



Appeal Decision

Site visit made on 13 June 2022

by Roy Curnow MA BSc(Hons) CMS MRTPI

An Inspector appointed by the Secretary of State

Decision date: 20 July 2022

Appeal Ref: APP/X1165/X/22/3293652

Dawn, Brim Hill, Maidencombe, Torquay TQ1 4TR

- 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 Tony Payne against the decision of Torbay Council.
 - The application Ref P/2021/0931/CP, dated 12 August 2021, was refused by notice dated 25 January 2022.
 - 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 Porch addition, side extensions, rear extension, dormer loft conversion and outbuilding.
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Decision

1. The appeal is allowed in part and attached to this decision is a certificate of lawful use or development describing the extent of the existing use which is found to be lawful.

Application for costs

2. Applications for an award of costs were made by both parties. These applications are the subject of a separate Decision.

Procedural Matters

3. When I visited the site, I saw that significant building operations had been, and were being, undertaken. My decision is based not on what has been built, however, but on an assessment of what was proposed at the date of the application.
4. There are areas where there is agreement between the main parties. I will, however, have to determine whether I find that those matters would be lawful and, in doing so, I will also take account of third parties' views.
5. In its submissions, the Council states that, when taken in isolation, some of the proposed development would be permitted development ('PD'). It goes on to say that "it would have been inappropriate and unreasonable to issue a decision which related to individual elements and this was not asked for by the appellant". Notwithstanding this, it is possible for the Appellant to gain a certificate for some elements of what he seeks in a certificate, should they be severable from others that might not be shown to be lawful.

Reasons

6. Section 192(1)(b) provides for the making of an application to ascertain whether any operations proposed to be carried out in, on, over or under land would be lawful at the time that the application was made.
7. The onus lies with the Appellant to make his case on the balance of probabilities. The main issue is whether the Council's decision to refuse to issue a certificate under s192 was well-founded.
8. The Appellant seeks a certificate to show that the erection of various extensions and an outbuilding would be PD by reason of the terms of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended, ('the GPDO'). This decision addresses each of the proposed developments, and reference to the relevant classes of the GPDO will be referred to accordingly. Each of these classes of PD is found within Schedule 2, Part 1 of the GPDO. I shall simply refer to the relevant classes within my decision.
9. Dawn is a detached dwelling presenting a single storey to Brim Hill. It is not listed, nor does it lie within a conservation area. It is set on steeply sloping land and, as a result, although quite close to it, it is some way below the level of Brim Hill. To its front is the drive from the road and a detached garage. It has gardens to each side and a more extensive rear garden. The latter is very steeply sloping.
10. The planning history for the site shows that a number of applications have been made in respect of the property. Most recent of these was an application for extensions and renovations to the dwelling, (Council reference P/2020/1044 – the '2020 application'). This was refused by the Council, but a subsequent appeal was allowed.
11. The application that forms the subject of the appeal before me was submitted following the refusal of the 2020 application. However, in the words of the Appellant, the certificate application served as a fall-back position to establish what works at the property might amount to PD and provide assurance for a number of matters.

Principal elevation

12. As it is a matter that has implications for the application of certain PD rights in the GPDO, it is necessary to identify the dwelling's principal elevation. This is not a matter that is disputed by the main parties; however, some third parties disagree with them in this regard. The main parties identify that it is the property's northwest elevation, others its southeast elevation.
13. The term principal elevation is not defined in the GPDO. The Government has produced guidance on definitions and the interpretation of the GPDO in its 'Permitted development rights for householders - Technical Guidance', September 2019, ('the Guidance'). It sets out that in most cases the principal elevation will be that part of the house which fronts (directly or at an angle) the main highway serving the house (the main highway will be the one that sets the postcode for the house concerned). It will usually contain the main architectural features such as main bay windows or a porch serving the main entrance to the house. Usually, but not exclusively, the principal elevation will be what is understood to be the front of the house. It goes on to say that there can only be one principal elevation. This is not a statutory document, therefore it is for decision-makers to reach a decision based on the facts before them.

14. At Dawn, the northwest elevation fronts onto Brim Hill, the highway serving it. It has a front door facing the road, though I cannot be sure when this was installed, and this elevation has bay windows in it. Due to the fall of the land, at the time of the application, the southeast elevation was larger and had distinctive architectural features. A photograph in a third party representation¹ shows that there was a verandah at first floor level supported on pillars. This was not present when I visited the site and I am unsure if it was there at the date of the application.
15. Notwithstanding this, as a matter of fact and degree and primarily because of its relationship with the public road, I find that the northwest elevation is the property's principal elevation.

Porch

16. It is proposed to add a porch to this elevation, though this is not a matter that depends on the identification of the principal elevation. The main parties agree that this would be PD.
17. The porch would have to accord with a number of other criteria set out in Class D, and I refer to those that are relevant to this proposal. It would serve an external door; no part of the porch would be more than 3m above ground level; it would have a floor area of less than 3 sqm; and would not be within 2m of the property's boundary with a highway. For these reasons, it would be PD, as defined in Class D.

Side extensions

18. Extensions are proposed on either side of the dwelling. Both would run along its full depth, with that on its northeast side being wider than that on the southwest side. Such extensions fall to be considered against the PD rights in Class A, 'The enlargement, improvement or other alteration of a dwellinghouse'. The Council's position is that these works would not be PD, by reason of paragraph A.1.(j)(ii) which says that a side extension would not be allowed where it would have more than a single storey.
19. There is no definition of 'storey' in either the GPDO or the Guidance. The Appellant draws my attention to the National Space Standards, which he says "advises that habitable rooms must have a headroom of 2.1m or greater to be counted as useful internal space". He has not attached a copy of this, however, and I am unsure what document he refers to. I am aware that amongst the Technical Requirements in the Government's 'Technical housing standards – nationally described space standard' ('Technical Standards') is "i. the minimum floor to ceiling height is 2.3m for at least 75% of the Gross Internal Area".
20. Notwithstanding its reference to room heights, as the Introduction to the Technical Standards makes clear, it is to be used in association with new dwellings. Therefore, it is not relevant here.
21. I do not agree with what I read as the Appellant's premise that, following on from his comment that "habitable floor space is only [proposed] at ground floor", a storey has to comprise a 'habitable room'. That would mean that were a non-habitable room of considerable height, say a utility room or similar, be proposed underneath a habitable room, such as a living room, it would not equate to a storey. This position is incorrect.

¹ Maidencombe Community Group, 27 September 2021

22. In support of his lines of argument relating to room height, the Appellant states that the height in the undercroft would be limited to 1.8m and this would be reduced towards the front of the dwelling. However, this is not shown on the submitted drawings. There is no annotation on these to show the proposed floor and ceiling levels for the lower level of the side extensions. Importantly, this is not shown on the Proposed Section through the dwelling, as this has not been drawn through either proposed side extension.
23. For similar reasoning, whether it is proposed to use the space formed below a room in an extension, whether it is unusable, or whether it has any doors and windows cannot be determinative of whether an extension is one or two storeys high.
24. The question of whether an area of a building beneath another part of a building is another storey to the building has, to my mind, to be a matter of fact and degree. Whilst I take the point that the GPDO does not refer to the appearance of a proposed extension, how it would look has, to my mind, to be a part of an assessment of whether it would include more than one storey.
25. I note the decision in *Eatherly v LB Camden & James Ireland* [2016] EWHC 3108 (Admin). However, the circumstances in that case were different inasmuch as Mr Ireland sought a certificate of proposed development for the creation of a basement wholly beneath his house. That is different from the case before me, where the lower storey would be an integral part of an extension that creates living accommodation above.
26. From the detail that is shown in the drawings, and taking the statement that the lower levels of the extensions would be 1.8m high at face value, for the reasons above my finding is that the side extensions would be more than one storey. As such, they would not be PD under the terms of Class A.
27. The Council allege that work on side extensions to the property was undertaken prior to the date of the 2020 application being allowed at appeal. It was thus unlawful and could not be granted a certificate. I do not have sufficient information to determine whether this was the case. However, given that I have found that the proposed side extensions were not PD at the time that the application was made, this is immaterial to my decision.

Rear extension

28. Class A is also the basis for an assessment of whether the proposed rear extension would be lawful. The application proposes the erection of a flat-roofed, two-storey extension on the rear, southeast elevation of the dwellinghouse. The drawings show that it would extend out from the rear of the property by 3m and, at Upper Ground floor level, would entail the removal of an existing extension.
29. This is referred to in the 'Description' of development and 'Detailed Proposals' in the Officer's report. However, there is no assessment of this part of the proposed development in that report's 'Key Issues/Material Considerations' as there are with the other elements of the proposal. Similarly, the matter is not specifically addressed in the Council's Statement of Case.
30. Seemingly as a consequence of the Council's submissions, the Appellant does not make any arguments in respect of the rear extension in his Statement of Case. He states that this was part of the proposed works, in its paragraph 3.1.3, but save for a brief reference under the heading 'Verandah, Balcony, Raised Platform' it does not thereafter expand on the matter.

31. Whilst the Council is largely silent on the matter, the onus is on the Appellant to prove his case on the balance of probability that what is proposed would be PD. He has not done so. As such, I cannot conclude that the rear extension would be lawful under Class A.
32. I have taken account of the arguments put forward by the Council that the rear extension was unlawful as work on it began prior to the appeal on the 2020 application was allowed. For similar reasoning as given in my findings on the side extensions, I do not need to take this further.

Verandah

33. Both parties have referred to a 'verandah, balcony, raised platform' in their submissions, for the sake of brevity I will refer to it as a verandah. This is not specifically referred to in the description of the proposal on the application form. However, as part of its response to a series of questions asked by the Council, the Appellant said in an email dated 10 November 2021 said that the proposal included the "Replacement of existing decking in same place at lower ground floor level and of same size". As the Council went on to assess the matter in its Officer report, I take it that it agreed that this was part of the application. Therefore, notwithstanding that it was not included in the description of development, I shall address the matter.
34. Again, this falls to be assessed under Class A, as what is proposed would be an enlargement, improvement or other alteration of a dwellinghouse. Amongst its criteria as to why a development would not be PD is A.1.(k) that this would be the case if "it would consist of or include—(i) the construction or provision of a verandah, balcony or raised platform".
35. The Appellant says that what would occur is the replacement of existing decking in the same place at lower ground floor level and would be of the same size. He says that any sections that are rotten would be replaced in a like-for-like manner. The existing drawings show an area of decking to the rear of the dwelling.
36. The Survey drawings show a verandah to the rear of the dwelling. This is shown to be raised up above the falling garden. Few details of its construction are given. However, they do show it to have had a balustrade and to have been, at least in part, supported by corner posts. Given the reference to areas that might be rotten, it is safe to assume that wood was involved in its construction.
37. At my site visit, I saw that a large verandah of a different design to that in the Survey drawing, and without timber, had been erected. The Council is of the view that, as a result of the works undertaken to the property, this part of the proposed development cannot be carried out. However, I am not charged with assessing whether what has been built is permitted development, but whether replacement decking would have been permitted development at the time of the application.
38. The Appellant's submissions lacks clarity. There is a difference between the replacement of existing decking and the replacement of rotten areas of that decking. To my mind, the former points to its wholesale replacement and the latter to partial repair. If what is proposed is the former, scant evidence has been provided to demonstrate how what is proposed in the 'replacement' would be the same as what was there at the date of the application and why this should be held to be PD. If the latter, it is quite possible that some replacement of rotten timber would be PD. However, there would be a point where partial replacement becomes

a wholesale replacement or rebuild. Having not been given any evidence of the amount of rotten timber that was to be replaced, I cannot be sure as to what is proposed and, as a consequence, whether the work would be PD under Class A. It has not, therefore, been demonstrated that this element would be lawful.

Dormer extension

39. At the time that the Officer's report was written, the Council had some doubt as to whether the dormer extension would be permitted development under the terms of Class B, 'The enlargement of a dwellinghouse consisting of an addition or alteration to its roof'. Its reservation at that time was that it was not satisfied that condition B.2.(b)(bb) of the GPDO would be met. This requires the edge of the enlargement closest to the eaves of the original roof to be, so far as practicable, not less than 0.2 metres from the eaves, measured along the roof slope from the outside edge of the eaves.
40. That this would be the case was clarified in the Appellant's Statement of Case to the Council's satisfaction. As a result, the Council's view is now that the dormer extension would accord with Class B and is thus PD.
41. I have assessed the scheme shown in the drawings and other submissions against the terms of Class B. I find that it accords with its provisions and that the erection of the dormer would be PD.

Outbuilding

42. An outbuilding is proposed on steeply sloping land at the lower end of the garden. This development falls to be considered against the terms of Class E. The Council found against this aspect of the proposed development on the grounds that: it was not shown to be required for a purpose incidental to the enjoyment of the dwelling; that it would have more than one storey and that it is unclear whether separate engineering operations would be required to construct the outbuilding.
43. Amongst the terms of the PD rights set out in Class E(a) is that an outbuilding is required for a purpose incidental to the enjoyment of the dwellinghouse. Therefore, it follows that the requirement for the outbuilding has to be demonstrated.
44. No evidence as to why the outbuilding was required was put forward at the application stage. In his Statement of Case, the Appellant sets out a range of uses that the outbuilding might be put to. However, whilst he says that these would be incidental uses, he provides no reasoning as to the requirement for the outbuilding.
45. The Council questions the size of the outbuilding's floor area and states that this could be used for a residential purpose. Class E allows for buildings that might be of a considerable floor area, and what is proposed could be held to fall within those parameters in certain circumstances. However, as the requirement for the outbuilding has not been justified, it follows that neither has the size of the building.
46. Paragraph E.1.(d) sets out that an outbuilding would not be PD were it to have more than one storey. I have addressed the question of what a storey is in respect of the side extensions, above. Here, the proposed outbuilding would "be likely to have" have what the Appellant describes again as an undercroft. Save for what might be inferred from the outbuilding's external elevations, I have little information of that undercroft. These show that the wall of the outbuilding below its floor level, at the level of ground on its upper side, would be greater than the

2.5m from its floor level to the building's eaves. From the evidence of the drawings, even allowing that some of the undercroft might have limited headroom by reason of the slope of the land, there would be a space of considerable height here.

47. As I have said, above, whether the outbuilding would have more than one storey is a question of fact and degree. Whether it is proposed to use the space formed below a room in an outbuilding, or whether it has any doors and windows cannot be determinative of whether it has one or more storeys.
48. In this case, the large undercroft would be likely to have a higher 'floor to ceiling' height than the floor area that is proposed to be used above it, I find that the proposed outbuilding would have more than one storey. It would not accord with the terms of paragraph E.1.(d) and would not be PD.

Other Matters

49. I am in receipt of correspondence from third parties and bodies in the area, including Maidenhead Community Group, whose submission is supported by others, and the Chair of the Torquay Neighbourhood Forum. Some of the points that they raise were the same as those raised by the Council. They are addressed, above.
50. In respect of other points raised, as this is an appeal against the refusal of a certificate of lawfulness relating to PD rights, planning matters and possible environmental implications, such as foul and surface water drainage and the effects on wildlife, cannot be taken into account. Similarly, the procedure and processing of the appeal against the decision on the 2020 application have no relevance here.

Conclusion

51. The Appellant has proven the case that the proposed porch and dormer extension would have been PD at the time that the application was made. He has, however, failed to do so in respect of the proposed side and rear extensions, verandah and outbuilding. The porch and dormer elements are readily severable from the others that were applied for.
52. Section 193(4) provides that an LDC may be issued for the whole or part of the land specified in the application.
53. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the porch and dormer extension was not well-founded and that the appeal should succeed to that extent.
54. In addition, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed side and rear extensions, verandah and outbuilding was well-founded and that the appeal should fail to that extent.
55. I will therefore exercise the powers transferred to me under section 195(2) and (3) of the 1990 Act as amended.

Roy Curnow

Inspector

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 12 August 2021 the porch addition and dormer loft conversion described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The porch addition and the dormer loft conversion have been shown to be permitted development under the terms of Schedule 2, Part 1, Class D and Class B, respectively, of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended, at the time that the application was submitted to the Council.

Signed

Roy Curnow

Inspector

Date: 20 July 2022

Reference: APP/X1165/X/22/3293652

First Schedule

Erection of a porch addition and dormer loft conversion

Second Schedule

Land at 'Dawn', Brim Hill, Maidencombe, Torquay TQ1 4TR

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 20 July 2022

by Roy Curnow MA, BSc(Hons) CMS MRTPI

Land at: 'Dawn', Brim Hill, Maidencombe, Torquay TQ1 4TR

Reference: APP/X1165/X/22/3293652

Scale: Not to scale

