
Appeal Decision

Site visit made on 22 July 2022

by Roy Curnow MA BSc(Hons) CMS MRTPI

An Inspector appointed by the Secretary of State

Decision date: 11 August 2022

Appeal Ref: APP/A3655/X/21/3284037

29 Beaufort Road, Maybury, Woking GU22 8BZ

- 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 Mrs Navidia Hussain against the decision of Woking Borough Council.
 - The application Ref PLAN2021/0885, dated 28 July 2021, was refused by notice dated 16 September 2021.
 - The application was made under section 191(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 Roof dormer window that serves a bathroom.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The descriptions of the development that is the subject of the certificate proposal are different on the application form and decision notice. I have used that from the application form.

Application for costs

3. An application for costs was made by Woking Borough Council against Mrs Navidia Hussain. This application is the subject of a separate Decision.

Main Issue

4. The main issue is whether the Council's decision to refuse to issue a certificate of lawfulness for a front roof dormer was well-founded.

Reasons

5. 29 Beaufort Road is a two-storey dwelling on an estate of similar properties.
6. By way of background to the appeal, planning permission was granted for 'Proposed part single storey, part two storey side and rear extension following demolition of existing outbuilding' on 28 April 2017. The Council's reference for this application was PLAN/2017/0257.
7. It seems that the decision notice referred to incorrect drawing numbers and that the Council subsequently issued a replacement decision notice with the correct drawing numbers. The latter 'decision notice' carries the same date as

that of the earlier one. However, Appendix E to the Appellant's Statement of Case (SoC) shows that the preparation of a replacement decision notice was only arranged internally by the Council on 4 May 2017, and its issue was dependent on the applicant's agent returning the original decision, so that issuing would have been no earlier than 4 May 2017.

8. I have referred to the second decision notice in inverted commas for the reason that the Council does not have the power to unilaterally issue a replacement decision notice. This can only be achieved through the procedure set out in s97 of the Act. The evidence does not show that this was the case and, therefore, the subsequently issued 'decision' is irrelevant. The terms of the initially issued decision, dated 28 April 2017, are relevant and I subsequently refer to this as the decision.
9. By the time that the second decision had been issued, construction work was underway with builders working to a set of plans that included the dormer. The Appellant states that her agent was told verbally that this would be permitted development.
10. Whether or not this was the case, both the correct and incorrect decisions contained condition 3 that reads: "Notwithstanding the provisions of Article 3 of the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking and re-enacting that Order with or without modification) no window, dormer window, roof light, door or other additional openings other than those expressly authorised by this permission shall be formed (at first floor level or above in the north east and north west elevation (including the roof) without planning permission being first obtained from the Local Planning Authority". The reason for this reads: "To protect the amenity and privacy of the occupiers of adjoining properties in accordance with Policy CS21 of the Woking Core Strategy 2012". Thus, from 28 April 2017, the Appellant was aware that these permitted development rights were removed from the extension.
11. What was built differed from the development which was approved, by way of the installation of a dormer window. The Appellant states that the Council invited her to make an application to retain the dormer. She assumed that this was simply a "paperwork exercise" to regularise the dormer window. I am told that advice to this effect was given verbally, so it is not possible to verify it. That application, Council reference PLAN/2019/0784, was refused. I am told that a subsequent appeal against this decision was dismissed.
12. S191(1)(b) of the Act provides that if any person wishes to ascertain whether any operations which have been carried out in, on, over or under land are lawful, she may apply for a certificate of lawfulness. S191(2) states that "For the purposes of this Act uses and operations are lawful at any time if - (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force".
13. The evidence shows that no enforcement notice is in force and, therefore, it is a question of assessing whether the Council could have taken enforcement action against the dormer on the date that the certificate application was made. Whether or not it could take enforcement action, or intends to, is

immaterial to my assessment of lawfulness. I find similarly with regards to the actions of the Council's housing management company, which owns the property. It has requested the dormer be removed, stating that a failure to do so could result in the occupiers' eviction.

14. In this application for a certificate of lawfulness, the onus lies with the Appellant to make her case on the balance of probability.
15. The assessment is to be made on matters of law, on the basis of the evidence before me. Therefore, whilst the Appellant's personal circumstances are understood, they can play no part in my decision.
16. The Appellant's case is that at the time the application was made it was too late for the Council to take enforcement action against the erection of the dormer. The time limits in which a local planning authority might take enforcement action are set out in S171.B of the Act.
17. The Appellant states that this a matter of unauthorised operational development and S171B(1) is relevant. Therefore, the Council had four years in which to take action against the dormer. Her case is made on the ground that the decision notice for PLAN/2017/0257 did not exist at the time that the dormer was constructed. Therefore, the permitted development rights were not removed by condition when the development was substantially complete.
18. The Council's position is that what has occurred is a breach of condition 3 attached to PLAN/2017/0257, and, as such, the ten year time limit in S171B(3) is relevant.
19. Planning permission PLAN/2017/0257 was granted on 28 April 2017. For her argument on the four-year limit to have any bearing, the Appellant would need to demonstrate that the dormer window had been substantially completed prior to the date of the decision.
20. Appendix E to the Council's SoC is a record of Building Control site visits to the property in respect of a two-storey extension and loft conversion. This shows that work had not commenced on 24 April 2017. The first reference to work having commenced was that excavations for the extension were noted on 2 May 2017; this cannot, however, be read as the date that development commenced.
21. Appendix F to the Council's SoC comprises a series of photographs of the property on 14 June 2017. They show that work on extending the property was well underway, though the extension had no roof at that time, nor was the dormer built. The Appellant states, in her Final Comments, that due to the position of shadows the Council's photographs were taken early in the morning. She goes on to say that "by the end of the day, after many hours of construction, the roof structure and dormer was substantially completed" and that "the shower room could be used, and was in use on the 26th July 2017 with the aperture for the window frame and glass boarded up ready for the window frame and glass to be fitted".
22. I find that the dormer was not complete prior to the issuing of the decision for PLAN/2017/0257. Based on the evidence, I find that, as a matter of fact and degree and on the balance of probability, the work being undertaken was based on the planning permission with the addition of the dormer that was thought to be permitted development. It was not permitted development, by reason of

condition 3. As such, the development was subject to condition 3 and the ten-year time limit in S171B is relevant. It is clear that ten years had not passed between the date of the substantial completion of the dormer extension and that when the application for the certificate was made.

23. The statutory declarations made by the Appellant and her husband are based on the case that the four-year time limit is relevant. As such, these do not take her case forward. Neither do the photographs she has submitted.
24. I note that her position was, to a degree, based on that reached by her previous Agent. However, I do not have evidence to show how that person's conclusions were reached. In any event, the case before me is fundamentally flawed, by reason of applying the wrong time limit.

Conclusion

25. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of Roof dormer window that serves a bathroom 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.

Roy Curnow

Inspector