REGARDING AN APPLICATION FOR PLANNING PERMISSION FOR AN EXTENSION AT SIX QUEEN'S ROAD, BECKENHAM

ADVICE, 1 JULY 2020

Introduction and summary of advice

1. I am asked to advise the London Borough of Bromley ("the Council") in respect of an application for retrospective planning permission for a rear extension at 6 Queen's Road Beckenham ("the property").

2. Specifically, I am asked to advise whether a previous notification by the Council that prior approval was not required to build a similar extension within the limits of Class A of Part 1 to Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 ("GPDO") is a material consideration for this application and to advise on the legal issues raised in the objections submitted.

3. My advice can be summarised as follows:

    a. A planning permission for the extension proposed in the Notification of a Proposed Larger Home Extension (ref 18/04031/HHPA) ("the Notification") accrued or crystallised at the point the Council determined that prior approval was not required. That planning permission is capable of being a material consideration (as a fallback position). The weight to be given to it is a matter for the Council.

    b. I have set out below the proper approach (as a matter of law) to the determination of the planning application.

    c. I consider the legal issues raised by the neighbours to be without merit.

Facts

4. The property is an end-of-terrace dwellinghouse.

5. On 5 September 2018 the Council received a Notification of a Proposed Larger Home Extension (ref 18/04031/HHPA) ("the Notification"). The drawings accompanying the proposal provided for a single storey rear extension with a depth of six metres and a height of three metres.

6. No objections to the proposal were received during the consultation period and consequently on 12 October 2018 the Council notified the applicants that it had determined that prior approval was not required for the application proposal ("the prior approval decision notification").

7. Building commenced. At some point the Council received a complaint from the neighbouring property that the extension that was being built was not in compliance with the approved plans because it was higher than three metres and contained a parapet wall not shown on the plans. That extension has now been completed in a modified form (see paragraph 9 below).

8. The Council conducted an enforcement investigation which concluded that planning permission was required for the extension as built.

9. Consequently an application for retrospective planning permission has been received from the property owners. This differs from the approved plans in that the parapet wall has been removed and the height of the rear extension is 3.23 metres[1].

10. The extension proposal is, because of its height, outside the scope of any permission which could be granted under the GPDO[2]. This is why an application for planning permission has been made.

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[1] There is some dispute about the actual height of the walls, but the application before the Council is for an extension of 3.23 metres in height.

[2] This is because of subparagraph (i) of paragraph A.1. of Part 1 of Schedule 2 to the GPDO, which stipulates that the maximum height of the eaves of any extension to the property must not exceed three metres. N.B. this excludes the height of any parapet wall, which must not exceed four metres in height Subparagraph (f) of paragraph A.1., and see page 12 of the 'Technical Guidance on Permitted development rights for Householders', Ministry of Housing, Communities and Local Government (September 2019).

11. The neighbours have objected to the application on various grounds and have also asserted that the Council cannot and should not take into account the prior approval decision when determining the application.

Material considerations in the determination of applications for planning permission

12. It is helpful to first step back and consider the relevant legal principles.

13. The starting point is that, when determining applications for planning permission under Part III of the TCPA 1990, the local planning authority ("LPA") must have regard to the provisions of the development plan, so far as material[3] and, *inter alia*, any other material considerations[4], and the determination must be made in accordance with the development plan unless material considerations indicate otherwise[5].

14. Whether or not a particular matter constitutes a material consideration is a question of law, but the weight to be given to any material consideration is a matter of planning judgment for decision maker, and, absent legal error, the Court will not interfere with that judgment[6].

15. The planning history of the site, including previous grants and refusals of permission, may be a material consideration[7]. This would include previous decisions regarding the acceptability or otherwise of the same or a similar form of development, although the weight to be accorded to any particular decision will be a matter for the decision maker taking into account the particular facts and circumstances.

16. The fallback position is what could lawfully happen on the land if the planning application was not approved. This may be a material consideration to which a local authority shall have regard under section 70 (c) TCPA 1990 when determining an application for planning permission, provided that there is a possibility, understood to mean a real prospect as opposed to a merely theoretical possibility, that the fallback position will actually be

[3] section 70 (2) (a) TCPA 1990

[4] section 70 (2) (c) TCPA 1990

[5] Section 38 (6) of the Planning and Compulsory Purchase Act 2004

[6] *Tesco v SSE* [1995] 1 WLR 759

[7] *North Wiltshire DC v SSE* [1993] 5 P & CR 137 per Mann LJ at 145

implemented[8] (a low bar). Permitted development rights may in principle constitute a fallback position[9].

Permitted development rights under the GPDO

17. Planning permission may be granted under the TCPA 1990 in various ways. These include on application to the LPA[10], and under the GPDO[11].

18. Pursuant to section 60 TCPA 1990, Article 3 (1) of the GDPO grants planning permission for certain classes of development, including Class A – the enlargement, improvement or other alteration of a dwelling house[12].

19. Development under Class A is subject to any relevant exception, limitation or condition set out in paragraphs A.1. to A.4. of Class A, Part 1 of Schedule 2 to the GPDO. That means that in order to benefit from planning permission granted under the GPDO, such development must fall within the requirements of, and accord with, all other applicable limitations and conditions which apply to Class A[13].

Smaller extension

20. The applicants are entitled, in any event, and without prior approval, to build a single-story rear extension of up to three metres in length and three metres in height in accordance with the permitted development rights described in Class A, Part 1 of Schedule 2 to the GPDO[14].

21. The existence of those permitted development rights is potentially a material consideration to which the LPA should have regard as a fallback position, depending on the LPA's view of the materiality of those permitted development rights to the present application (i.e.

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[8] *Samuel Smith Old Brewery (Tadcaster) v SSCGL* [2009] EWCA Civ 333, and see *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314

[9] see e.g. *Mansell*

[10] Section 58 (1) (b) TCPA 1990

[11] Section 58 (1) (a) TCPA 1990

[12] Class A, Part 1 of Schedule 2 GPDO

[13] See, e.g. *Keenan c Woking BC and SSCLG* [2017] EWCA Civ 438 and *Pressland v LB Hammersmith and Fulham* [2016] EWHC 1763 (Admin)

[14] Subparagraphs (f) and (i) of A.1. of Part 1 of Schedule 2 to the GPDO

whether or not the LPA considers that permitted development rights for a three-meter extension affects its assessment of the acceptability of a six-meter extension). This will also affect the LPA's view of the relevance of decisions on other rear extensions nearby, as will the possibility of other fallback positions which might distinguish the present application from those decisions.

The prior approval decision notification

22. The Notification in this case was, however, in respect of a single storey rear extension of no more than six metres in length and three metres height[15], and thus the larger type of rear extension potentially permitted under Class A[16]. Permission under the GPDO for such development is subject to a prior approval process in accordance with the conditions in A.4. of Schedule 2.

23. The conditions in A.4. include that:

    a. development must not begin before one of three things have occurred: the receipt of written notice that prior approval was not required (this was the outcome here); the receipt of a notice of prior approval; or the expiry of 42 days without notification from the LPA that prior approval is given or refused[17].

    b. Development must be carried out in accordance with the details provided (where prior approval is not needed) or approved (where prior approval has been given)[18].

24. The procedure for making and determining applications for prior approval is set out in A.4 of Schedule 2. There does not appear to be any dispute that it was followed in this case.

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[15] See the description in the prior approval decision notification.

[16] In that it met the requirements of paragraph (g) of A.1. but exceeded the limitations in subparagraph (f) of A.1. of Part 1 of Schedule 2 to the GPDO.

[17] Subparagraph 10 of paragraph A.4.

[18] Subparagraph 11 of paragraph A.4.

25. In a prior approval case, planning permission under the GPDO accrues or crystallises for the development outlined in the application upon the developer's receipt of a favourable response from the planning authority as to its application[19].

26. Such permission is not extinguished if the development on site is otherwise than in accordance with it[20], unless that development has the effect of removing the qualifying basis on which those rights are founded (in this case, the dwelling house)[21], or the permission has expired under section 91 TCPA 1990. Neither of those are the case here. Similarly, the likelihood that, if the Notification were made now, the neighbours would object, triggering the requirement for the LPA to assess amenity under subparagraph 5 of paragraph A.4. of Part 1 of Schedule 2 to the GPDO, does not affect the existence of this permission or its materiality as a fallback.

27. In short, planning permission under the GPDO for the extension that was the subject of the Notification accrued or crystallised on 8 October 2018 and remains extant, because the qualifying basis for that permission (the dwelling house) still exists, and the permission has not expired. Therefore, the planning permission that accrued or crystallised as a result of the prior notification approval decision is a material consideration to which the Council should have regard when determining the present application and its effect on neighbouring amenity, as a potential fallback position, in accordance with the principles set out at paragraphs 12 to 16 above. 'Potential' fallback position, because the Council must consider whether there is a real possibility (see paragraph 16 above) of the accrued planning permission being implemented. That is a question of judgment to be applied in

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[19] *Orange Personal Communication Services Limited v London Borough of Islington* [2006] EWCA Civ 157. The position is more complicated where an LPA has given prior approval or determined that none was needed, but the decision was in error because the application proposal does not in fact comply with the requirements set out in Class A, see *Marshall v East Dorset DC* [2018] EWHC 226 (Admin). I understand, however, that this issue does not arise here.

[20] That was precisely what happened in *Orange*. The approach of Mr Justice Crane (in the decision that was the subject of the appeal) was that *"as a matter of law, the fact that here there was an unlawful installation makes no [difference]. The point would be the same in law if there had been no attempt to carry out the work"*, paragraph 42 of the judgment cited at paragraph 12 of the appeal judgment. Neither the parties, nor the Court of Appeal, took issue with this part of the judgment.

[21] See *Arnold -v- Secretary of SSCLG* [2015] EWHC 1197 (Admin). The neighbour has misunderstood the meaning of Article 3 (5) GPDO which provides that permitted development rights acquired in connection with a building do not apply if that building is itself unlawful.

the facts and circumstances of this case. The weight to be given is a matter of planning judgment for the Council.

The neighbours' objections

28. It is not correct that the prior approval decision notification cannot be taken into account simply because an extension has been built which does not comply with the notification proposal[22]. That is wrong in law, see paragraph 26 above.

29. It is also incorrect to state that '*for a fall back under the larger householder extension right to be material as a 'realistic' fall back, the applicant would need, inter alia, to prove all relevant neighbours would not object"* [23]; that analysis ignores the accrued planning permission as a result of the prior approval notification decision, see paragraphs 25 and 26 above.

30. Neither *Keenan* nor *Winters v SSCLG* [2017] PTSR 568[24] assist the neighbours, or the LPA with its determination of this application. Both were concerned with whether development which did not meet the requirements of GPDO at the time it was commenced could become permitted development if those requirements were subsequently complied with. That is not the issue here.

Conclusion

31. Thank you for instructing me. If you have any questions or would like clarification on any of the matters set out in this advice please do not hesitate to contact me by email or telephone.

Laura Phillips

Six Pump Court Chambers

1 July 2020

[22] This appears to be the argument made by the neighbours, see letter of 23 June 2020 and section 3 of Mr Yang's Personal Statement dated April 2020

[23] See the penultimate paragraph of the letter to Mr Yang from Mr Kingsley-Smith dated 5 June 2020

[24] see paragraph 4 of the letter from Mr Kingsley-Smith dated 7 May 2020