



Appeal Decision

Site visit made on 15 August 2023

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 September 2023

Appeal Ref: APP/W0340/W/22/3300783

Land to the rear of Magnolia Cottage, The Old Orchard, Calcot, Reading RG31 7RF

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Mr R Willett against West Berkshire District Council.
- The application Ref 21/02418/FUL is dated 15 September 2021.
- The application sought planning permission for one no. 2 bed detached cottage and garage without complying with conditions attached to planning permission Ref 04/02607/FUL, dated 14 December 2004.
- The conditions in dispute are Nos 2, 8 and 9 which state that: No 2 "*The development hereby approved shall be carried out in accordance with the submitted plans as amended by letter dated 9 November 2004 and the accompanying plans received on 12 November 2004*"; No 8 "*Irrespective of the provisions of the current Town and Country Planning (General Permitted Development) Order 1995 or any subsequent revision, no additions or extensions to the dwelling shall be built or ancillary buildings erected within the curtilage, unless permission has been granted by the Local Planning Authority on an application made for that purpose*"; No 9 "*The windows at first-floor level in the south east elevation of the dwelling hereby approved shall be fitted with fixed obscure glass before the dwelling is occupied, unless details of any methods of opening have been submitted to and agreed in writing by the Local Planning Authority, and the obscure glazing shall thereafter be retained in position. Notwithstanding the provisions of the current General Development Order, no additional openings shall be inserted at first floor level in the southeast elevation of the dwelling without the permission in writing of the Local Planning Authority.*"
- The reasons given for the conditions are: No 2: "*To ensure that the permission relates to the revised plans only, where they differ from the plans originally submitted.*"
No 8: "*To prevent overdevelopment of the site and to safeguard the amenities of neighbouring properties in accordance with Policies EN1 and LD3 of the Berkshire Structure Plan 1991-2006 and OVS2 of the West Berkshire District Plan 1991-2006.*"
No 9: "*To prevent overlooking to adjoining properties in accordance with Policies LD3 of the Berkshire Structure Plan 1991-2006 and OVS2 of the West Berkshire District Plan 1991-2006.*"

Decision

1. The appeal is allowed and planning permission is granted for one no. 2 bed detached cottage and garage without complying with conditions 2, 8 and 9 attached to planning permission Ref 04/02607/FUL, dated 14 December 2004 at the Old Orchard, Reading, RG31 7RF subject to the conditions in the Schedule at the end of this Decision.

Preliminary Matters

2. The additional information supplied with the appeal does not amend the details of the application. The scheme before me is exactly the same as that considered by the Council and examined by interested parties at the application stage. No-one who would be consulted on any changes to the scheme has been deprived of the opportunity of such consultation. Accordingly, having regard to established case law¹ and the revised *Procedural Guide*², there is no sound reason for the additional information to not be considered. Moreover, the copy of the appellant's letter of 11 December 2009 comes from the Council's records. Accordingly, an important part of the additional information would already have been available when the application was being considered by the Council.
3. Planning permission Ref 04/02607/FUL to erect a two-bedroom detached cottage and garage at the appeal site was granted on 14 December 2004. Condition 1 is the standard five-year time limit for commencing development. Copies of Statutory Declarations (SDs) were supplied with the appeal, attesting to development having begun prior to the expiry of the permission. One SD is signed by the appellant, the second being signed by a now-retired contractor engaged in works at the site. Exhibited with the appellant's SD is a copy of a letter dated 11 December 2009, which refers to the undertaking of a '*material operation*' as defined in s56 (4) of the Act, namely '*the digging of a trench which is to contain the foundations, or part of the foundations, of a building*', on 30 November 2009, to begin the development for the purposes of s56 (2) of the Act. The letter is date-stamped as having been received by the Council on 29 December 2009. Exhibited with the second SD are copies of photographs dated 1 & 5 December 2009, which show a foundation trench and a masonry wall erected in the trench up to damp proof course level.
4. The SDs are dated and witnessed by a solicitor. The contents of the SDs offer a sufficiently precise and unambiguous description of exactly what works were undertaken at the site, where and when. The documentary evidence corroborates the account of events provided by the appellant and the witness. Although not certified as true copies, there is little which would lead me to believe that the SDs had been reproduced inaccurately. Furthermore, there is nothing before me which contradicts or otherwise casts doubt on the appellant's version of events. The absence of a response to the appellant's letter of 11 December 2009 is not a significant factor in ascertaining whether development has begun for the purpose of s56 (2). Nor is it necessary for there to be a Certificate of Lawfulness under s191 or s192 of the Act confirming that development has begun. Consequently, and as a matter of fact and degree, I afford considerable weight to the evidence of development having been undertaken at the site prior to the expiration of the permission.
5. Turning to the situation on the ground today, a freestanding double garage has been erected at the site. The position of the foundation trench and wall, in the dated photographs exhibited with the second SD, corresponds to one of the garage walls. The footprint of the garage as originally built and its position within the site accords with that in the approved scheme. In terms of the depth and overall height, the 'as built' garage is not different from the approved garage. The width of the garage as originally built is also similar to

¹ *Bernard Wheatcroft Ltd v SSE* [JPL] 1982 P37.

² *Procedural Guide: Planning appeals England*.

that of the approved garage, with what is clearly a later timber walled addition filling the previous gap to the front boundary wall.

6. The 'as built' garage has a slightly different roof form compared to that approved, with half hips at the front and rear instead of to the sides. There are other elevational changes including the repositioning of a window, omitting a door opening and inserting a rooflight. Nevertheless, none of the changes alter the overall scale and design of the garage compared to that approved. As originally built, the garage was similar to that in the approved scheme. Therefore, as a matter of fact and degree, the changes to the garage do not represent a deviation from the approved scheme, either individually or in accumulation. The changes made to the garage do not prevent the dwelling from being erected in accordance with the approved drawings. Furthermore, as I am given to understand that the details required by conditions 3-6, 10 and 12 of the permission were approved by the Council prior to any works taking place, there has been no breach of the pre-commencement conditions. Accordingly, based on the available evidence I find, on the balance of probability, that the permission was implemented.
7. The application does not seek to vary the operative part of the permission. No amendment to the description of the development in the original permission is sought, nor would one arise if permission were granted. The changes proposed do not fundamentally alter the original permission. As the garage has already been erected, it is not necessary to include its elevations on the submitted drawings. Therefore, varying condition 2 to permit the erection of the revised dwelling would not result in a conflict with the description of the development. The principles set out in established case law³ concerning the extent to which an original permission can be varied, when making an application under s73 of the Act, would not be offended. For this and the other reasons set out above, the Council could have determined the application. It follows therefore that the appeal is to be determined and it is to that which I now turn.

Main Issues

8. The appellant sought to vary condition 2 to specify the drawings showing a dwelling of revised design and to remove/vary conditions 8 and 9. The main issues in the appeal are therefore the effect of varying/removing the disputed conditions on the character and appearance of the area, and; the effect on the living conditions of occupiers of adjoining residential property, having regard to privacy.

Reasons

Character and appearance, living conditions

9. The site, which is located in an established residential area, was formerly part of the rear garden of a substantial detached dwelling and fronts onto a lane serving a number of dwellings. Although some traditional properties are present in the locality, in general the surroundings are characterised by modern two storey dwellings of similar appearance, utilising similar external materials and occupying ample sized plots containing maturing planting. These factors contribute significantly to the pleasantly spacious and cohesive suburban character and appearance of the area.

³ *John Leslie Finney v Welsh Ministers, Carmarthenshire County Council, Energiekontor (UK) Limited* [2019] EWCA Civ 1868.

10. The revised dwelling would have a slightly larger footprint compared with the approved scheme, having regard to a modest increase in its depth. It would also be slightly taller at the eaves and ridge levels. This would make little difference in terms of the overall scale of the dwelling, compared to what was previously approved. The changes to the elevations include moving the entrance door and porch to the front and using a tiled roof instead of glazing on the rear bay. The size and position of a number of window openings would also be altered and there would be a limited number of additional windows, including a bay window on one side and an additional first-floor window in the side facing south-east. In addition, solar panels would be provided on the roof slopes. These changes would make minimal difference to the overall design and appearance of the dwelling compared to the approved scheme.
11. The changes to the elevations would not result in harmful overlooking of adjoining residential property. According to the submitted drawings, the additional first-floor window in the south-east elevation lights a bathroom and is therefore likely to be obscure glazed. Consequently, the revised dwelling would not be substantially different to the approved scheme and it would not have an unacceptable effect on the character and appearance of the area or on privacy levels currently enjoyed by occupiers of adjoining residential property.
12. Condition 8 restricts rights in the GPDO⁴ to extend the dwelling and erect ancillary buildings within the curtilage. Planning conditions are required to meet the tests in paragraph 56 of the revised National Planning Policy Framework (the Framework). The Planning Practice Guidance (PPG) advises that restricting the future use of permitted development rights may not pass the tests of reasonableness or necessity and the scope of such conditions needs to be precisely defined, so that it is clear exactly which rights have been limited or withdrawn. The site is not unusually constrained, for example in terms of size or its relationship to adjoining property. During my visit, I observed little which might indicate that extending the dwelling or erecting garden outbuildings within the GPDO limits would harm the character and appearance of the area or the privacy of occupiers of adjoining residential property. Accordingly, I am not persuaded that the generally restrictive effect of condition 8 on GPDO rights is either necessary or reasonable.
13. Amongst other things, condition 9 restricts rights in the GPDO to install additional first floor openings in the south-east elevation of the dwelling. Unless obscure glazed and non-openable up to 1.7 m above the floor of the room in which it is installed however, such windows would not be permitted by the GPDO in any event. The GPDO thus provides a sufficient safeguard for the privacy of occupiers of adjoining residential property in this regard.
14. Condition 9 also requires first-floor windows in the south-east elevation to be fitted with fixed obscure glazing, unless details of any openings have been approved by the Council, and for obscure glazing to be retained. Two of the first-floor windows in this elevation are likely to be obscure glazed in any event, as according to the submitted drawings they light bathrooms. Nevertheless, inserting clear glazing in the windows above ground floor level in this elevation in future could result in direct overlooking of adjoining rear gardens, thereby significantly eroding the levels of privacy currently enjoyed by occupiers of those properties. There is no sound reason for not providing scope

⁴ The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) at Article 3, Schedule 2, Part 1, which superseded the 1995 version of the Order.

to open part of the windows for ventilation purposes; this could be by way of an opening top light for example, without resulting in harmful overlooking. Therefore, to meet the tests of necessity and reasonableness condition 9 should be varied so that it is slightly less onerous in respect of restricting GPDO rights and the provision of ventilation in the first-floor windows in the south-east elevation, whilst still ensuring that all windows in that elevation are fitted with obscure glazing and maintained as such.

15. Drawing the above matters together varying the requirements of condition 2 to specify the drawings for the revised dwelling, not restating condition 8 and varying condition 9 as set out above, would not cause unacceptable harm to the character and appearance of the area or to the living conditions enjoyed by occupiers of adjoining residential property. The Council did not seek to argue otherwise. As a result, the dwelling would be of a high quality and sustainable design respecting and enhancing the character and appearance of the area, contributing positively to local distinctiveness and a sense of place as well as to the quality of life in the Council's administrative area, in accordance with Policy CS 14 of the West Berkshire Core Strategy.

Other Matters

16. There is no firm evidence to suggest that the revised dwelling would harm highway safety. As the access and parking arrangements are largely unaltered from the approved scheme, the effect on access to the pair of garages and the parking area close to the site entrance would be substantially unchanged. Alleged incidences of access to the garages and parking area being restricted and the effect on rights of access thereto have little bearing on this appeal.
17. There is also no firm evidence that the revised dwelling would affect the significance of heritage assets. As each application is assessed on its individual merits, the revised dwelling would not create a precedent for further development. Alleged breaches of conditions on a nearby development undertaken by the appellant are of limited relevance. It is open to the Council to take enforcement action against any breach of planning control drawn to its attention. The effect of a development on property values is not a planning matter.

Conditions

18. Since development has already begun, I have omitted the standard time limit condition. I have imposed a condition which specifies the drawings for the revised dwelling, in the interests of certainty. The PPG makes it clear that a planning permission granted under s73 should also restate the conditions imposed on earlier permissions that continue to have effect. I have re-worded and consolidated conditions 3-6, 10 and 12 of the original permission as appropriate, to ensure that development is carried out in accordance with the details approved thereto. This is in the interests of highway safety in respect of condition 2 and in respect of conditions 3, 4, 6 and 7, to safeguard the character and appearance of the area. I have imposed conditions 5 and 9, which restate conditions 7 and 11 of the original permission, to safeguard the living conditions of occupiers of adjoining residential property and in the interests of highway safety, respectively. I have also imposed condition 8 in substitution for condition 9 of the original permission, to safeguard the living conditions of occupiers of adjoining residential property.

19. The conditions have been re-ordered to reflect advice on such matters in the PPG. It has also been necessary to alter the wording of various conditions to ensure the Framework tests of enforceability and precision are met and in the case of condition 9, to refer to the revised GPDO. Furthermore, I have omitted the 'tailpiece' from the conditions attached to the original permission. This is in the interests of certainty; conditions should not offer the prospect of an informal variation or waiver. The proper way in which to vary the requirements of a condition is by making a s73 application.

Conclusion

20. Varying condition 2 of the original permission to enable erection of the revised dwelling, together with removing condition 8 and varying condition 9, would not have an unacceptable effect on the character and appearance of the area or the living conditions of occupiers of adjoining residential property and accords with the Development Plan. Therefore, I conclude that the appeal should succeed.

Stephen Hawkins

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans: Drawing No 1005/P/2B Rev B.
- 2) Before excavations for the foundations of the dwelling hereby permitted begin, a temporary parking and turning area shall be provided within the site in accordance with the details previously approved by the Council pursuant to the condition attached to planning permission reference 04/02607/FUL. The parking and turning area so approved shall be maintained until the approved parking and turning area for the dwelling have been constructed and brought into use.
- 3) Before excavations for the foundations of the dwelling hereby permitted begin, the tree and landscape protection scheme previously approved by the Council pursuant to the condition attached to planning permission reference 04/02607/FUL shall be implemented in full, including by erecting temporary fencing in the positions and to the specifications in that scheme, in accordance with the approved details. The tree and landscape protection scheme shall be maintained throughout the development of the site in accordance with the approved details and no excavations for services, storage of materials, parking of vehicles, excavation of soils or materials shall take place within the area designated as being protected.
- 4) The development hereby permitted shall be constructed in accordance with the details of the external materials and the details of the floor levels in relation to the existing and proposed ground levels previously approved by the Council pursuant to the conditions attached to planning permission reference 04/02607/FUL.
- 5) Construction works shall take place only between 7.30 am and 6.00 pm on Mondays to Fridays and between 7.30 am and 1.00 pm on Saturdays and shall not take place at any time on Sundays or on Bank or Public Holidays.
- 6) The dwelling hereby permitted shall not be occupied until the fencing and other means of enclosure have been constructed in accordance with the scheme approved by the Council pursuant to the condition attached to planning permission reference 04/02607/FUL. Thereafter, the fencing and other means of enclosure shall be maintained in accordance with the approved details.
- 7) The dwelling hereby permitted shall not be occupied until the hardsurfaced areas of the site have been constructed in accordance with the scheme approved by the Council pursuant to the condition attached to planning permission reference 04/02607/FUL. Thereafter, the hardsurfaced areas shall be maintained in accordance with the approved details.
- 8) The dwelling hereby permitted shall not be occupied until the first-floor windows in the south-east elevation have been glazed with obscure glass containing no opening below 1.7 m above the floor level of the room in which the window is installed. Thereafter, these windows shall be

maintained with obscure glazing, incapable of being opened other than as set out above.

- 9) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (or any order revoking and re-enacting that Order with or without modification), the garage within the site shall not be used for any purpose other than for the parking and storage of vehicles.