



Appeal Decision

Inquiry held on 7, 8 and 16 February 2024

Site visit made on 7 February 2024

by James Blackwell LLB (Hons) PGDip, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 21st June 2024

Appeal A Ref: APP/Z3635/C/23/3320593

Appeal B Ref: APP/Z3635/C/23/3320594

Appeal C Ref: APP/Z3635/C/23/3320595

Riverbank, 1 The Creek, Sunbury-on-Thames, TW16 6BY

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended).
- The appeals are made by Mr Anthony Brindley (Appeal A), Mrs Zoranna McDermott (Appeal B) and TW16 Ltd (Appeal C) against an enforcement notice issued by Spelthorne Borough Council.
- The enforcement notice, ref 19/00015/ENF, was issued on 16 March 2023.
- The breach of planning control as alleged in the notice is "*Without planning permission the unlawful development of a new dwelling house, garage, boathouse, associated terracing and planters, steps, walls, pillars and hardstanding*".
- The requirements of the notice are to:
 1. Demolish the main dwelling house;
 2. Demolish the garage;
 3. Demolish the boathouse;
 4. Demolish the associated terracing and planters;
 5. Demolish the steps;
 6. Demolish the walls, gates and pillars;
 7. Remove the hardstanding;
 8. Remove all resultant materials for steps 1 – 7;
 9. Reinstall the green landscaping of the original site by regressing and planting trees.
- The period for compliance with the requirements is 4 months of the notice taking effect.
- The appeals are proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. 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 Act.

Summary decisions: The appeals succeed in part and the enforcement notice is upheld with variations in the terms set out below in the Formal Decisions.

Application for Costs

1. An application for costs has been made by the appellants against the decision of Spelthorne Borough Council. This application is the subject of a separate decision.

Preliminary Matters

2. I have determined these appeals with regard to the latest version of the National Planning Policy Framework, published in December 2023 (Framework). I am satisfied that the updates do not materially affect its content insofar as it is relevant to the main issues of this appeal.

Planning History

3. Planning permission was granted in connection with the appeal site on 18 April 2018 (ref 17/01464/FUL) for "*Erection of a detached dwelling following demolition of the existing building. Erection of a detached garage, brick boundary walls and extension of the existing concrete retaining wall and platform along the south-eastern site boundary*" (2018 Permission). Condition 1 of the 2018 Permission required the development to be commenced within three years.
4. The appellants proceeded to develop the appeal site following the grant of the 2018 Permission. However, the as-built scheme deviates from the approved plans in numerous ways. The appellants therefore sought to regularise the as-built scheme through a section 73 application, reference 19/00845/RVC, which was refused on 25 October 2019 on flood risk grounds (Refused S73 Application).
5. The appellants subsequently submitted a full retrospective planning application for the as-built development (reference 20/00643/FUL). This application was refused on 14 August 2020, again solely on flood risk grounds (Refused 2020 Application). On appeal (reference APP/Z3635/W/21/3268858), this application was also dismissed (Previous Appeal).

Previous Appeal Decision

6. In the Previous Appeal, the as-built scheme was dismissed for reasons relating to flood risk, green belt and character and appearance. Many of the findings of the Inspector hinged on their conclusion that the 2018 Permission had lapsed, which meant they considered the as-built scheme as a new dwelling, and not a replacement, with no fallback position.
7. Notwithstanding the findings of the previous Inspector, the parties dispute whether or not the 2018 Permission has been implemented. During a round-table discussion at the inquiry, as well as during the formal presentation of evidence, the parties each presented extensive evidence on this issue, which was not before the previous Inspector. Whilst I am mindful of the previous Inspector's findings in my decision, I have considered this issue based on the information and evidence presented to me at this inquiry. Given the implementation of the 2018 Permission is critical to the outcome of several of the grounds of the appeal, I have addressed the issue separately, before discussion of the main grounds of appeal.
8. I should also highlight that the as-built scheme now differs from the scheme before the previous Inspector, particularly in terms of landscaping. Where relevant, particularly in respect of the deemed planning application pursuant to ground (a), I have reached my own conclusions with regard to the main issues, based on the scheme as I saw it during my own visit.

Evidence

9. During the round-table discussion in respect of the 2018 Permission, the Council located an email (dated 10 September 2018) relating to the discharge of a condition attached to that permission. Whilst late, it was relevant to the discussion which took place, and given it was a short document, the appellants were able to digest its content easily during the event. I therefore accepted the document into evidence.

10. Due to various inaccuracies with the plans originally submitted, I have also accepted an updated set of as-built plans from the appellants, which the Council has reviewed and commented on.
11. During the inquiry, both parties submitted written copies of their opening and closing statements, as well as written copies of their legal submissions made during the round-table discussion. Each of these documents has been accepted without dissent, and are listed at the end of this decision.
12. Following the round-table discussion in respect of the 2018 Permission, all subsequent evidence during the inquiry was given under oath.

2018 Permission

13. The Council contends that the 2018 Permission has not been implemented. Their argument hinges on two factors: the first is that two pre-commencement conditions were not discharged (whether before or after commencement) which they say renders the development unlawful; the second is that the as-built scheme is materially different to the approved scheme, and therefore constitutes a different development altogether. Each of these points are considered in turn.

Pre-commencement Conditions

14. It is common ground between the parties that two conditions attached to the 2018 Permission, namely conditions 12 and 14, were not formally discharged by the Council prior to commencement of development.
15. As identified by the parties, the *Whitley principle*¹ establishes that where development is carried out in contravention of 'conditions precedent', then development has not commenced lawfully. In *Hart Aggregates*², it was held that for there to be a breach of a condition precedent which means development is carried out without planning permission, then the condition must go to the heart of the planning permission. In the present case, the appellants say the relevant conditions did not go to the heart of the 2018 Permission, and therefore do not constitute conditions precedent.
16. The two conditions, which deal with ground conditions and energy efficiency, are set out below:

"Condition 12: Prior to the commencement of development a survey report detailing ground conditions of the site shall be submitted to and approved in writing by the Local Planning Authority. Where made ground or contamination is encountered a scheme to investigate, assess and remediate contamination risks shall be agreed in writing with the Local Planning Authority, and shall be carried out in accordance with the agreed details and timetable".

The reason given for the condition was *"to protect the amenities of future residents and the environment from the effects of potentially harmful substances"*.

"Condition 14: No development shall commence until a report has been submitted to and agreed by the Local Planning Authority which includes details and drawings demonstrating how 10% of the energy requirements generated

¹ Established in *F G Whitley & Sons v Secretary of State for Wales & Clwyd CC* [1990] JPL 678; [1992] JPL 856

² *R (on the application of Hart Aggregates Ltd) v Hartlepool Borough Council* [2005] EWHC 840 (Admin)

by the development as a whole will be achieved utilising renewable energy methods and showing in detail the estimated sizing of each of the contributing technologies to the overall percentage. The detailed report shall identify how renewable energy, passive energy and efficiency measures will be generated and utilised for each of the proposed buildings to meet collectively the requirement for the scheme. The agreed measures shall be implemented with the construction of each building and thereafter retained and maintained to the satisfaction of the Local Planning Authority unless otherwise agreed in writing”.

The reason given for the condition was “to ensure that the development is sustainable and complies with Policies SP7 and CC1 of the Spelthorne Borough Core Strategy and Policies Development Plan Document 2009”.

17. It is helpful to consider the comments of Sullivan J in the *Harts Aggregate* case in the context of these conditions, who distinguished “between cases where there is only a permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure obtain approval for one particular aspect of the development”. He went on to say that “in the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against”³.
18. The 2018 Permission is a full detailed permission, and conditions 12 and 14 both clearly relate to the approval of particular aspects of the development, namely ground conditions and energy efficiency. When considered in the context of Sullivan J’s comments in *Harts Aggregates*, the failure to discharge these conditions should therefore not preclude the possibility of the 2018 Permission having been implemented.
19. In terms of condition 12, the appellants commissioned a ground report by YourEnvironment, which was submitted to the Council in July 2018 in an effort to discharge the condition. As well as detailing the ground conditions of the appeal site, the report confirmed that no evidence of potential contamination was found (with the exception of general anthropogenic materials).
20. The Council sought “clarification” from the appellants in respect of certain anomalies within the report, which were identified in an email to Timothy Butterworth (the appellants’ architect) on 10 September 2018. These anomalies principally concerned the trial pits in which made ground was encountered and the component parts of the made ground/topsoil. It seems no further communication was exchanged between the parties in respect of this condition until approximately three years later, after the expiry of the commencement period of the 2018 Permission.
21. Aside from this email, there is nothing else to suggest the Council had any serious concerns in relation to the conclusions of the submitted ground report. Notably, whilst the officer report for the Refused S73 Application refers to the discharge of certain conditions attached to the 2018 Permission, no mention is made of condition 12. The officer report for the Refused 2020 Application again makes no mention.

³ Paragraph 67, *R (on the application of Hart Aggregates Ltd) v Hartlepool Borough Council* [2005] EWHC 840 (Admin)

22. If the Council had considered the ground report so fundamental to the development, such that the development would be unlawful without its approval, then presumably this would have been raised more urgently with the appellants. Instead, all that was sought was “clarification” of certain details of the ground report. This behaviour is indicative of the Council not treating the condition as a true condition precedent.
23. Moreover, there is nothing in the ground report to suggest that the ground conditions would pose any particular risk to the amenity of future residents. The overarching reason for the condition was therefore broadly met by the submitted details.
24. In terms of condition 14, the appellants say a specification for solar panels was also submitted to the Council in July 2018. Whilst submission of a specification is likely to have fallen short of the condition requirements, assuming that 10% of the development’s energy requirements could be achieved through solar panels alone, there is no reason why these details could not have been approved during the course of the development. This is because installation of solar panels would invariably come at a late stage of development. In other words, it was not necessary for these energy efficiency measures to be approved prior to commencement, and in turn, the condition would not be a true condition precedent.
25. As with condition 12, there is also no suggestion that the Council had any particular concerns in terms of the failure to discharge condition 14. There appears to have been no correspondence with the appellants to request further details, and there was again no mention of condition 14 in any officer reports relating to the subsequent planning applications. Once again, this is indicative of the Council not treating the conditions as true conditions precedent.
26. In the case of *Barrett*⁴, HHJ Jarman KC DHCJ said “*whether a condition goes to the heart of the planning permission can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context*”. When a “*fact-sensitive enquiry*” is carried out in respect of conditions 12 and 14, I do not consider that either of these conditions can be said to go to the heart of the permission. Reflecting the principles established in *Harts Aggregate* and *Whitley*, the conditions are therefore not true conditions precedent. In turn, whilst the failure to discharge these conditions would constitute breaches of planning, these breaches would not mean that the 2018 Permission had not been implemented.

Deviations from Approved Plans

27. The Council further contends that the 2018 Permission was not implemented, due to the extent of difference between the as-built scheme and the scheme approved by the 2018 Permission. The differences include a small extension accommodating a utility/plant room on the north-eastern elevation of the as-built dwelling. A boathouse has been constructed along the riverside, which was not approved under the 2018 Permission. There are also changes to the outdoor terraces, steps, roof profile, fenestration and flood voids.

⁴ The Welsh Ministers v Barrett [2023] EWHC 2503 (Admin)

28. The case of *Commercial Land*⁵ provides helpful guidance when assessing deviations from as-built plans and the implementation of a planning permission. In this case, Ousley J held that, in considering whether a material operation is 'comprised in the development' for the purposes of s56(2) of the 1990 Act, it is insufficient to simply consider the material differences between what has been built and what was approved. Similarities and the degree of compliance with the approved plans are also relevant, together with the extent to which the works are substantially useable in implementing the planning permission.
29. Notwithstanding the differences outlined above, the general footprint of the as-built dwelling does largely correspond with the footprint of the dwelling approved under the 2018 Permission. Even with the small extension, which equates to approximately 6sqm, the overarching size and appearance of the as-built dwelling are also similar to the approved scheme.
30. Given these similarities, much of the development carried out, including most of the foundations, walls and roof, would have been substantially useable in implementing the 2018 Permission. Indeed, the Council noted that the deviations from the as-built plans only became visually apparent when development was significantly progressed, which adds credence to this assessment. As per *Commercial Land*, it therefore seems reasonable to conclude that a large proportion of the works comprised within the development would have also constituted a material operation for the purposes of implementing the 2018 Permission.
31. Moreover, many of the deviations from the approved plans, such as the boathouse, external terracing, and fenestration, would have been incorporated into the development at a later stage of construction. In its earlier stages, the development seemingly aligned much more closely with the approved plans. As per the comments of Kerr J in *Hussain*⁶, "*it is possible to commence a development for the purpose of section 56 and thereby meet a deadline forming a condition of the permission, and then later to deviate from the permitted works in a manner that later becomes an enforcement issue without retrospectively altering the fact that the commencement of the development had occurred for section 56 purposes*". In line with *Hussain*, this is further evidence of the 2018 Permission having been implemented by the development carried out.
32. These conclusions are consistent with the *Hillside*⁷ judgment, which held that the materiality of a departure from a permitted scheme must be considered in the "*context of the scheme as a whole*". In *Southwood*⁸, Knowles J does say that s96A of the 1990 Act provides "*guidance*" when assessing the materiality of changes, which is certainly pertinent to any assessment. However, the caselaw is clear that differences from approved plans must be considered in their totality, and in the context of their overall significance.
33. When considered in this way, and notwithstanding the deviations from approved plans, I am content that certain works comprised in the as-built development represented implementation of the 2018 Permission.

⁵ *Commercial Land Ltd v The Secretary of State for Transport, Local Government and the Regions and The Royal Borough of Kensington and Chelsea* [2002] EWHC 1264 (Admin); [2003] JPL 358

⁶ *Hussain v Secretary of State for Communities and Local Government* [2017] EWHC 687 (Admin)

⁷ *Hillside Parks Ltd v Snowdonia National Parks Authority* [2022] UKSC 30

⁸ *John Southwood v Buckinghamshire Council & Stephen Green* [2024] EWHC 71 (Admin)

Summary

34. Bringing these points together, I have found that neither condition 12 nor 14 attached to the 2018 Permission go to the heart of the permission, and therefore, are not true conditions precedent. The failure to discharge these conditions would therefore not mean the 2018 Permission was not implemented. I have also concluded that works comprised in the as-built development represented implementation of the 2018 Permission.
35. In turn, the works carried out, mostly notably the early foundations and walls, would have constituted a material operation for the purpose of s56(2) of the 1990 Act, and the 2018 Permission was therefore implemented. This means the 2018 Permission represents a fallback, and one which is likely to be carried out if the as-built scheme cannot be retained. This is pertinent to the consideration of the other grounds of appeal.
36. Whilst the appellants also say the 2018 Permission was implemented immediately upon grant as it was part retrospective, this would not affect my findings above, so it is not necessary to consider the point further.

GROUND B AND C

37. Pursuant to ground (b), the appellants contend that the alleged breach of planning control has not occurred. Whilst the appellants do not dispute the presence of the relevant buildings and structures on the site, they say these were not constructed "*without planning permission*".
38. The appellants further contend that parts of the alleged development were constructed pursuant to permitted development rights, by virtue of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GPDO). In turn, they say that the terraces, planters, steps, walls, pillars and hardstanding did not require planning permission.
39. To succeed on either of these grounds, the evidential burden rests with the appellants to demonstrate their case, on the balance of probability. Planning merits are not relevant.
40. Notwithstanding my conclusion that the 2018 Permission has been implemented, it remains the case that the as-built development departs from the approved scheme in a number of fundamental ways. As set out, it incorporates a small extension and boathouse, as well as changes to the terraces, steps, flood voids, roof profile and fenestration, none of which were consented. This means the as-built scheme does not benefit from planning permission, and in turn, the breaches of planning control as alleged in the EN have occurred. The appeals on ground (b) therefore fail.
41. As per Article 3(5) of the GPDO, permitted development rights conferred by Schedule 2 do not apply where the building operations involved in the construction of the building to which those rights relate, are unlawful. It follows that any potential permitted development rights would not apply to the appeal site, as the building operations comprised in the construction of the dwelling are unlawful. This means the terraces, planters, steps, walls, pillars and hardstanding would not be lawful without planning permission.
42. In terms of the perimeter boundary walls, these were constructed prior to demolition of the pre-existing dwelling. The same is true of the wall which runs

from the eastern elevation of the annexe building. The appellants therefore contend that these walls and pillars would have benefited from permitted development rights associated with the pre-existing dwelling. However, extensive parts of these boundary walls are understood to exceed 2 metres in height (when measured from ground level), and would therefore fall foul of the conditions to be considered permitted development (under Class A of Part 2, Schedule 2 of the GPDO).

43. In any event, and notwithstanding that these works came first, the network of walls and boundary features closely interconnects with other elements of the development, including the raised terraces, many of the planters, and the dwelling itself, with a consistent use of materials throughout. The walls and pillars therefore comprise part and parcel of the development as a whole, and should not be considered in isolation. Notwithstanding the height of these walls, permitted development rights would therefore still not apply.
44. For these reasons, the terraces, planters, steps, walls, pillars and hardstanding do not benefit from permitted development rights, and therefore constitute development requiring planning permission. Accordingly, the appeals on ground (c) also fail.

GROUND D

45. Pursuant to ground (d), the appellants say the development was substantially completed more than four years prior to the date of the EN. As per s171B(1) of the 1990 Act, they therefore contend that the development was immune from enforcement at the date of the EN, and lawful. The EN was issued on 16 March 2023 which means the appellants would need to demonstrate the development was substantially complete on or before 16 March 2019 to succeed on this ground. Once again, planning merits are not relevant, and the burden of proof falls on the appellants, on the balance of probability.
46. Whilst much of the evidence on this ground relates to the dwelling itself, the appellants say that the boundary walls and pillars were substantially complete before construction of the new dwelling began. In turn, they contend these elements of the scheme were immune from enforcement, irrespective of my findings with regards to the dwelling. However, as the walls and pillars form part of the development as a whole, it follows that they could not have been substantially complete, and immune from enforcement, independently from the rest of the development.
47. I have considered the appellants' evidence in accordance with the principle established in *Gabbitas*⁹. This says that where there is no evidence to contradict an appellant's version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, then it should be accepted.
48. It was established in *Sage*¹⁰ that for building operations to be considered substantially complete, there must be a "*fully detailed building of a certain character*". In other words, it must be completed for the purpose for which it was intended. Even if outstanding works only affect a building's interior, it may still not be regarded as substantially complete for the purposes of s171B(1).

⁹ *Gabbitas v SSE & Newham BC* [1985] JPL 630

¹⁰ *Sage v SSETR and Maidstone BC* [2003] UKHL 22

49. In oral evidence, Mr Brindley said the dwelling was substantially completed in or around January 2019. This was on the basis that the windows were delivered in December 2018, and would therefore have been installed soon after, likely in January. However, Mr Brindley could not pinpoint an exact date at which time all of the windows and doors had been installed, and did concede it was possible that this date was not until February 2019, or possibly even March 2019.
50. Dated photographs from the Council's site visit on 16 January 2019 show some windows installed on all sides of the property at this point. However, most of the external doors were not yet installed, and some of the larger windows at the rear of the property were also missing. These openings are shown boarded up in the photos. It is therefore clear that the dwelling was not substantially complete as at the date of this visit in January 2019.
51. A still from a video taken from a neighbouring property, supposedly dated 17 March 2019, also shows several of the rear window/door openings still boarded up at this time. Whilst the still from the video is not determinative, as its date is not verified or corroborated by sworn testimony, it does raise some doubts over the state of habitation of the property on or before 16 March 2019, particularly in the absence of a specific date when the property was habitable.
52. Moreover, the Council's records, which are based on information given by the respective gas and electric companies, indicate that the boiler installation was completed on 13 May 2019 and electrical works during July/August 2019. Whilst Mr Brindley says both gas and electric were completed before this time, he was unable to pinpoint a date, nor was he able to explain why the respective utility companies would have said otherwise. These records raise uncertainty over whether the dwelling was habitable on or before 16 March 2019, as they indicate that the dwelling did not have heating or electric at this time. If that were the case, the building would not have been fit for the purpose it was intended at this point.
53. The formal completion certificate issued by Building Control certifies that the dwelling was complete on 22 August 2019. This date broadly corresponds with the time Mr Brindley says he and his wife moved into the property. Whilst it is possible that substantial completion of the property occurred before this formal completion date, in the absence of greater certainty of when the dwelling became habitable, this is the most robust evidence before me of when the dwelling was considered substantially complete.
54. On account of these factors, the appellants have not demonstrated, on the balance of probability, that the appeal dwelling was habitable, and therefore fit for the purpose for which it was intended, on or before 16 March 2019. On the evidence before me, this means the development was not immune from enforcement as at the date of the EN. The appeals on ground (d) therefore fail.

GROUND A

Main Issues

55. The main issues in respect of ground (a), being the deemed planning application (DPA), are informed by the Council's reasons for issuing the EN. They are:

- whether the development represents inappropriate development in the Green Belt having regard to the Framework and any relevant development plan policies, including its effect on openness (where relevant);
- the effect of the development on the character and appearance of the area; and
- the effect of the development on flood risk.

Reasons

Green Belt

56. The appeal site is located within the Green Belt. The Framework is explicit that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. It goes on to state that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. Paragraphs 154 and 155 of the Framework set out a number of exceptions where the construction of new buildings within the Green Belt may not be considered inappropriate. I have considered each component of the development against these exceptions, as well as the development together as a whole.
57. Under paragraph 154(d) of the Framework, these exceptions include the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces.
58. On the basis that the 2018 Permission has been implemented, which specifically authorised the demolition of the original, it is reasonable to treat the as-built dwelling as a replacement building. In terms of size, the footprint of the dwelling is approximately 7sqm larger than the pre-existing dwelling, and 6sqm larger than the dwelling approved under the 2018 Permission. When assessed against either baseline, this represents less than a 3% increase in floorspace, and would therefore not be materially larger than the one it replaces. Given the use of the as-built building also remains the same as the original, the dwelling would fall within the exception under paragraph 154(d).
59. Even if the as-built dwelling were not a replacement building, there is also an exception under paragraph 154(e) of the Framework, which permits limited infilling in villages. In this instance, the appeal site is flanked on either side by other dwellings, and there are also dwellings across the road and along the opposite side of the river. The new dwelling is therefore surrounded on all sides by other houses, and would clearly constitute infilling. Whilst there is some debate whether the appeal site is technically within a village, it is within a clearly defined residential area, with several nearby local amenities which are typical of village life. Its location therefore shares many characteristics of a village, which means the dwelling would broadly reflect the intention behind the paragraph 154(e) exception. On this basis, I am satisfied the dwelling would also fall within this exception.
60. The open fronted garage was consented as part of the 2018 Permission. In their original assessment of the garage, the Council considered its construction in the context of paragraph 154(c) of the Framework, which permits the extension or alteration of a building provided it does not result in disproportionate additions over and above the size of the original building. Whilst not technically an extension, as it is a detached structure, the Council

concluded the garage would still fall within the general remit of this exception, given its proportionate size and ancillary role to the main dwelling. I have no reason to disagree with this assessment, and therefore consider the garage would not be inappropriate development in the green belt.

61. Paragraph 154(b) provides an exception for the provision of appropriate facilities for outdoor sport or recreation, provided those facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it. The boathouse, which is typical of numerous other boathouses along the river, is located discreetly on the riverbank of the appeal property, and is modest in size. The boathouse, which is used for outdoor sport/recreation, is therefore consistent with the overriding purposes of the green belt, whilst also preserving its openness. In turn, this component of the development would fall within the exception under paragraph 154(b).
62. The walls, pillars, terraces and planters all constitute engineering operations, and under the paragraph 155(b) exception, would not be considered inappropriate development within the green belt, provided they preserve its openness and do not conflict with the purposes of including land within it.
63. The Creek is a narrow lane which is flanked on either side by tightly spaced properties, many of which sit close to their frontage. Notwithstanding its location within the green belt, much of the lane therefore feels very enclosed rather than open. In turn, whilst the boundary walls and pillars do enclose the appeal site, given the tight grain of development along the road and its corresponding enclosed character, these features do not detract from any sense of openness along the road. Whilst raised from the ground, the terraces, steps and planters are also fairly low level, and do not make any meaningful difference to the openness of the appeal site itself. The same is true of the hardstanding around the appeal site.
64. In turn, I am satisfied that these elements of the development preserve the openness of the green belt. Given that the appeal site is surrounded on all sides by other houses, they are also consistent with the relevant purposes of the green belt, most notably checking the unrestricted sprawl of large built-up areas. The walls, pillars, terraces, steps and planters therefore fall within the paragraph 155(b) exception.
65. Each element of the development therefore falls within one of the prescribed exceptions where the construction of buildings within the green belt will not be considered inappropriate. In turn, the development as a whole is not inappropriate development in the green belt. The development is also consistent with saved Policy GB1 of the Spelthorne Borough Local Plan 2001, which broadly reflects the green belt provisions of the Framework.

Character and Appearance

66. The 2018 Permission, which the Council considered acceptable in design terms, represents a legitimate fallback, which is likely to be implemented if the as-built scheme is not retained. I have therefore considered the effect of the development on the character and appearance of the area, by reference to the approved scheme.
67. Visually, the differences between the as-built dwelling and the consented dwelling make little difference to its overall appearance. Its size and footprint,

bulk, height and use of materials are all very similar. The small extension along its north-eastern elevation is discreetly located towards the rear of the property, and integrates effectively with the substantive part of the dwelling and surrounding terracing. The extension is also barely perceptible from any public vantage points.

68. As mentioned, the frontage of several dwellings along The Creek directly abut the lane, which gives it a secluded and enclosed character. The boundary walls and pillars of the appeal property reflect these characteristics, and therefore assimilate well with the street scene. The terraces, steps and planters are typical features of a domestic garden, and again integrate well with the property as a whole. The hardstanding is mainly limited to a driveway at the front of the property, which is now offset by large areas of grass, which helps soften its impact.
69. The detached garage was already consented under the 2018 Permission. It is an open structure, which reflects the residential character of the property. In terms of the boathouse, the riverbank is punctuated by numerous other boathouses, and so this element of the appeal scheme also reflects the riverside character of this area.
70. For these reasons, I am satisfied that the development complements the character and appearance of the area. It is consistent with Policy EN1 of the Council's Core Strategy and Policies Development Plan Document (2009) (Core Strategy), which requires development to achieve a high standard of design, which respects and makes and a positive contribution to the street scene and character of the area in which it is situated.

Flood Risk

71. The appeal site is located within flood zone 3b, and therefore comprises functional floodplain, which has a high risk of flooding. Recent flood events in the vicinity of the appeal site attest to the importance of the floodplain in this area, and the critical nature of all available flood storage capacity.
72. The Framework requires a sequential, risk-based approach to be taken to development in areas known to be at risk from flooding. The aim of the Sequential Test is to steer new development to areas with the lowest risk of flooding from any source. This is to avoid, where possible, flood risk to people and property. Where development is necessary in such areas, the Framework says it should be made safe for its lifetime without increasing flood risk elsewhere.
73. The Environment Agency's Position Statement on Replacement Dwellings in Flood Zone 3 (August 2014) (EA Position Statement) acknowledges that finding an alternative site for a replacement dwelling is not often a realistic option. For replacement dwellings, as is the case here, the EA therefore adopts a pragmatic approach in the application of the Sequential Test.
74. Nonetheless, the EA Position Statement makes it clear that the Sequential Test does still need to be carried out. It says an applicant "*should state why there are no alternative options of sites at lower flood risk for them to develop*". It goes on to say that "*the Sequential Test should be discussed with the local planning authority at the earliest opportunity as it is for the local planning authority to determine whether the Sequential Test has been passed*". In this

instance, the appellants have not carried out a Sequential Test, nor have they explained why there are no alternative options of sites at lower flood risk for them to develop. The Sequential Test has therefore not been passed, which is a notable gap in the appellants' Flood Risk Assessment (FRA).

75. Notwithstanding the Sequential Test, the EA objects to the as-built development in any event, which it confirmed in a letter dated 26 July 2021 (EA Letter). Their objection is based on shortcomings and inconsistencies with the submitted FRA, which include notable discrepancies with the figures given for the built footprint of the development.
76. The appellants say that the footprint of the replacement dwelling is 264sqm, which is 6sqm larger than the dwelling approved under the 2018 Permission, and 7sqm larger than the pre-existing dwelling. However, the FRA cites an apparent footprint figure of "350sqm (*current and proposed impermeable*)", which is inconsistent with the figures noted above. In oral evidence, Jim Hitchin, who prepared the FRA, was unable to confirm where this figure came from. Having not visited the site, he says he had worked off figures given to him by Mr Brindley and/or Mr Butterworth. Neither Mr Brindley nor Mr Butterworth were able to shed further light on this 350sqm figure, nor confirm which components of the development it may have included.
77. Putting aside these discrepancies, the FRA provides no robust assessment of the additional components of the development, and how these may impact flood risk. This is a fundamental flaw of the FRA, as the garage, boathouse, walls, pillars, terraces, steps, planters and hardstanding, together comprise a significant proportion of the development, and could themselves affect flood storage capacity within the site. These structures could also impede flood flows within the appeal site, which could cause displacement of flood water, thereby increasing flood risk elsewhere.
78. For these reasons, the EA says a volumetric comparison between the as-built development and the pre-existing development is needed in order to properly assess the impact of the development with regards to flood risk. They say this comparison should include "*landscaped areas and outbuildings*", so that flood storage capacity and the need for any mitigation can be properly assessed. Despite the EA highlighting the need for this information within the FRA, no volumetric comparisons have been provided by the appellants.
79. The EA highlights other shortcomings with the FRA, notably in respect of the void design. In particular, detail is lacking with regards to the void openings, soffit heights, and volumetric capacity. Whilst these voids could conceivably constitute betterment, without sufficient detail, their effectiveness in terms of mitigation cannot properly be assessed. Yet again, these details have not been provided by the appellants, despite being requested from the EA.
80. The appellants contend that the EA assessed the development as a new dwelling and not a replacement, and that its conclusions should therefore be ignored. However, the EA Letter makes repeated references to the development being a replacement dwelling, and even draws comparisons between the footprint of the as-built dwelling and the pre-existing dwelling. In turn, there is nothing to suggest their assessment of the as-built scheme was flawed.

81. Given the location of the development in flood zone 3b, where the risks from flooding are so acute, it is essential that flood risk assessments are comprehensive, accurate and robust. However, in this instance, there are serious shortcomings and inconsistencies with the FRA, which mean I cannot properly assess the development's impact on flood risk. Critically, even when assessed against the fallback, I cannot determine whether levels of flood storage capacity are retained within the appeal site, nor whether the development as a whole could lead to greater levels of flood risk elsewhere.
82. On the available information, the development therefore conflicts with Policy LO1 of the Core Strategy. This says the Council will maintain the effectiveness of the more frequently flooded area (Zone 3b) of the floodplain to both store water and allow the movement of fast flowing water by not permitting any additional development including extensions. For the reasons highlighted, the development also conflicts with the flood risk provisions of the Framework.

Conclusion

83. I have found that the development is not inappropriate development in the green belt. It also preserves the character and appearance of the area. However, the serious deficiencies with the FRA mean I cannot rule out flood risk harm. On the evidence before me, the development therefore conflicts with the development plan as a whole, and there are no other considerations, including the provisions of the Framework, that outweigh this finding.
84. The appeal on ground (a) therefore fails.

GROUND F

85. Pursuant to ground (f), the appellants contend that the steps required to be taken in the EN exceed what is necessary to remedy the alleged breach of planning control. In particular, they say the requirements should allow the development to be amended in accordance with the plans approved as part of the 2018 Permission.
86. As per s173(4) of the Town and Country Planning Act 1990, the purpose of the EN is to remedy the breach of planning control. The requirements set out in the EN must therefore achieve this purpose.
87. Given I have concluded that the 2018 Permission has been implemented, it follows that a requirement to modify the development to comply with the terms of the 2018 Permission would achieve the purpose of remedying the breach of planning control. It is therefore appropriate to incorporate an alternative requirement into the EN which allows the appellants to modify the development in this way. Nonetheless, the option to demolish the development will remain, as in practice, it is not clear how easily the as-built scheme can be modified to comply with the terms of the 2018 Permission. A standalone requirement to demolish the boathouse must also remain, as this formed no part of the 2018 Permission.
88. The appellants further contend that many other elements of the development would benefit from permitted development rights, and that removal of these features would therefore be excessive. However, as highlighted, permitted development rights do not apply where the building to which those rights relate, is unlawful. Moreover, the matters alleged all form part of the

development as a whole, and so would not have benefited from permitted development rights, even if any had been available.

89. Notwithstanding this position, it is clear that parts of the terraces, which are raised platforms, exceed 0.3 metres in height, and would therefore not be permitted under the GPDO. Similarly, extensive parts of the walls and pillars exceed the prescribed limits of the GPDO, and would again not be permitted. As many of the planters are structurally supported by the walls, it is not clear whether these could remain in isolation.
90. In terms of the hardstanding, the GPDO places restrictions on hard surfaces located between the principal elevation of a dwelling and a highway, and which exceed 5sqm. In such circumstances, they will only be permitted under Class F of Part 1, if they are made of porous materials, or if provision is made to direct run-off water from the hard surface to a permeable area or surface within the dwelling's curtilage. It is not clear whether these criteria are met in respect of the hardstanding within the site.
91. In turn, even if certain permitted developments had been available, the extent to which they would apply to the various components of the development is not at all clear. Whilst some permitted development rights would become available if the as-built scheme was modified to comply with the 2018 Permission, this lack of clarity means it would be very difficult to amend the requirements of the EN in respect of discrete elements of the development, with sufficient precision. It would also be very difficult to separate out isolated components of the matters alleged, given their level of physical integration with one another.
92. It is therefore not appropriate to amend the requirements of the EN to account for certain permitted development rights which may become available upon compliance with the EN. Nonetheless, provided the appellants modify the as-built scheme to comply with the 2018 Permission, several of these components (or at least parts of them), which were comprised within the consented scheme, can be retained in any event.
93. Notwithstanding these conclusions, there are no particular restrictions on the site which would have prevented the appellants from lawfully removing any trees or grass which were previously on the appeal site. In turn, I agree that step (9) of the EN, which requires the appellants to reinstate the green landscaping of the original site by re-grassing and planting trees, is excessive, and goes beyond what is needed to remedy the breach of planning control. I have therefore removed this requirement.
94. There is also a small section of the perimeter wall located between the front entrance gate and the north-eastern boundary, which benefits from planning permission granted under reference 19/00758/FUL. The plan relating to Step (6) of the EN, which requires the appellants to demolish the walls, gates and pillars, includes this section of wall to be demolished. The Council has therefore submitted a substitute plan for Step (6), which excludes this part of the perimeter wall, which I shall also incorporate into the notice.
95. Notwithstanding the acceptability of the overall as-built scheme, the appellants suggest they should also be permitted to retain the boathouse. However, given the FRA makes no assessment of the boathouse, I cannot be sure of its impact on flood risk. On the given information, it would therefore not be appropriate

for the boathouse to be retained, even if this element of the scheme could be considered in isolation.

96. For the reasons outlined, the steps required to be taken in the EN do, in part, exceed what is necessary to remedy the breach. To the extent outlined, the appeals on ground (f) therefore succeed.

GROUND G

97. Pursuant to ground (g), the appellants contend that the period for compliance with the requirements of the EN falls short of what should reasonably be allowed. The EN currently requires the steps to be complied with, within four months of the date that the notice takes effect.
98. The steps of the EN are significant, and are likely to take many months to complete. Contractors will be needed for the works, which will take time to line up and become available. More generally, the steps of the EN will also need careful consideration before any works are carried out, given the potential practicalities of modifying the scheme in line with the 2018 Permission.
99. In the circumstances, I therefore consider that a period of twelve months to comply with the requirements of the EN would be more appropriate in this instance. The appeals on ground (g) therefore succeed.

Other Matters

100. Further to my conclusion that the 2018 Permission has been implemented, I consulted the main parties on the potential merits of modifying the allegation in the EN to refer to a breach of condition. However, upon review of the parties' responses, I consider the appeals are most fairly and effectively addressed on the basis of the allegation as originally drafted by the Council.
101. There is a detached annexe building within the northern corner of the appeal site, which does not form any part of the matters alleged in the EN. This building is understood to be long-established, and does not form any part of this decision.

Conclusion

102. I have varied the steps of the EN so that the appellants can modify the as-built scheme to comply with the 2018 Permission. A few other minor changes have been made to the requirements, and the appeals on ground (f) therefore succeed to that extent. I have also extended the time for compliance with the requirements, and so the appeals on ground (g) also succeed.
103. However, for the reasons outlined, the appeals on grounds (b), (c), (d) and (a) should not succeed. Subject to the variations outlined, I shall therefore uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decisions

104. It is directed that the enforcement notice is varied by:
- (a) substituting Plan 5, Item F, for the revised Plan 5, Item F attached to this decision;

- (b) substituting Schedule 4 of the Notice with the following new Schedule 4:

Schedule 4

Steps required to be taken:

1. Either:

- (a) alter the development so that it complies in all respects with the terms of planning permission 17/01464/FUL dated 18 April 2018 including the conditions subject to which that permission was granted; OR
- (b) carry out the following works:
 - a. demolish the main dwelling house (see attached Plan 2, item A, hatched in red);
 - b. demolish the garage (see attached Plan 2, item B, hatched in blue);
 - c. demolish the associated terracing and planters (see attached Plan 3, item D, hatched in green);
 - d. demolish the steps (see attached Plan 4, item E, hatched in orange);
 - e. demolish the walls, gates and pillars (see attached Plan 5, item F, hatched in brown);
 - f. remove the hardstanding (see attached Plan 6, item G, hatched in yellow); and
 - g. remove all resultant materials for steps 1(b)-(a-f).

2. Demolish the boathouse (see attached Plan 2, item C, hatched in black) and remove all resultant materials from its demolition.

105. Subject to these variations, the appeals are dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

James Blackwell

INSPECTOR

DOCUMENTS SUBMITTED AT INQUIRY

1. Appellants' Opening Submissions (incorporating legal submissions for round-table discussion)
2. Appellants' Closing Submissions
3. Council's Opening Submissions
4. Council's Submissions for round-table discussion re status of 17/01464/FUL
5. Council's Closing Submissions
6. Email dated 10 September 2018 from Siri Thafvelin to Timothy Butterworth
7. Updated as-built drawings (dated 15/02/24):
 - a. L01 Rev A (Site and Location Plan)
 - b. P01 Rev A (Proposed Elevations)
 - c. P02 Rev A (Proposed Elevations)
 - d. P03 Rev A (Proposed Plans)
 - e. P04 Rev A (Proposed Sections)
 - f. P05 Rev A (Elevations incl. Boat House)
 - g. P06 Rev A (Roof Plan)
 - h. P07 Rev A (Proposed Site Plan)
 - i. P08 Rev (Proposed Garage)

APPEARANCES

FOR THE APPELLANT

1. Kate Olley (Counsel)
2. Anthony Brindley (Appellant)
3. Diane J Aldridge BA (Hons) MRTPI
4. Timothy Butterworth
5. Alan Duggan
6. Jim Hitchin

FOR THE COUNCIL

1. Izindi Visagie (Counsel)
2. Neill Whittaker BSc (Hons) MA MRTPI

Plan

Revised Plan to be attached to the Enforcement Notice dated 16 March 2023

Land at: Riverbank, 1 The Creek, Sunbury-on-Thames TW16 6BY

References: APP/Z3635/C/23/3320593, APP/Z3635/C/23/3320594, APP/Z3635/C/23/3320595

Scale: Not to Scale

Amended Enforcement Notice Plan 5

