The Planning Inspectorate

Appeal Decisions

Inquiry Held on 17 May 2022

Site visits made on 17 May 2022 and 29 June 2022

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 July 2022

Appeal A: APP/E2001/X/21/3279877
54 West End, South Cave HU15 2EY

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr J Forman against the decision of East Riding of Yorkshire Council.
- The application Ref 21/00482/CLP, dated 8 February 2021, was refused by notice dated 8 April 2021.
- The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is proposed alterations to roof to create first floor office space and change of use of ground floor to offices and coffee shop.

Summary of Decision: The appeal is dismissed.

Appeal B: APP/E2001/W/21/3274022
54 West End, South Cave HU15 2EY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Jonathan Forman against the decision of East Riding of Yorkshire Council.
- The application Ref 20/01880/PLF, dated 17 June 2020, was refused by notice dated 4 November 2020.
- The development proposed is Alterations to roof to create apartment with work/home office facility at first floor and continued use of ground floor as offices.

Summary of Decision: The appeal is allowed, and planning permission granted subject to conditions set out below in the Formal Decision.

Appeal A

Procedural matter

1. The Council's case is that planning permission, reference DC/12/03689/PLF, for the development described above was not lawfully begun. As such, it considers the permission to have lapsed, and accordingly that a lawful development certificate cannot be granted.

2. Its reasons were firstly that the works undertaken did not constitute material operations sufficient to begin the development, in accordance with the provisions of s56 of the Act. Secondly, that the appellant failed to discharge a

so-called 'condition precedent' attached to the aforementioned planning permission, such that the permission was not therefore lawfully commenced, which was fatal to it.

3. During the Inquiry the Council conceded that it no longer sought to resist the appeal on the basis of the works undertaken not constituting material operations. Instead it sought to rely solely on the ground that the appellant had failed to discharge a condition precedent. My decision is therefore focused on this specific matter.

Background

4. The Council granted planning permission, reference DC/12/03689/PLF, on 11 February 2013 for "Alterations to roof to create first floor office space and change of use of ground floor to offices (A2) and coffee shop (A3)". The permission was subject to eight conditions. These included Condition 2, which required details of the materials to be used in the construction of external surfaces of the development to be submitted to and approved in writing by the Council, prior to any development taking place.

Reasons

5. The main issue is whether the development was lawfully begun. There is no dispute that settled case law has found it necessary for a condition to be both expressly prohibitive of commencement of development before a particular matter was approved (or in requirement of a particular matter to be approved before commencement of development) and also to have such significance as to go to the heart of the permission, in order for it to constitute a 'condition precedent'. A failure to discharge such conditions would result in development without planning permission.

6. Whilst the appellant does not seek to argue that Condition 2 did not prohibit development from commencing before the approval of a particular matter, he nevertheless argues that the condition does not go to the heart of the permission, and moreover that it should not be regarded as a valid condition.

7. The legal tests for planning conditions are that the condition should be imposed for a planning purpose and no other purpose, however desirable; fairly and reasonably related to the development permitted; and not so unreasonable that no reasonable planning authority could have imposed it.

8. The appellant claims that the materials condition was invalid on the basis that it was imposed without good reason. This is because the proposed materials, notably slate roof tiles and off-white render for the walls, were details that were expressly stated on the approved plans. Also, because the materials were stated on the approved plans, the reasons given for the condition, namely that the materials were uncertain or unacceptable was untrue.

9. Conservation Areas are designated for their special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance. The appeal site is located within South Cave Conservation Area (CA). The Council's Conservation Area Appraisal acknowledges the multifaceted character of the CA, with elements of town and village. It therefore seems to me that the CA is likely to be inherently visually sensitive. Accordingly I see nothing unreasonable in the innate wording of the condition, which seeks to control the use of external materials for new development there.

10. Turning to the specific circumstances of this case, the appellant says that the proposed materials were stated and agreed by the Council, as per the approved plan; also that this position was endorsed by a Council officer during an informal conversation with the appellant at the time. However I note that prior to the February 2013 permission, and notwithstanding the notation of material details on the plans, a consultation response from the Council's Conservation Officer recommended the imposition of a materials condition, so as to enable approval of sample materials.

11. I consider that notation of proposed materials on an approved drawing may in many circumstances be an entirely appropriate manner in which to dispense with the issue. However, the notation in this case, simply referring to 'slate' and 'off white', does not account for possible variations in the size or shade of roof tile, nor does it pin down exactly what the colouring of the render would be.

12. Whilst this level of detail may be excessive in many cases, I am not persuaded, because of the visual sensitivity of the location, that the Council was not reasonably entitled to take a more nuanced approach by imposing a planning condition calling for more detail. The lack of adequate specification of the materials was reflected in the reason for the condition. Put simply, the level of detail on the plan was not enough and therefore not acceptable to the Council. As such, the wording of the condition was imposed for a planning purpose, was not unreasonable and was not therefore invalid. Furthermore, to my mind, the approval of a specific plan, containing notation of proposed materials would not be incompatible with a separate condition requiring further details of those materials.

13. As to the purported verbal agreement by the Council that the level of detail provided about materials was sufficient, such that the condition was redundant, I have not been provided with any formal record to support this claim. Whilst I cannot discount that this happened, the lack of written supporting evidence fails to make this a compelling argument and I therefore give it limited weight.

14. Drawing the above considerations together, as a matter of fact and degree, I am persuaded that Condition 2 related to a significant matter that was fundamental to the scheme. It was a condition precedent. The failure to discharge the condition was significant enough to strike at the heart of the permission, which accordingly did not commence. The planning permission has therefore lapsed.

Conclusion

15. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of proposed alterations to roof to create first floor office space and change of use of ground floor to offices and coffee shop was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeal B

Main Issues

16. The main issues are the effect of the development on the living conditions of (i) neighbouring occupiers at 52a West End and 2 Water Lane, with particular

regard to overlooking, enclosure and overshadowing of properties and (ii) future residential occupiers of the site with particular regard to the availability of private outdoor amenity space.

Reasons

Living Conditions of Neighbours

17. The appeal site essentially comprises a rectangular, single storey building with a small rear extension. It is set within a tightly confined plot, with very limited external space. The site adjoins the aforementioned residential plots which consist of two semi-detached bungalows. The proposal is to extend the building upwards to provide separate residential accommodation at first floor level. This would increase the eaves and ridge level of the building by in excess of 2.5 metres.

18. Turning firstly to the question of overlooking and loss of privacy. The south-west gable end of the appeal building is immediately adjacent to the front driveway and garden area of No 52a. It is also close to the front and side elevations of that bungalow, which contain windows serving habitable rooms, notably the main living room and kitchen / dining area.

19. The proposed development involves the insertion of two windows at first floor level, facing No 52a. These windows, which would serve a bedroom and office respectively, would form an oblique angle with the aforementioned front elevation windows serving rooms in the bungalow, and also with the side of that bungalow which is utilised by the occupier as a private garden space. Notwithstanding this, and also despite the presence of some small intervening trees which might filter views to a degree, I am concerned that the proximity of the proposed development is likely to lead to the forward facing windows in the bungalow being overlooked to a degree and to both an actual and perceived loss of privacy to residents there.

20. The appellant has referred to the front rooms of that property already being overlooked from the highway, and in particular from the adjacent bus stop. Whilst I acknowledge the proximity of the public footpath and bus stop, I draw the distinction between this and the potential for casual overlooking from the concealed interior of a building which would be less exposed to public disapproval. This does not therefore justify the use of clear glazing in this case.

21. I consider the impact could be overcome by the use of obscure and non-openable glazing. I am mindful that this would not be an ideal solution for a habitable room such as a bedroom, and I therefore return to this point as part of the planning balance considerations later in the decision.

22. The other potential area of harm resulting from overlooking that has been raised, is in respect of the opposite gable end of the building, facing No 2 Water Lane. The new upper floor window in this elevation would serve a kitchen / dining area. However the outlook from there would be onto the forecourt parking area and a small part of the front garden of the neighbouring property. These areas are already very prominent in relation to adjacent highways and are not the most private amenity spaces within that property. I conclude that the development does not result in harm to the occupiers of No 2 Water Lane with particular regard to overlooking.

23. The footprint of the appeal building is set substantially forward of the adjacent bungalow at No 52a. This therefore already results in the presence of a 'strong' boundary wall on one side. Raising the height of the appeal building would inevitably create a more imposing boundary feature. However, whilst visible, the extended building would be offset from the aforementioned private side garden space and I do not agree that the extension would harm the enjoyment of this area. Furthermore from front rooms, the outlook directly ahead, and (in the case of the main front room) towards the opposite side as well, would remain relatively open or unaffected by encroaching buildings. When considering the existing layout and form of the appeal building, the net impact of the development would not result in an unacceptable and overbearing sense of enclosure that caused oppressive living conditions for residents.

24. Similarly the proposed extension would be set back from the side rear boundary of No 2 Water Lane. I also noted that the appeal site was at lower ground level compared to its neighbour. Whilst the extension would be very noticeable from this property, I nevertheless consider it to be sufficiently apart from the rear garden area and from rear facing habitable room windows not to result in an overbearing impact for occupiers there. The side elevation of the dwelling appears to accommodate secondary or non-habitable room windows. In any event, when considering the exiting layout of the plot, this elevation also appears to be sufficiently separated for the extension not to result in any harm by way of enclosure.

25. The appeal building is sited to the north of the adjacent dwellings. Accordingly, whilst the development may result in greater overshadowing of the front garden areas of No 52a and No 2, this is likely to be limited to relatively short periods in the early morning and late evening respectively, at times of greater daylight.

26. In terms of general light from the sky, I have had regard to the location of windows serving the kitchen / dining area of No 52a, as referred to in Mr Cook's proof of evidence. Whilst the extension may result in reduced light entering the recessed forward facing dining room window, I concur with the view that the side facing kitchen windows, offset from the proposed extension would be less affected by the development. I have also taken into account that light from the kitchen windows would continue to provide some benefit to the dining area, whilst mindful of the existence of tall boundary planting between this and the adjacent property. The extension would be sufficiently offset from No 2 Water Lane so as not to result in any significant effect on light. Drawing these considerations together, and from the evidence before me, I am not persuaded that the impact on natural light to either property would be significant in terms of harm to living conditions.

27. In exercising my function on behalf of a public authority, I have had due regard to the Public Sector Equality Duty (PSED) contained in the Equality Act 2010, which sets out the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity. The Act recognises that disability constitutes a relevant protected characteristic for the purposes of PSED. I have taken into consideration the representations made by the neighbouring occupier of 52a West End, in respect of the limitations caused by their physical disability meaning they are particularly reliant on the enjoyment provided by their home. However I consider that subject to measures to

mitigate the property being overlooked, as discussed above, no disproportionate harm would be caused in this case.

Living Conditions of Site Occupiers

28. There is very limited external space at the rear of the appeal property. What little exists is for the most part channelled into a short and narrow corridor, immediately overlooked by an adjacent ground floor office, and enclosed by high boundary walls. It is very unlikely that this area, relatively gloomy and lacking in privacy, would form an attractive or practicable space for outdoor recreation or relaxation. This said, it does seem to me that the space may offer some practical value to a residential occupier as an area to dry laundry, without the need for any significant modification.

29. I noted from my visit that an area of open space with footpaths and bench seating was situated a relatively short distance from the appeal site, along Water Lane. I have no reason to believe that this area would not be available for general public use and it seems to me, together with opportunities to walk around the village in general, it would allow for relaxation in an attractive and peaceful setting. It is also not uncommon for flats to be approved without access to private external amenity space.

30. Drawing together these considerations I do not find that the development would be harmful to the living conditions of future residential occupiers.

Other Matters

31. The appeal site is located within the CA. In accordance with the Planning (Listed Buildings and Conservation Areas) Act 1990 I have a statutory duty under Section 72(1) to pay special attention to the desirability of preserving or enhancing the character or appearance of the CA.

32. As set out above the character of the CA is acknowledged to be varied. West End, in particular, is characterised by a mixture of modern and older predominantly two storey dwellings, finished in a variety of building materials, in a relatively verdant setting. The existing building incorporates relatively large windows in the front elevation, a design feature which is reflected in proposed windows for the front and north-east elevations.

33. I conclude that the design of the proposed development would not appear at odds with its surroundings or result in any harm to the special interest of the CA. Rather the development would result in a neutral effect on the character and appearance of the CA as a whole, which accordingly would be preserved.

34. The nature and limited scale of accommodation proposed means it is likely to have few occupiers. In this context I am satisfied that there would be sufficient unrestricted on-street parking available in the vicinity not to result in harm to highway safety, or to the living conditions of neighbours as a result of comings and goings.

35. Concerns were raised by the occupiers of No 52a West End regarding the accuracy of the drawings submitted, particularly the relationship shown between the siting of that property and the appeal building. I acknowledge these concerns, however having visited the site I am satisfied I have been able to understand the impact of the proposed development on its surroundings.

36. Objections were raised by the occupier of No 50a West End. However that property is in my view sufficiently separated from the appeal site not to be impacted by the development.

37. The Council has identified that a small portion of the site would encroach within an area identified as being at high risk of flooding. However I concur with the view that because the extension would be at first floor level, and therefore away from any immediate danger, this would not be a compelling reason to refuse planning permission.

38. With regard to concerns raised about the construction of the extension resulting in a fire hazard, I note that this specifically related to the original proposal to use timber cladding. The proposal now is to finish the building with render, however in any event this would be a matter for the Building Regulations.

39. I have considered the argument that the grant of planning permission would set a precedent for other similar developments. However each application and appeal must be determined on its own individual merits and a generalised concern of this nature would not in itself justify withholding planning permission in this case.

Planning Balance

40. Subject to an appropriate planning condition I do not find harm to the living conditions of neighbours. The need for obscure glazing in order to prevent overlooking would detract somewhat from the amenities of future occupiers of the appeal property. However, I note the appellant raises no objection to this and when considering the development as a whole, including my findings regarding private amenity space, I do not find this to be sufficiently harmful to the living conditions of occupiers such that the refusal of planning permission would be justified.

41. I have found that the earlier planning permission, the subject of Appeal A, has lapsed and cannot now be implemented. That permission was also for an upward extension of the building, which though differently designed would have resulted in a development of a similar height and bulk to that currently proposed. Although the previously permitted development can no longer be taken as a viable fallback position, I am mindful that consistent decision making is key to upholding confidence in the planning system and, as such, like cases should be determined in a like manner. Accordingly in my view, a previous permission, albeit one that has now lapsed, cannot simply be overlooked when it is sufficiently closely related to the issues that regard should be had to it. I therefore consider that this previous permission carries some positive weight in favour of the grant of planning permission, albeit weight that I do not consider to be critical in the planning balance, given that I have, subject to conditions, not found harm in this case.

42. I would add that the development, despite small in contribution, conforms with the national planning policy objective to significantly boost the supply of homes; also with the Council's acceptance, in the context of Policy H1 of its Local Plan, that the development would contribute to the overall supply of housing and local housing mix in the District. The design lends itself to working from home with the sustainability benefits this would bring.

43. I conclude that the development would accord with Policies H1, ENV1 and ENV3 of the East Riding Local Plan 2016 (LP) and also with the National Planning Policy Framework insofar as they seek to secure high quality design which respects local distinctiveness, protects the significance of heritage assets and the living conditions of residents, whilst providing a mixture of housing types. I do not find conflict with Policies S1 and S5 of the LP insofar as they seek to promote sustainable development and deliver housing in the District.

Conditions

44. I have had regard to the planning conditions discussed at the Inquiry, in the event of planning permission being granted. A condition confirming the approved plans is required in the interests of certainty. A condition requiring samples of facing materials to be agreed is needed in order to preserve the character and appearance of the CA. The application of obscure glazing to the south-west facing windows is required in order to protect the living conditions of neighbouring residents.

45. A condition removing residential permitted development rights in relation to possible future alterations to the building would not be required. This is because the nature of the proposed residential use, a first floor flat, would not benefit from such permitted development rights, such that express permission would be required for future development in any event.

46. A condition to facilitate the use of private outdoor amenity space would also not be required for the reasons set out earlier in the decision letter.

Conclusion

47. For the reasons given above I conclude that the appeal should be allowed.

Formal Decisions

Appeal A

48. The appeal is dismissed.

Appeal B

49. The appeal is allowed and planning permission is granted for Alterations to roof to create apartment with work / home office facility at first floor and continued use of ground floor as offices at 54 West End, South Cave HU15 2EY in accordance with the terms of the application, Ref 20/01880/PLF, dated 17 June 2020, subject to the conditions in the Schedule below.

Roy Merrett

INSPECTOR

SCHEDULE OF CONDITIONS

1) The development hereby permitted shall begin not later than 3 years from the date of this decision.

2) No development shall commence until samples of the materials to be used in the construction of the external surfaces of the extension hereby permitted have been submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved samples.

3) Subject to condition 4 below, the development hereby permitted shall be carried out in accordance with the following approved drawing: 20-110 P-101 D.

4) The work / home office facility at first floor hereby permitted shall not be occupied until the windows in the south-west gable elevation, facing No 52a West End, have been fitted with obscured glazing, up to a height of at least 1.7 metres above the floor of the room in which it is installed. No part of the aforementioned obscured glazing that is less than 1.7 metres above the floor of the room in which it is installed shall be capable of being opened. Details of the type of obscured glazing shall be submitted to and approved in writing by the local planning authority before the windows are installed and once installed the obscured glazing shall be retained thereafter. Any alteration to the size or design of the windows approved in the south-west gable elevation shall only be in accordance with details that have first been submitted to and approved in writing by the local planning authority.

END OF SCHEDULE OF CONDITIONS

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Killian Garvey of Counsel

He called:

Anthony Devey MPLAN – Planning Team Leader

Stephen Cook BA Hons MRTPI – Western Planning Manager

FOR THE APPELLANT:

Roger Shrimplin MA (Cantab) DipArch RIBA FRTPI FCIArb MCIL
(acting as advocate and witness)

He called:

Jonathan Forman RIBA – Appellant

Documents Submitted at the Inquiry:

1. Consultation responses from Conservation Officer regarding planning application ref: 12/03689/PLF.
2. Statement to the Inquiry from the occupiers of No 52a West End.
3. Council's Opening submissions.
4. Council's report to Committee regarding planning application ref: 12/03689/PLF.
5. Case law *Brayhead (Ascot) Ltd. V Berkshire County Council and Another (1963)*