
Appeal Decisions

Site visit made on 4 December 2023

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 7 February 2024

Appeal A: APP/Z2505/C/22/3310783

The Barn at Seadyke House, Seadyke Road, Kirton, Boston PE20 1QE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Alex Russell against an enforcement notice issued by Boston Borough Council.
- The enforcement notice was issued on 11 August 2022.
- The breach of planning control as alleged in the notice is the material change of use of annexe accommodation to form primary residential accommodation defined by Class 3 of Schedule 1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) and in breach of condition 5 of planning permission number B/05/0016 dated 02 March 2005.
- The requirements of the notice are to cease the use and building as an independent residential unit and restrict all future occupancy to that which is for purposes incidental to the residential use of the adjacent dwelling, Seadyke House as permitted by condition 3 of planning permission number B/05/0016 dated 02 March 2005.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed and the enforcement notice is quashed with corrections.

Appeal B: APP/Z2505/W/22/3310855

The Barn at Seadyke House, Seadyke Road, Kirton, Boston PE20 1QE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr A Russell against the decision of Boston Borough Council.
- The application Ref B/22/0280, dated 7 July 2022, was refused by notice dated 26 October 2022.
- The development proposed is change of use of former annexe to form dwelling.

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. Whilst with respect to Appeal A there is no formal appeal on ground (b), the appellant's evidence implies a claim that the breach alleged in the enforcement notice had not occurred as a matter of fact at the time the notice was served. I will deal with this hidden ground of appeal first.
2. The alleged breach of planning control set out in paragraph 3 of the Notice identifies the material change of use of annexe accommodation to form primary residential accommodation in breach of condition 5 of planning permission number B/05/0016 dated 02 March 2005. However, the restriction on the occupancy of the former agricultural building is clearly condition 3 which reads:

"The development hereby permitted shall not be occupied at any time other than for purposes ancillary to the residential use of dwelling referred to as Seadyke House in the submitted plans".

3. In this case both main parties are aware of the relevant condition, even though the number used in the Notice is incorrect. Therefore, this is capable of being corrected without causing injustice to either party.
4. In paragraph 3 of the Notice the matters which appear to constitute a breach of planning control refers to *"primary residential accommodation; defined by Class 3 of Schedule 1 of the Town and Country Planning (Use Classes) Order 1987 (as amended)"*. This appears to be incorrect and should refer to *"Class C3 of Schedule 1 of the Town and Country Planning (Use Classes) Order 1987 (as amended)"*. Although this reference is incorrect, in my judgement the overall intention of the Notice is clear in that it is attacking what the Council considers to be a breach of planning control in relation to a condition attached to the previous planning permission granted for the conversion of the former agricultural building to form annexe accommodation under planning reference B/05/0016. Consequently, this can be corrected without causing injustice.
5. Also, since the planning application was refused, the Government has published a new National Planning Policy Framework (the Framework). In relation to the main issues in relation to Appeal B, Government policy has not materially changed. As such, the cases of either side have not been prejudiced.

Appeal A on hidden ground (b)

6. In order to succeed on ground (b) the appellant must prove, on the balance of probability, that there has not been a material change of use of annexe accommodation to form primary residential accommodation. The appellant has stated in evidence that the former barn was converted to a dwelling in accordance with planning permission reference B/05/0016 and subject to the restriction as an annexe to Seadyke House. The evidence goes on to confirm that the site was converted into a dwelling in approximately 2005. It is clearly the appellant's case that the Barn has never actually been occupied as an annexe to Seadyke House by the previous owner but it was used as a separate dwelling by him, and by tenants who occupied it separately from Seadyke House.
7. The Council Tax records alongside the evidence provided by local residents add to the body of evidence that the Barn has never been occupied as an annexe, but instead as a separate dwelling. Therefore, despite the condition limiting occupation of the Barn to an annexe it is clear to me that it has always been occupied as a single dwelling, entirely separate from Seadyke House.
8. Furthermore, although the burden of proof is on the appellant, the Council has not provided evidence that the property has ever been occupied otherwise than as an independent residential unit. That being the case, it cannot be said that there has been a material change of use of annexe accommodation to form primary residential accommodation. Consequently, the breach alleged in the enforcement notice had not occurred as a matter of fact and the appeal succeeds on ground (b). Therefore, in these particular circumstances the appeal on grounds (d), (f) and (g) do not need to be considered.

Appeal B

9. The main issues are:

- i. Whether or not the principle of the development is acceptable in the context of the Council's development strategy set out in the South East Lincolnshire Local Plan 2011-2036 Adopted March 2019 (the Local Plan) and the National Planning Policy Framework (the Framework); and
- ii. Whether or not the development is vulnerable to the risk of flooding.

Principle

10. Policy 1 of the Local Plan sets out the spatial strategy for Boston Borough. The evidence before me is that the appeal site is outside of any named settlement and is therefore within the Countryside for the purposes of the development plan. According to Policy 1, development in the countryside will be permitted that is necessary to such a location and/or where it can be demonstrated that it meets sustainable development needs of an area in terms of economic, community or environmental benefit.
11. The appellant contends that the appeal site is served by the service centre of Kirton and that weight should be given to the occupation of the appeal site supporting the village. Whilst development within Kirton can help to sustain its existing facilities and services and help to meet the needs of other communities, including rural dwellings, the opposite cannot be said to be true and it would be contrary to the overall sustainable development objectives of Policy 1, the wider Local Plan and the Framework to agree that development outside the settlement would be a sustainable means of supporting the services. There may be some minor benefit to the service centre from the occupation of the property, but that would be almost negligible and would not outweigh any objection arising from the conflict with Policy 1.
12. There are some exceptions to Policy 1 and development in the countryside which are set out in Policies 19 and 23 of the Local Plan. Policy 19 does not relate to this appeal because it relates to Rural Exceptions Sites. Policy 23 supports the re-use of buildings in the countryside where they are capable of conversion without the need for significant extension, alteration or rebuilding and are of sufficient merit to warrant retention. The building itself has been recognised for its merit in the context of its rural surroundings and when approved, it was determined that its conversion would not reduce the contribution it makes and its character and appearance within its setting. However, due to its countryside location where permission would not normally be granted for new residential accommodation, the Council considered it necessary to condition its occupancy.
13. That principle has not changed and consequently, in the absence of there being clear evidence of a specific identified agricultural or other need, the principle of the development is not acceptable in the context of the Council's development strategy set out in the Local Plan and the Framework.

Flood Risk

14. The appeal site is within Flood Zone 3 and a Flood Risk Assessment was submitted with the application. As an application for the change of use of the property no sequential and exceptions test is required, but it must nonetheless

be demonstrated that the property would be safe. The Strategic Flood Risk Assessment and advice from the Environment Agency is that as a single storey property, flood risk should be modelled using the 0.1% scenario accounting for climate change. The Environment Agency has commented that an average 3.5 metres ground level and a flood level of 4.2 metres in such an event. The Flood Risk Assessment identifies a number of mitigation measures that could be incorporated into the building to protect it from the risk of flooding. These include ground floor external doors being water resistant to a depth of 0.6 metres, which would exclude water to a depth of 4 metres, using the loft area as a safe refuge with additional escape windows and adding other resilience measures such as backwater valves and no-return valves and electrical installations above 4 metres. The appellant has also stated that he will sign up to the Environment Agency flood warning service and provide an emergency plan to the Council.

15. However, the Environment Agency objects to the proposed change of use of the property on the grounds that the Flood Risk Assessment submitted by the appellant does not comply with the requirements set out in the Planning Practice Guidance, Flood Risk and Coastal Change section. In particular, the Assessment fails to provide appropriate measures to deal with the flood risk identified. The loft space which is proposed to be a safe refuge would be accessible by a ladder with no access to water or other facilities and therefore does not meet requirements for there to be a second storey or safe refuge. Without such a refuge space, the only physical mitigation against flooding would be flood doors to 600mm, which is unacceptable for a single storey dwelling. In any case, the Agency's own calculations show that flood doors to 600mm would be insufficient mitigation to prevent water entering the building.
16. Consequently, I conclude that the development is vulnerable to the risk of flooding and conflicts with Policies 4 and 31 of the Local Plan and the Framework. Among other objectives these seek to ensure that development at risk of flooding will only be permitted where the application is supported by a site-specific flood risk assessment which demonstrates that the vulnerability of the proposed use is compatible with the flood zone and mitigation measures can demonstrate how the development will be made safe and that occupants will be protected from flooding from any source.

Other matters

17. It is my understanding that the appellant's conveyancers failed to advise him of the restriction on occupation attached to the Barn and furthermore, the previous owner also failed to disclose this matter. As such, he was unaware of the restriction and believed he had purchased a property that he could live in as an independent dwellinghouse. I have found in his favour with respect to Appeal A and quashed the enforcement notice because the property has never, in fact, been occupied as an annexe.
18. Therefore, I understand that the appellant is in a difficult situation; however, the courts have generally taken the view that planning is concerned with land use in the public interest, so that the protection of purely private interests could not be a material consideration. In any case, I have balanced the appellant's particular circumstances against the harm I have identified. In this case I find that the harm with respect to the principle of the development in

this location and its vulnerability to the risk of flooding outweigh any personal circumstances.

19. It has also been argued that the Council's approach interferes with the rights under the United Nations Convention on Human Rights which are enshrined in the Human Rights Act 1998, which states that everyone has a right to respect and family life, and their home, among others. These are qualified rights, whereby interference may be justified if in the public interest, but the concept of proportionality is crucial. In this particular case, it is in the public interest and proportional to control the use of the appeal site in order to protect the countryside and ensure that the property is not vulnerable to flood risk.

Conclusion

20. Having taken account of the main issues, other matters raised and the evidence submitted by the parties, I conclude that the development conflicts with the development plan as a whole and planning permission should be withheld.

Formal Decisions

Appeal A

21. The enforcement notice is corrected by the deletion of paragraph 3 and the substitution therefor of the words "Without planning permission, the material change of use of annexe accommodation to form primary residential accommodation; defined by Class C3 of Schedule 1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) and in breach of condition 3 of planning permission number B/05/0016 dated 02 March 2005."
22. Subject to this correction, the appeal is allowed, and the enforcement notice is quashed.

Appeal B

23. The appeal is dismissed.

A A Phillips

INSPECTOR