Policy Guidance.
9. The Framework says that a local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. It sets out a number of exceptions to this general principle, the only one of relevance here

is the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces.

10. The appeal site was previously occupied by a building in lawful use as two dwelling houses, and thus the replacement is in the same use. The key question here is whether it is materially larger than the former building. The Council accepts that the building is erected on a similar footprint to the former building, and that the increases in size result from the increase in height to the eaves by about 1m and to the roof ridge by about the same amount, as well as through the insertion of dormer windows and the addition of two porches.
11. The appellant indicates that the increase in floorspace is some 47.3% over that of the previous building and the increase in volume is about 44%. The Council does not dispute these figures. There is no definition of what "materially larger" means in either the Framework, the Planning Practice Guidance or the Cherwell Local Plan. The appellant has referred me to a number of officer reports from the Council in considering the matter, including on applications within the Heathfield village, where officers have consistently taken the view that an increase of up to 50% in floorspace would not be considered to be "materially larger". In this case, as the additional floorspace largely arises from the replacement of a partial mezzanine floor with a first floor across the whole building without increasing the footprint, I regard the increase in volume is a more determinative factor.
12. The 43% volume increase falls well below the upper limit of 50% which the Council has previously held not to be "materially larger". A significant part of that increased volume arises from the provision of the rear dormer windows, which for the reasons explained below, I have held to be unacceptable in planning terms, and will require to be removed. Thus, with the removal of these bulky elements, I am satisfied that the resultant building would not be materially larger than the building it replaced, and thus would not be inappropriate development.
13. As the Framework makes specific provision for such developments, it follows that the effect on the openness of the Green Belt does not need to be considered.

Character and appearance

14. Policy ESD 15 of the CLP 2011 deals with the character of the built and historic environment, and amongst other things, requires development to contribute positively to an area's character and identity by creating or reinforcing local distinctiveness. Saved policies C28 and C30 of the Cherwell Local Plan 1996 respectively deal with layout, design and external appearance of new development and design control, both seeking to protect the character of the area. The recently revised Framework places great emphasis on good design, saying that the creation of high quality, beautiful and sustainable buildings and places is fundamental to what the planning and development process should achieve.
15. The site lies in a group of buildings of various designs and eras, accessed by a private drive. The group includes a public house, now closed and in a poor condition, a large care home complex and various buildings in use as flats and dwelling houses. The site does not lie in a conservation area and there is no local designation in respect of any architectural or historic significance.

16. The original pair of dwellings formed an annex to The White House, a two storey, hipped roof dwelling, built in brick but painted an off-white. The building subject of the notice echoes the form of the original building, and whilst it is slightly higher, it nevertheless possesses a subservient character in relation to the White House and does not appear cramped. The use of reconstituted stone complements the use of stone on the small building on the western side of the White House, and on Walkers Barn opposite.
17. On the rear, northern elevation, there are 5 dormer windows on the roof slope. Dormer windows are characteristic of the area, and there are six such windows on the front elevation of the building noted as Walkers Barn on the enforcement notice plan, which faces the appeal site. The dormers on the appeal building are irregularly spaced across the roof slope; those on the western side comprise a pair of different sized dormers, together with a single dormer, whilst those on the eastern side comprises a pair of well-spaced dormers.
18. The dormers on Walkers Barn are small, of a sufficient width only to accommodate the windows they contain and occupy only a small proportion of the roof slope. The dormers in this case are overly large in relation to the size of the building, particularly the westernmost group, and make the building appear top-heavy. The lack of symmetry is also incongruous. I consider that they fail to meet the high standard of design that local and national policies aim to achieve in new development.
19. The six triangular dormers on the front elevation are small and fit in well with the roof slope. I find these to be acceptable and amount to good design. The Council objects to the orientation of the building, with its rear elevation facing the private road which wraps around the group of buildings, arguing that it fails to provide a clearly defined frontage. Judging from the photographs, the previous dwellings had no obviously discernible front elevation. The group of buildings in Heathfield has an irregular layout, and there is no well-defined frontage to the group. My impression of the current arrangement is that both the adjacent White House and the appeal dwellings front onto private courtyards on the north side, and well-defined, and fairly long gardens separate the rear elevations from the road. I consider that this layout is satisfactory and does not harm any local distinctiveness.
20. However, the building as it stands is of poor design and permission should not be granted for it. I need to consider whether conditions could be imposed to overcome the objections. The rooflights and porches are readily severable from the building, and their exclusion would not fundamentally alter the nature of the development. The appellant has suggested such a possibility rather than requiring the removal of the whole building, which I agree would be excessive in the light of my findings that a building of this size would be acceptable in principle.
21. The Council also objects to the enclosure and separation of the garden area, pointing to the fact that the lawful development certificate for the two dwellings was issued only in respect of the buildings. However, the Council accepts that the area now used as a garden was likely to have previously been used as garden area for The White House; the word "curtilage" is a legal concept, not a use of land, and in this case there has been no change in the use of the land. The erection of means of enclosure would be permitted development under the

provisions of Article 3 and Class A of Part 2 to Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015.

22. I therefore conclude that, subject to a condition to require the removal of the porches and rear dormers, the dwellings would not harm the character and appearance of the surrounding area, or conflict with Cherwell Local Plan policies.

Other Matters

23. The appellant is critical of the Council for issuing the enforcement notice some 3½ years after they became aware of the breach, since when the dwellings have been occupied and the occupants have become settled in the community. The Council has not explained why there was a delay in issuing the notice, and whilst I understand the appellant's concerns about this delay, the law allows for a 4 year period to take action, and the timing of the issue of the notice can have no bearing on the planning merits of the deemed application.

Conditions

24. The Council has not suggested any conditions to be imposed if the appeal were to be allowed, and thus I shall impose only the condition discussed above, to require the removal of the rear dormer windows, the making good of the roof slope, whilst allowing for the insertion of any roof lights which may be installed using permitted development rights.

Conclusion

25. For the reasons given above, I conclude that the appeal succeeds on ground (a) and the notice will be quashed. I shall grant planning permission for the development as described in the notice.
26. The appeal on grounds (f) and (g) do not therefore fall to be considered.

JP Roberts

INSPECTOR