The Planning Inspectorate

Appeal Decision

Site visit made on 15 February 2023

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 March 2023

Appeal Ref: APP/Z5630/X/22/3294509
33 Forest Side, Worcester Park KT4 7PA

- 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 Jamie Hoult against the decision of the Council of the Royal Borough of Kingston-upon-Thames.
- The application Ref 21/02258/CUE, dated 17 August 2021, was refused by notice dated 4 November 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 described as: Changes to the existing roof tile, from red/brown to grey (Redland Plain Tile – Slate Grey). This includes the tiles to the main roof and dormer, rear ground floor extension roof, front porch roof & hanging tiles to portion of wall between the bay windows on the front elevation.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appeal form and covering letter suggest that the application has been made under section 192 of the 1990 Act. But Section 7 of the application form indicates that the application is for **existing** building works and building works in breach of a condition. Moreover, section 10 of the application form states that the building works were substantially completed on 15 February 2021. So I have dealt with the appeal under section 191 and not section 192.

3. Planning Practice Guidance (PPG) is clear that planning merits are not relevant at any stage in a lawful development certificate application or the appeal process for such an application[1]. Therefore I have not taken any planning merits into account in my decision.

Background

4. On 17 June 2020 planning permission Ref 20/00908/HOU was granted on the appeal property for:

   'Conversion of garage to habitable space, demolition of conservatory, erection of single storey rear extension with associated changes to fenestration, first floor side extension, hip and rear dormer roof extensions with installation of

[1] Lawful development certificates, paragraph: 009 Reference ID: 17c-009-20140306

3no front rooflights to facilitate loft conversion. Erection of detached outbuilding in rear garden.'

5. Condition 1 of that permission stated:

'The approved development shall be carried out in accordance with the following drawings/details: 01 SITE LOCATION PLAN, 02 SITE PLAN, 03 EXISTING AND PROPOSED GROUND FLOOR PLAN, 04B First Floor and Loft, 05B Roof and Side Elevation, 06B Front and Rear Elevations, 07B Section A, 08B Section B, 09B Rear Garden. Reason: For the avoidance of doubt and in the interests of proper planning.'

6. Condition 3 of that permission stated:

'Development shall be carried out in accordance with the materials specified on the approved plans and on the application form unless otherwise agreed in writing by the Local Planning Authority. Reason: To ensure a satisfactory appearance on completion of the development in accordance with Policy DM10 (Design Requirements for New Developments including House Extensions) of the LDF Core Strategy Adopted April 2012.'

7. The approved plans clearly specify that the roof and the proposed extensions to it are to be clad in plain clay tiles.

8. The appellant now seeks an LDC which they describe is to 'change' the colour of the roof tiles. It was apparent at my site inspection that the extensions approved by the 2020 permission have been constructed and the 'change' had already occurred, such that the roofed parts of the development and rear dormer are clad in grey tiles.

Main Issue

9. The main issue is whether the Council's decision to refuse the application was well-founded or not.

Reasons

10. Under section 191(1) of the 1990 Act, if any person wishes to ascertain whether— (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, they may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

11. Section 191(2) of the 1990 Act 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.

12. Section 191(3) states that, for the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if— (a) the time for taking enforcement action in respect of the failure has then expired; and (b) it does

not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

13. Section 191(4) provides that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

14. The PPG states that the applicant is responsible for providing sufficient information to support an application[2]. So in an LDC appeal, the onus is on the appellant to make out their case and I must consider whether, on the balance of probabilities, on the facts of the case and relevant planning law, the existing development is lawful.

15. The appellant's case is focussed on 'permitted development' rights pursuant to Schedule 2, Part 1 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the Order). Within Part 1, the appellant has referred to Classes B, C and D. In summary, these classes of permitted development respectively allow additions to the roof of a dwellinghouse, alterations to the roof of a dwellinghouse and the erection or construction of a porch outside any external door of a dwellinghouse.

16. But whatever permitted development rights the appeal building may enjoy under the Order, Article 3(4) of the Order states:

    'Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order.'

17. In other words, it is not lawful to have **carried out** the development granted planning permission in 2020, with roof tiles other than those shown on the approved plans.

18. I have considered whether the 2020 permission could have been carried out in accordance with the conditions of that permission and the roof tiles changed subsequently. But on the balance of probability, I do not find it likely that this is what has occurred in this case and, bearing in mind that the burden of proof is on the appellant, there is no evidence this is what has occurred either.

19. Moreover, there is no argument before me that the development described in the 2020 planning permission is permitted development under the Order, such that the appellant does not need to rely on that express grant of planning permission for what has been built.

20. The appellant argues that permitted development rights have not been removed. Be this as it may, this does not mean that the 2020 permission could be lawfully implemented in breach of any of its conditions. This is because of the effect of Article 3(4) of the Order.

21. I have been referred by the appellant to other decisions of the Council. Nevertheless, each case turns on its own specific facts and, based on the

[2] Lawful development certificates, Paragraph: 006 Reference ID: 17c-006-20140306

information provided, I cannot be certain that circumstances in the cases referred to are the same as those in the case before me. In any event, I note that the other decisions referred to concern section 192 proposals, rather than existing development, as is the case in this appeal.

22. Taking all of the above into account, Conditions 1 and 3 referred to above, together with Article 3(4) of the Order mean that the change which has been made was not lawful and I find nothing ambiguous about the wording of these planning conditions on the permission which was granted.

Conclusion

23. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of: *"Changes to the existing roof tile, from red/brown to grey (Redland Plain Tile – Slate Grey). This includes the tiles to the main roof and dormer, rear ground floor extension roof, front porch roof & hanging tiles to portion of wall between the bay windows on the front elevation"*; 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.

L Perkins

INSPECTOR