



Appeal Decisions

Site visit made on 6 January 2023

by D Boffin BSc (Hons), DipTP, MRTPI, DipBldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 4 April 2023

Appeal A Ref: APP/A2280/C/21/3274505

Appeal B Ref: APP/A2280/C/21/3274506

1 Dean Road, Strood, Kent ME2 3QH

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act). The appeals are made by Mr David Watford (Appeal A) and Mrs Kelly Watford (Appeal B) against an enforcement notice issued by Medway Council.
- The notice was issued on 6 April 2021.
- The breach of planning control as alleged in the notice is:
Without the benefit of planning permission the erection of a detached single storey dwelling to the rear of the Property.
- The requirements of the notice are:
 - (i) Demolish the unauthorised single storey dwelling
 - (ii) Remove all debris and associated materials from the Property
- The period for compliance with the requirements is: 2 calendar months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (f) of the 1990 Act. 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 1990 Act. Appeal B is proceeding on the grounds set out in section 174(2)(b), (c) and (f) of the 1990 Act.

Decisions – both appeals

1. The appeals are allowed and the enforcement notice is quashed.

Applications for costs

2. Applications for costs were made by Mr and Mrs Watford against Medway Council. These applications are the subject of separate decisions.

Preliminary Matters

3. As set out above there are two appeals on this site. They relate to the same site and the same enforcement notice. To avoid duplication, I have dealt with them together, except where otherwise indicated.
4. The appeals were originally also made under ground (d) of section 174(2) of the 1990 Act but that ground of appeal has subsequently been withdrawn. A Hearing was due to be held on the 13 December 2022 for this appeal but was cancelled due to bad weather. Due to the production of a Statement of Common Ground between the main parties and to minimise any further delays the procedure was changed to written representations. Both main parties had the chance to comment on the change to the procedure.

The ground (b) appeal

5. In order for the appeal to succeed on ground (b) the appellants would be expected to show on the balance of probability that the erection of a detached single storey dwelling has not in fact occurred.
6. The appellants consider that what has been erected is not a dwelling and that the development as constructed is not substantially or materially different to that granted planning permission¹ in 2016 (the 2016 permission). The Council has accepted that it could be considered that it was slightly premature to refer to the development as a 'dwelling' at the time the notice was issued. It considers that the notice can be corrected by deleting the word 'dwelling' and replacing it with 'building'. It also considers that windows and doors are in different positions, rooflights have not been inserted and boundary treatments are different to that approved by the 2016 permission and that these differences result in the development being materially different to the 2016 permission.
7. I noted that whilst the shell of the building is complete the internal space within it is not and the window openings are boarded over. As such, the building is not in use and there are no facilities within it. There is no definition of the term 'dwelling/dwellinghouse' within the 1990 Act. However, it was accepted in *Gravesham BC v SSE & O'Brien* [1983] JPL 306 that the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence. I acknowledge that given the position of the window and door openings in the elevation facing Chapter Road that the building has the appearance of a dwelling when viewed externally. Moreover, the boundary treatments within the site also differ to that shown on the approved plans for the 2016 permission and their position and design could be taken to indicate that in the future the building may be occupied independently of the dwelling, 1 Dean Road (No 1). Nevertheless, the building did not at the time the enforcement notice was issued and does not have any facilities within it. Therefore, the development as constructed is not a dwelling and the alleged breach of planning control has not in fact occurred.
8. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act where the correction will not cause injustice to the appellant or local planning authority. I have therefore considered whether I could correct the allegation in the notice to address the breach of planning control that has occurred. As such, I must establish what, if any, breach of planning control has occurred. The 2016 permission related to the construction of a detached single storey annexe building to the rear of No 1. The 2016 permission was subject to 4 planning conditions but none of those conditions required details to be submitted to and approved by the Council prior to the commencement of the development. There is no dispute that the building constructed on the site has the same dimensions and is in the same location as that approved by the 2016 permission. Consequently, I consider that most of the elements of development relating to the external shell of the building are common to both the 2016 permission and the enforcement notice.

¹ Ref No: MC/15/4550

9. Based on the evidence before me, it appears that the digging of a trench to contain the foundations of the development would have been a 'material operation' as defined within section 56 of the 1990 Act in respect of the 2016 permission. As such, it appears that the development permitted by that planning permission was begun within the time limits set out in that permission. I acknowledge, that it is reasonable to consider that it is possible to deviate from the permitted works in a manner that later becomes an enforcement issue. In this case, the development as constructed has window and door openings in different positions to that approved as part of the 2016 permission and roof lights have not been inserted. Nevertheless, this does not retrospectively alter the fact that the 2016 permission can be treated as being begun in relation to section 56 of the 1990 Act. Therefore, I consider that the 2016 permission is still extant.
10. The differences to the design of the building in relation to the position of the window and door openings and lack of roof lights in combination with the alterations to the boundary treatments may, as stated previously, indicate that the building could be capable of being occupied independently of No 1 in the future. Moreover, if that occurred it may constitute a material change in the use of the site and it could be treated as a breach of condition 4 of the 2016 permission which states that the development shall only be occupied ancillary to the main dwelling and shall not be occupied as a separate hereditament. The number of window and door openings constructed within the building is similar to that approved and access into the building would be via the elevation facing Chapter Road rather than the elevation facing No 1. However, that factor on its own has little impact on how the building is or would be used. Furthermore, the alterations to the boundary treatments are not cited within the enforcement notice or its requirements.
11. In my judgement, the differences to the design of the building in themselves do not constitute a substantial deviation from the 2016 permission and as a matter of fact and degree these do not amount to material changes that have significant planning consequences. As a result, as constructed the breach of planning control that has occurred is a breach of condition 2, that the development shall be carried out in accordance with the approved plans, on the 2016 permission. Therefore, the Council's suggestion to correct the description of the alleged breach by deleting the word 'dwelling' and replace it with 'building' would not address the breach of planning control that has occurred.
12. I do not consider that I can correct the allegation to a breach of condition 2 of the 2016 permission without injustice to the parties. This is because it would fundamentally change the scope of the notice. Moreover, I cannot be certain of what each party's case would be in the face of such a correction and in particular what grounds (under section 174(2)) an appeal might have been brought by the appellants. Furthermore, the enforcement notice and its requirements do not currently relate to any of the boundary treatments. It is clear from the evidence before me that the Council considers that the boundary treatments are part of the breach of planning control. Their inclusion would make the enforcement notice more onerous on the appellants and injustice would be caused to them as a result. My decision below to quash the notice leaves open to the Council the option of issuing a further notice with a corrected allegation.

Conclusion

13. For the reasons given above, I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed.
14. In these circumstances, the appeals on grounds (a), (c) and (f) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act do not fall to be considered.

D Boffin

INSPECTOR