



Appeal Decisions

Site visit made on 17 August 2021

by Richard S Jones BA (Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 November 2021

Appeal A Ref: APP/Q3630/C/21/3266381

Appeal B Ref: APP/Q3630/C/21/3266382

Land at 37 Western Avenue, Thorpe, Egham, TW20 8QB

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Allan Redman (Appeal A) and Mrs Helen Redman (Appeal B) against an enforcement notice issued by Runnymede Borough Council.
 - The enforcement notice was issued on 26 November 2020.
 - The breach of planning control as alleged in the notice is, without planning permission, the construction of a side and rear extension and a loft conversion to a dwelling house which are materially larger than that previously authorised.
 - The requirements of the notice are:
 - 5.1. Demolish all those parts of the side extension including any part of the roof that are within 2.55 metres measured horizontally from the flank wall of No. 39 Western Avenue and remove any resulting materials from the site that are not re-useable.
 - 5.2. Make good the new flank wall and roof to ensure they are water-tight using external materials of a similar appearance to the existing materials whilst ensuring that no part of the resulting development is within 2.55 metres measured horizontally from the flank wall of No. 39 Western Avenue.
 - 5.3. No windows are to be inserted in the new flank wall at ground floor level.
 - 5.4. Any windows inserted above ground floor level in the new flank wall shall have obscured glazing at Pilkington Glass Level 4 or an equivalent standard. Any part of such a window that is less than 1.7 metres above the floor of the room in which it is located, shall be non-opening, fixed shut and shall be permanently retained in that condition.
 - 5.5. Ensure that any part of any door inserted in the new flank wall shall be located no further than 3.5 metres from the south west corner of the new flank wall and any glazing included in such a door shall be obscurely glazed at Pilkington Glass Level 4 or equivalent standard and shall be permanently retained as such.
 - The period for compliance with the requirements is twelve months.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a), (f) and (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.
 - Appeal B is proceeding on the grounds set out in section 174(2)(f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decisions

Appeal A

1. It is directed that the enforcement notice is corrected by deleting 'which are materially larger than that previously authorised' in paragraph 3.
2. Subject to the correction, Appeal A 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 Town and Country Planning Act 1990 Act as amended (the 1990 Act) for the development already carried out, namely the construction of a side and rear extension and a loft conversion to a dwelling house at land at 37 Western Avenue, Thorpe, Egham, TW20 8QB, as shown on the plan attached to the notice and subject to the following conditions:

- (i) The building operations hereby permitted shall be removed and all materials resulting from the demolition shall be removed within 180 days of the date of the failure to meet any one of the requirements set out in (a) to (e) below:
 - a) Within two months of the date of this decision a scheme for the creation of a part hip to the roof facing No 39 Western Avenue, reducing the height of the end point of the ridge of the roof by approximately 840mm and thereby also setting back the highest part of the ridge away from the boundary by a corresponding 840mm, along with a reduction in the roof overhang closest to No 39 Western Avenue to 100mm, shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
 - b) If within eight months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, a valid appeal shall have been made to the Secretary of State.
 - c) If an appeal is made in pursuance of b) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
 - d) The approved scheme shall have been carried out and completed in accordance with the approved timetable.
 - e) Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be retained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

- (ii) No windows shall be installed at first floor level in the side elevation facing No 39 Western Avenue.

Appeal B

- 3. Having regard to my decision on Appeal A, Appeal B does not fall to be considered.

Appeals A and B – The Enforcement Notice

- 4. The alleged breach is *the construction of a side and rear extension and a loft conversion to a dwelling house which are materially larger than that previously authorised*. However, the notice does not require compliance with that previously authorised. Rather, the requirements are directed at remedying injury to amenity - as confirmed by the Council in response to my request for

clarification on this point. On that basis I also sought the views of the parties as to whether reference in the allegation to the development being materially larger than that authorised could be deleted without injustice. The parties confirmed that it could. I agree and, as reference could cause uncertainty, I shall correct the notice accordingly.

Appeal A on Ground (a) and the Deemed Planning Application

5. The appeal relates to a semi-detached bungalow for which planning permission was granted in November 2016¹ for *roof extensions to include hip to gable roof and rear dormer windows, one and a half storey rear extension and side extension with roof over following removal of existing garage*. It is accepted that the extension as built is approximately 500mm wider and therefore closer to No 39 Western Avenue than that approved. Amongst other differences, the two dormers are also closer and the roof overhang greater than that shown on the approved plans.
6. The Council subsequently refused a retrospective application in August 2019² for reasons relating to the effect of the development on the living conditions of the occupiers of the neighbouring property at No 39 (outlook, privacy and loss of light). An appeal against that decision was dismissed in April 2020³. Because of that decision, the Council has queried whether a ground (a) appeal can now be considered, referring me to s174(2D) of the 1990 Act. However, those provisions relate to Wales only and are not relevant in this case.
7. I have noted the appellant's reference to the Council's officer recommendation to approve the 2019 planning application and his views regarding the previous Inspector's decision. Nevertheless, a recent appeal decision essentially relating to the alleged development is clearly a material consideration and regard should be had to it. Indeed, there must be very sound reasons for me to reach differing conclusions to the previous Inspector, not least because of the importance of consistency in the planning process.
8. As noted by the previous Inspector, the side elevation of the one and a half storey extension faces the side elevation of No 39, which is a detached bungalow. A number of windows and a door are situated along the facing side elevation of No. 39, including those serving a kitchen/diner and a dining room.
9. Paragraphs 8 and 9 of the previous Inspector's decision sets out the following findings:

Due to the increased height and proximity to No 39, the side elevation of the extension at No 37 appears overly large and dominant when viewed from No 39. This is particularly evident when viewed from the window directly above the sink and that next to the hob at No 39 which, in my view, due to the orientation of the room, are likely to be the primary windows within the kitchen. The extension appears oppressive and causes harm to the outlook from those windows.

A door and several windows, one at first floor level, are sited within the side elevation of No 37 which faces No 39. Whilst the use of obscure glazing and a

¹ Reference: 16/1325

² Reference: 19/0627 retrospective application for side and rear extensions, hip to gable roof extension and insertion of a rear dormer window to enable loft conversion

³ Reference: APP/Q3630/D/19/3238957

requirement for windows to be fixed shut could be secured by a suitably worded planning condition this is not the case when considering the door. The door has been obscure glazed; however, it can, and is likely to, be easily, and regularly, opened allowing clear and direct views directly into the side windows and kitchen of No 39 at close proximity. I appreciate that, prior to the construction of the extension, an existing kitchen door served No 37. This door, however, was in a different position further away from the main kitchen window above the sink at No 37 and was also significantly further from the boundary.

10. The Inspector did not find the effect on light to be significant. Nevertheless, whilst acknowledging that 500mm is a relatively slight variation, it was concluded that such closer proximity is unduly harmful to the living conditions of the occupants of No 39, with particular regard to outlook and privacy. Based on my own observations, which includes viewing the development from No 39, I find no reason to disagree.
11. The appellant has confirmed that the purpose of this appeal is not to seek a re-determination of the previous appeal decision. It is explained that the reasons for the ground (a) appeal is that the merits of the case have changed, such that a different planning judgement can be made, and, because I may grant deemed consent for an alternative solution.
12. Consequently, the main issues are:
 - whether there are any material changes in circumstances and/or other considerations that lead me to arrive at a differing view on the effect and acceptability of the alleged development on the living conditions of the occupiers of No 39, with particular regard to outlook and privacy; and
 - if not, whether unacceptable harm can be avoided by an amended scheme, and whether such a scheme can be appropriately secured.
13. Since the previous appeal decision, the appellant has erected a 2m fence along part of the boundary between the two properties. The new fence sits immediately adjacent to an older timber fence which runs beyond the length of the new fence. As noted by the previous Inspector, the original fence affects No 39, although far less significantly than the extension. In terms of outlook, I agree. The previous Inspector also recognised that boundary treatments could be used to improve privacy but considered that any fence high enough to have a positive effect is likely to lead to further adverse effects on outlook.
14. The appellant has provided photographs of the old fence in isolation and states that the new is about 30cm higher. Despite the relatively modest increase, the solidity of the new fence compounds the degree of visual confinement in comparison to the pre-existing situation whereby a degree of visual permeability was provided by the upper trellising of the old fence. However, by the time of my site visit, plastic sheeting had been applied to the trellising of the original fence, creating additional solidity. Compared with that arrangement the additional harm to outlook arising from the new fence is slight. Moreover, the loss of privacy for the occupants of No 39 arising from clear and direct views from the doorway of No 37 has been satisfactorily resolved.
15. However, the removal of material privacy harm does not, on its own, make the development acceptable because, in my view, the main and unacceptable harm

- arises from the proximity and overbearing presence of the built form, which has now been exacerbated, albeit to a limited degree, by the new fence.
16. I fully appreciate the financial commitment made by the appellant to the extension works and understand available funds would barely be sufficient to complete the development, let alone cover the costs of any demolition and rebuilding works. I also appreciate that the financial plight has been compounded by his wife's loss of employment. The appellant's position is that should the requirements of the notice remain unchanged, he does not have the financial ability to comply. Financial evidence is submitted in support of that position.
 17. I also note and sympathise with the significant ongoing health issues of the appellant's wife, which have been exacerbated by the planning issues arising from the alleged development. At the same time, I also sympathise with the stated health effects on the occupant of No 39, who is elderly. Whilst these effects are not evidenced to the same degree as the appellant, I have no reason to doubt the submissions made on her behalf.
 18. Clearly it would be inappropriate to compare the severity of the respective health issues as both parties have been adversely affected. Nevertheless, because it is not a one-sided argument, it does limit the weight I have applied to the appellant's circumstances.
 19. Although the main shell of the extension is in place, internal and external finishes have not been applied. Due to the relationship with the original bungalow, that has had a knock-on effect on the internal living conditions for the appellant in terms of available living space, kitchen facilities and weather protection. A completed scheme would therefore improve the quality of the accommodation for the appellant and his wife and as a result, their living conditions. For these reasons, I cannot agree that the current appeal is a further delaying tactic. The current situation is undoubtedly difficult for both the appellant and neighbour.
 20. I have noted the other nearby developments referred to by the appellants but I am not aware of the planning background to them and I am unable to compare the relative effects on any side facing windows. Such arguments therefore attract limited weight in this case.
 21. Bringing all of the above together, I do not find that there are any material changes in circumstances or other considerations that are sufficient to outweigh the harm I have found to the living conditions of the occupant of No 39, arising from the alleged development as existing.
 22. The appellant highlights that I must consider factors relevant to the Human Rights Act 1998 (HRA). Article 1 concerns the protection of property and Article 8 deals with the right to respect for family life and the home. These are qualified rights and involve balancing the fundamental rights of the individual against the legitimate interests of other individuals and the wider public interest. The concept of proportionality is crucial.
 23. Dismissing the appeals would interfere with the appellant's rights under Articles 1 and 8. However, the evidence does not suggest that it would be likely to result in him (or his wife) being homeless. Having regard to the legitimate and well-established planning policy aims to protect the living conditions of

occupants, in this case I consider that greater weight attaches to other individuals and the public interest. On the basis of the alleged development as existing, dismissal of the appeal would be necessary and proportionate, and it would not result in a violation of the human rights of the appellant.

24. Understandably, to minimise the cost of remedial works, the appellant is keen to explore a range of solutions which could be implemented as more viable, realistic and reasonable alternatives to the disruptive and drastic requirement to demolish a segment of the extension, thereby requiring new foundations and rebuilding works.
25. Plans showing two options are presented. These are the creation of a part hip to the element of the roof facing No 39, reducing the height of the end point of the ridge of the roof by 840mm and thereby also setting back the highest part of the ridge away from the boundary by a corresponding 840mm⁴, or, the movement of the closest dormer 500mm further from the boundary with No 39⁵. In addition, the roof overhang towards No.39 would be reduced from 230mm to 100mm, for both options.
26. Caselaw⁶ directs that, so long as there is an appeal on ground (a), I must consider whether the modified development would be 'part of the matters' and should be permitted. Such options should be considered under ground (a), even though the actual application under ground (a) relates to the development as built.
27. Ultimately, what may be granted is governed by s177(1)(a) of the 1990 Act, which provides that planning permission may be granted in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters. Whether or not the proposed alternative scheme amounts to part of the matters, and may be permitted, is for the planning judgement of the decision maker⁷, but as recognised in caselaw⁸, virtually any alternative scheme is likely to involve at least some element of new work.
28. The main harm in terms of outlook arises from the height and proximity of the flank wall facing the side of No 39, rather than the nearest dormer. Consequently, I do not consider the option to reposition the dormer would overcome the harm on its own or in combination with a reduction in the roof overhang, even if I found that such works would be part of the matters.
29. However, creating a hip to the end of the extension would move the apex of the roof away from No 39 and reduce the height of the side facing wall. That would result in a meaningful reduction in the overall mass and bulk of the extension when viewed from the kitchen of No 39. Reducing the roof overhang would further alleviate the overbearing effect.
30. I sympathise with the importance placed by the occupant of No 39 on her kitchen and how the alleged development has affected the way she feels about her home. However, I am satisfied that the combined measures would ensure that the alleged development would not have an unacceptable degree of harm

⁴ Option 4, as shown on the submitted plans

⁵ Option 3, as shown on the submitted plans

⁶ Ahmed v SSCLG & Hackney LBC [2014] EWCA Civ 566

⁷ R (oao Banghard) v Bedford BC [2017] EWHC 2391 (Admin)

⁸ Bhandal v SSHCLG & Bromsgrove DC [2020] EWHC 2724 (Admin)

on the outlook from the kitchen of No 39, even taking account the slight additional harm caused by the new intervening means of enclosure. For the avoidance of doubt, I do not consider that unacceptable harm arises to the outlook from the main dining room of No 39 as its main aspect faces towards the rear garden and is largely unaffected.

31. Although personal circumstances have not been determinative, the alternative would also be significantly less costly and disruptive to the appellant. The footprint would remain unchanged and it would not amount to more extensive development, rather it would remove parts of it. Within the context of the alleged development, taken as a whole, the change in design would not be significant. In my judgement, such an alternative can clearly be identified within the scope of the alleged matters comprising the construction of a side and rear extension and a loft conversion to a dwelling house.
32. The works therefore properly fall within the statutory powers open to me to grant planning permission under s177(1)(a) of the 1990 Act. Moreover, as the alternatives have been presented with the appeal, all parties have had opportunity to comment.
33. I therefore find that the modifications to the roof⁹ would satisfactorily overcome the harm to the living conditions of the occupiers of No 39. Accordingly, the modified alleged development would not conflict with Policy EE1 of the Runnymede 2030 Local Plan, which supports proposals where, amongst other matters, they ensure no adverse impact on the amenities of occupiers of neighbouring properties. For the same reasons, I do not find conflict with paragraph 130 of the revised National Planning Policy Framework or those parts of the Council's Householder Guide and proposed Runnymede Design Supplementary Planning Document, as referenced by interested parties.

Other matters

34. The appellant explains that unbeknown to him, the builder erroneously constructed the extension wider than that approved. Whilst I have noted the comments and concerns of local residents about how the situation has come about, the Council accepts that there is no suggestion that the appellant has deliberately tried to circumvent the planning system. Moreover, any recourse which may be available against the builder, is not a matter for this appeal.
35. For the avoidance of doubt, I have found that the amended scheme does not result in unacceptable harm to the living conditions of the occupants of No 39, regardless of whether or not the original planning permission represents a fallback position.
36. I note the view of interested parties that ultimately any health effects which have arisen to the appellant's wife are self-inflicted. Nevertheless, the enforcement procedure is intended to be remedial rather than punitive.
37. Given the need to carry out modifications to render the development acceptable in planning terms, I do not consider that my decision would set a precedent that planning permissions can be ignored without consequence.

⁹ Shown submitted on the plans titled 'Option 4'

Conditions

38. As the deemed planning application is made in respect of the development as alleged and built, there is no mechanism for incorporating any revised plans into any deemed planning permission by way of condition. The only way to require that the works proposed by the appellant are carried out would be to permit the alleged development subject to a condition that a scheme is submitted to and approved by the Council, and then implemented within a specified period of time, or the development is removed.
39. Condition 1 is therefore necessary to ensure that the alternative details are submitted, approved and implemented so as to make the development acceptable in planning terms. It includes a strict timetable for compliance because permission is being granted retrospectively, and so it is not possible to use a negatively worded condition to secure the approval and implementation of the alternative scheme before the development takes place. I will include details of what the scheme should comprise in the interests of precision and to ensure the right outcome.
40. The condition will also ensure that the development can be enforced against if the required details are not submitted for approval within the period given by the condition, or if the details are not approved by the local planning authority or the Secretary of State on appeal, or if the details are approved but not implemented in accordance with an approved timetable.
41. The Council has suggested a condition be imposed requiring the first floor windows in the north western and south western elevations are fitted with obscure glazing to avoid overlooking. Whilst I agree that it is necessary to protect the privacy of the occupants of No 39, Option 4, as presented does not include any first floor windows in the north western facing elevation. I shall therefore include a condition precluding the installation of a first floor window in that elevation. I do not consider it necessary to condition the use of obscure glazing in the south western elevation as the windows are orientated towards the rear garden of the appeal property and consequently result in no more overlooking than that which ordinarily occurs in such suburban locations. Having regard to the above, it would not be appropriate to attach the Council's suggested plans condition.

Conclusion

Appeals A and B

42. For the reasons given above, I conclude that Appeal A succeeds on ground (a). I shall grant planning permission for the development as described in the notice as corrected.
43. Appeals A and B on grounds (f) and (g) do not therefore fall to be considered.

Richard S Jones

INSPECTOR