

Appeal Decision

Site visit made on 11 September 2024

by D Moore BSc (HONS), PGDip, MCD, MRTPI, IHBC

an Inspector appointed by the Secretary of State

Decision date: 16 September 2024

Appeal Ref: APP/Z3635/C/23/3331038

99 Marlborough Road, Ashford TW15 3PW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act).
- The appeal is made by Mr Avtar Singh Bhamra against an enforcement notice issued by Spelthorne Borough Council.
- The notice was issued on 13 September 2023.
- The breach of planning control as alleged in the notice is without planning permission and within the last four years, the carrying out of building, engineering, mining or other operations; specifically, the erection of a two-storey side extension, new front porch and garage conversion, in the approximate location shown edged in and hatched black on the plan.
- The requirements of the notice are to demolish the two-storey side extension, including the foundations and permanently remove any resultant debris from the Land.
- The period for compliance with the requirement is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (e), (f) and (g) 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 Act.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs has been made by Mr Avtar Singh Bhamra against Spelthorne Borough Council. This is the subject of a separate Decision.

The Enforcement Notice

2. The allegation is the erection of a two-storey side extension, new front porch and garage conversion. Only the two-storey side extension is required to be removed. There is an apparent contradiction in the reasons for issuing the notice. It is stated that the new front porch and garage conversion on the land encroaches on the 0.9m buffer zone from the bank of the River Ash, thereby rendering it unacceptable in flooding terms to the development and its future users and because of its impact on the riverbank. The appellant points out that the porch and garage have been built in accordance with approved plans and are not within the buffer zone.

3. It is clear from the notice as a whole that it is only the two-storey side extension that is targeted. I am satisfied that it is possible to establish from the notice in what respect it was alleged the land had been developed without the required permission and what must be done to remedy the alleged breach or injury to amenity.
4. The appellant also points out that the notice does not reference any development plan policies. However, I do not consider the notice to be a nullity for this reason. There may be no relevant policies, but even if there are and these have been omitted, the recipient has sufficient information to appeal. This is because the reasons explain that the development is considered unacceptable due to its impact on the riverbank and because of the risk of flooding. The notice sets out the harm resulting from the alleged breach of planning control and, thus, why the Council considers it expedient to take enforcement action.
5. I am referred to an appeal in which an Inspector found a notice to be a nullity. This was because the reasons for issuing the notice were a simple statement of facts that did not set out how or why the local planning authority considered the building to be harmful and in conflict with the development plan or other considerations.¹ That appeal differs because there was no statement of harm, unlike the notice before me.
6. The allegation describes the unauthorised development as being shown edged in and hatched black on the attached plan. The plan shows No 99 Marlborough Road edged in red but there is no hatching. Again, this is not a reason to support a finding of nullity or invalidity. The precise boundary of the land to which the notice relates is clear because Schedule 1 refers to 99 Marlborough Road, Ashford, Surry TW15 3PW as The Land, which is "shown edged in red on the plan attached". The recipient would not be misled, therefore. I am satisfied that I could correct the notice to remove the words "in the approximate location shown edged in and hatched black on the plan" from the allegation, without injustice, as this is unnecessary.
7. The appellant says that the date the notice would have come into effect was stated in the notice as 23 October 2023, whereas the covering letter stated 13 September 2023. This was an error on behalf of the Council as it included the date of the notice in the letter rather than the date it would come into effect. Nonetheless, the notice itself is precise and unambiguous and the recipient could understand from within its four corners what the relevant dates are.
8. I do not consider the notice to be a nullity or otherwise invalid, therefore.

The ground (e) appeal

9. To succeed on ground (e), the appellant must show on the balance of probabilities that copies of the notice were not served on the owner and the occupier of the land to which it relates or any other person having an interest in the land. The notice was served on the owner and occupier of the appeal property, the appellant and the mortgage provider. There is no evidence that any other owner, occupier or person with an interest in the land was not served as required. The appeal on ground (e) must fail, therefore.

¹ Ref APP/V2004/C/22/3296435.

The ground (b) appeal

10. To succeed on an appeal on ground (b), the appellant must show on the balance of probabilities that the matters alleged in the enforcement notice have not occurred as a matter of fact.
11. The allegation concerns the erection of a two-storey side extension, new front porch and garage conversion. There is agreement that the development as alleged has taken place. However, the appellant argues that the porch and garage conversion have planning permission. In cases where there is an apparent deviation from approved plans, a notice may allege a breach of condition or development without planning permission, depending on the significance of the departure. Whether or not any differences from the approved plans are material is a question for the ground (c) appeal.
12. It is also pointed out that there have been no mining and other operations, as alleged and any engineering works were in relation to the building. However, it is clear from the notice that the Council considers unauthorised operational development has taken place. The wording used is taken directly from Section 55(1) of the 1990 Act, which concerns the meaning of development. There is no ambiguity in the allegation.
13. It is accepted that the development, as built, deviates from the approved plans. The allegation is development without planning permission which is not incorrect. The matters alleged have occurred and the appeal on ground (b) must fail.

The appeal on ground (c)

14. The ground (c) appeal is that the matters alleged do not constitute a breach of planning control. It is argued that the garage conversion and porch have planning permission.
15. Crucially, it is agreed that the two-storey side extension has not been built in accordance with the approved plans. This part of the development is significantly larger than approved and the difference from the approved plans is material. In such circumstances, where the development was carried out as a single operation, the Council is entitled to find the whole development unlawful. The notice does not require the removal of the porch or alteration of the garage, in acknowledgement of the planning permission.
16. I find that the matters alleged constitute a breach of planning control and the ground (c) appeal must fail.

The ground (d) appeal

17. To succeed on ground (d) the appellant must show that at the date when the notice was issued, no enforcement action could be taken in respect of the matters alleged.
18. There is no evidence to support this ground of appeal, only the matters already argued in relation to grounds (b) and (c), which I have considered above. The development constitutes a breach of planning control because it does not accord with the planning permission.
19. The ground (d) appeal must fail, therefore.

The ground (a) appeal and the deemed planning application

Background

20. The appeal property is a detached house, which is situated adjacent to the River Ash. Planning permission was granted for the erection of a two-storey side extension and the conversion of the garage into a habitable room on 24 May 2017, Ref: 17/00435/HOU (the 2017 permission). A two-storey side extension was built but this differed from the approved plans.
21. A second application for the erection of a two-storey side extension, new front porch and garage conversion, was approved on 5 December 2022, Ref 22/00448/HOU (the 2022 permission). The application initially sought to retain the two-storey extension as built, but the plans were amended after submission to reduce the size of the extension and maintain a 0.9 metre distance from the top of the river bank. This was to address an objection from the Environment Agency, which was subsequently withdrawn.
22. The 2022 permission was subject to 7 conditions. Condition 1 states "within 6 months of the date of this planning permission the existing two storey side extension including any foundations, shall be demolished and any resultant debris removed from the site. The two storey side extension hereby approved shall be fully implemented strictly in accordance with the approved plans". Condition 3 listed the approved plans and required the development permitted to be carried out in accordance with them.
23. Condition 4 states "Within 6 months of the date of this planning permission details of a scheme for the reinstatement of the riverbank together with a planting scheme and a timetable for implementation, shall be submitted to and approved in writing by the Local Planning Authority. The river bank scheme shall be fully implemented in accordance with agreed details and timetable for implementation".
24. The appellant then sought a variation of conditions 1, 3 and 4 of the 2022 permission to allow the extent of demolition to be amended and an increase in the compliance period from six to 16 months. This application, Ref 23/00085/RVC, was refused on 16 March 2023 (the 2023 refusal) due to the effect on the integrity of the River Ash and the river bank, and flood risk.

Main Issue

25. The terms of the deemed planning application are derived from the allegation. Hence, planning permission is sought for the erection of a two-storey side extension, new front porch and garage conversion.
26. The dispute between the parties concerns the two-storey side extension. The extension as built encroaches into a 0.9 metre buffer zone that should have been retained between the external wall and the top of the river bank. The Council's objection to the development is that the two-storey side extension would be within the buffer zone of the adjoining River Ash.
27. The main issue is whether the development would be unacceptable due to the risk of flooding to the development and its future users and the effect of the development on the riverbank.

Reasons

28. There is no dispute that part of the development would be within an area considered to be at risk from flooding. The National Planning Policy Framework (the Framework) advises that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk. The Framework continues that, when determining any planning applications, local planning authorities should ensure that flood risk is not increased elsewhere. Applications should be supported by a site-specific flood-risk assessment (FRA) in Flood Zones 2 and 3.
29. The risk from flooding, and lack of an FRA, is a significant issue that indicates the development would not be acceptable in this location. The development is within flood zone 3, which is defined as having a high probability of flooding. The Environment Agency advice is that the development is unlikely to be safe for its lifetime. Furthermore, the building in the watercourse has a high likelihood of interfering with natural processes, which could place the building at risk of significant damage. In addition, there has been a loss of habitat.
30. However, there is a valid fallback position to which I must have regard. Despite the Council's views to the contrary, I consider that the 2017 permission was begun within the statutory period.
31. Section 56(2) of the 1990 Act provides that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. Section 56(4) states that "material operation" means any work of construction in the course of the erection of a building and / or the digging of a trench that is to contain the foundations, or part of the foundations, of a building. It is only necessary for the material operation to be carried out for the whole development to be taken to be begun. A material operation does not have to be completed.
32. Works took place to convert the garage and erect the porch, as approved, and foundations were dug that would contain part of the approved extension's foundations. It is possible to commence development for the purpose of Section 56 and thereby meet a deadline forming a condition of the planning permission, and then later deviate from the permitted works in a manner that becomes an enforcement issue without retrospectively altering the fact that the commencement of the development had occurred. In the circumstances, I find that the 2017 permission is extant.
33. The 2022 permission is also extant. I note that there were two conditions imposed on that permission that required certain activities to be carried out, or details to be approved within six months of the date of the permission. This has not taken place, but it would still be possible to comply with those conditions albeit within a longer timescale, since neither prohibited the commencement of development until the matters detailed were carried out or approved. Therefore, the 2022 permission also forms a valid fallback position.
34. The appellant may implement either the 2017 or the 2022 permission. I must, therefore, compare the impact of the development subject to the notice against the effect of what other development could lawfully take place.

35. The Environment Agency has advised the 2017 permission should have been refused due to the absence of an FRA. As such, it had not been demonstrated that the residential extension would be safe. It is explained that the Flood Risk Activity Permit (FRAP) for the 2017 permission was issued in error and, moreover, the development does not comply with its terms and conditions. Nonetheless, the planning permission was approved, and it remains extant.
36. The Environment Agency was also consulted on the subsequent application, which was described as partly retrospective. It was noted that there appeared to be inconsistencies in the information that was submitted about the location of the site boundary. The plans showed the site boundary to be within the watercourse and did not appear to be in context with the surrounding physical features. The Environment Agency objected to the development because of the inadequate buffer zone between the proposed extension and the River Ash.
37. The applicant was asked to ensure the creation and maintenance of a 0.9 metre buffer zone, in line with the FRAP. It was considered that this would mitigate the adverse effects and, while not ideal, the risks from flooding and damage to the watercourse would be within reasonable limits. An amended plan was submitted showing the extension set back 0.9 metres from the top of the riverbank. Consequently, the Environment Agency withdrew its objection and the 2022 planning permission was granted subject to conditions. These included the removal of the concrete material within the watercourse and up to the 0.9 metre point of the required buffer. Bank reinstatement was also required. It was considered that these measures would reduce the risk of flooding to the proposed development and protect the riverbank and the integrity and ecology of the watercourse.
38. The appellant has provided a structural engineer's report (Geobond Engineers), which advises that the removal of the unauthorised structure would cause considerable damage to the integrity of the riverbank, more than leaving it in situ, and may cause it to recede further. There are also letters from Lumax Consulting, dated 10 August 2022 and 16 February 2024. In the later letter, it is stated that the implementation of the 2017 permission would see the extension project further into the watercourse than the current construction.
39. The approved floor plans Ref: 2017.D103a, show a distance of 943 mm and 929 mm from the corners of the proposed extension to a dotted line. This is assumed to be the site boundary because it has since been established that the property boundary is actually within the watercourse. The scheme was approved without the 0.9 metre buffer zone, therefore. Crucially, the proposed floorplan shows the side extension would have a projection of 3.615 metres. The extension as built measures approximately 3.2 metres. If the appellant chose to implement the 2017 permission, the adverse effects of the development on flood mechanisms and the riverbank would be greater due to its larger size and extent of projection into the watercourse.
40. I also saw that the existing dwelling is closer to the watercourse than the extension and both are at a fairly significant risk of flooding. However, the difference in flood risk between the development as it is currently constructed

and the development 0.9 metres further back from the watercourse is not likely to be particularly significant given the proximity of the existing house.

41. As set out above, I must compare the impact of the development subject to the notice against the effect of what other development could lawfully take place. In making this comparison, I find that the adverse impacts of the development pursuant to the 2017 permission, if implemented, would be greater than the scheme as built.

Conclusion

42. Overall, I find that the development would be contrary to Policy LO1 of the Spelthorne Core Strategy and Policies Development Plan Document (2009) and the Council's Supplementary Planning Document on Flooding (2012), which seek to reduce flood risk and adverse effects on people and property. It would not accord with the guidance of the Framework insofar as it seeks to reduce flood risk.
43. Emerging Policies E1.4 and E3 of the Draft Spelthorne Local Plan 2022-2037, which seek to ensure development maintains and enhances rivers and watercourses while managing flood risks, are relevant. However, these policies carry limited weight as the plan is not yet at an advanced stage of preparation and I understand there are unresolved objections.
44. The development would not accord with the development plan as a whole. However, there is a valid fallback position that carries considerable weight. The 2017 permission is extant and could be implemented. That scheme would be highly likely to have a greater unacceptable risk of flooding and a greater adverse effect on the riverbank than the extension as built. Requiring the unauthorised two-storey side extension to be removed, only to enable the erection of a larger scheme would serve no useful planning purpose. I find that the other material considerations advanced, namely the fallback position, would outweigh the conflict with the development plan policy.

Conclusion

45. For the reasons given above, I conclude that the appeal succeeds on ground (a). I shall grant planning permission for the development as described in the notice as corrected. The appeals on grounds (f) and (g) do not fall to be considered.

Formal Decision

46. It is directed that the enforcement notice be corrected by the deletion of the words "in the approximate location shown edged in and hatched black on the plan" from the allegation in Schedule 2.
47. Subject to the correction, the appeal is allowed, the enforcement notice is quashed, and planning permission is granted on the application deemed to have been made under Section 177(5) of the 1990 Act for the development already carried out, namely the erection of a two-storey side extension, new front porch and garage conversion at 99 Marlborough Road, Ashford TW15 3PW as shown on the plan attached to the notice.

D Moore Inspector