Neutral Citation Number: [2022] EWHC 3317 (Admin)

Case No: CO/1057/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

THE KING (LW ZENITH LIMITED)	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
-and-	
HART DISTRICT COUNCIL	**Interested Party**

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- -

Mr Jonathan Clay (instructed by **Fladgate LLP**) for the **claimant**
Mr Horatio Waller (instructed by **Government Legal Department**) for the **defendant**
The interest party was not present or represented

Hearing date: 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives..

HHJ JARMAN KC:

Introduction

1. The claimant challenges a decision of an inspector appointed by the defendant, the Secretary of State, dismissing its appeal under section 78 of the Town and Country Planning Act 1990 (the 1990 Act) against the refusal of the interested party as local planning authority (the authority) to grant approval required under Article 3(1) and Schedule 2, Part 3, Class O, Paragraph O.2(1) of the Town and Country Planning (General Permitted development)(England) Order 2015 (the GPDO).

2. Class O permits a change of use from Class B1a office use to residential use, providing certain requirements set out in O.2(1) (a)-(e) are met. The claimant wishes to use those rights to change the use of a three storey office building called Zenith House, Fleet, into 34 residential flats. The sole ground on which the authority refused approval was that that permitted development right had been removed by the Hart Employment Land Article 4 Direction. The inspector, in her decision letter dated 15 February 2022 based on written representations, decided that the permitted development rights relied upon had not been so removed.

3. Had matters ended there, the appeal would have succeeded. However, it is not in dispute that the inspector, in considering whether to give prior approval, had a duty to consider whether the requirements set out above were met. In particular in this case, the requirement in sub paragraph (e) is that there should be provision of adequate natural light in all the habitable rooms of the flats. This is met in respect of 23 of the proposed flats in Zenith House as it currently stands. However, in respect of the remaining 11 proposed flats, further windows would be needed in the roof space and on the ground floor. Planning permission for these operations was granted by the authority in 2019. At the time of the inspector's decision this permission was extant and has since been implemented.

4. As this issue had not been addressed in the written representations of the claimant or the authority, the inspector raised it, with other matters, in correspondence with them, in these terms:

> "2. Do the parties accept that Condition O.2(1)(e) would apply in this case?
>
> 3. If the Inspector were to find that it did, the brief views of the parties are sought on whether the proposal would provide adequate natural light in all habitable rooms of the dwellinghouses proposed. This should explain how the physical differences (ie dormer windows and enclosure of undercroft parking area) between the existing and proposed plans but not covered by Class O would be secured. Could the Inspector have your concise comments on this by 14 January. This correspondence has been sent to both main parties."

5. The claimant's agent replied as follows:

> "Point 2 - Do the parties accept that Condition O.2(1)(e) would apply in this case? - Yes
>
> Point 3 It is acknowledged that the issue of a Prior Approval pursuant to class O of the GDPO does not grant PP for works which involve material physical alterations to the building and that a separate planning permission is required for such works. The attached 'Proposed Elevation' drawing (05) 100 Rev G, is on the LPA.'s Planning Application web page for this application and in the Zip folder of plans submitted with the appeal (regrettably it is not listed on the applications drawings list). As may be seen this shows the proposed additional fenestration of the infill ground floor undercroft parking area and the 3rd floor in the existing roof. Save for the addition of specified dimensions this is identical in terms of window locations both at ground and roof level as were approved by the LPA on 17th April 2019."

6. The reply of the authority was more detailed and ran to four pages and was entitled supplementary comments. Those comments included that the claimant cannot be compelled either to implement or complete the operational development that was permitted under the 2019 permission, and the prior approval could not be tied to that permission by condition. It was further stated that the inclusion of indicative operational development on the proposed plans was not a source of contention for the authority. However, it should be considered whether the change of use sought, in respect of layout and number of residential units proposed, could be carried out without implementing operational development. Class O required that a building's existing fabric must be capable of conversion to the proposed residential use and number of units stated.

7. Those replies were not shared by anyone with the other party to the appeal. The inspector issued her decision, without further recourse to the parties to the appeal. She found that the imposition of a condition to require the completion of the 2019 permission was not a proper use of condition, and that even if it were possible to word a condition to require this development before any permitted change of use occurred, that would necessitate work beyond the permitted development and involve a level of complexity beyond the "light-touch prior approval process."

8. There are three grounds of challenge to that approach. Mr Clay, for the claimant, took the first two together, and accepted that the outcome in respect of those will impact upon the third. Grounds 1 and 2 are that the inspector misinterpreted the GPDO, Planning Policy Guidance (PPG) and the National Planning Policy Framework (NPPF). Further or alternatively she had regard to irrelevant considerations and failed to have regard to relevant considerations. Ground 3 is that the inspector acted unfairly by failing to disclose to the claimant the authority's supplementary comments or by failing to notify the claimant that she intended to determine the appeal on a basis which had not been canvassed with or between the parties.

The inspector's decision

9. The relevant reasoning of the inspector is set out in her decision letter as follows:

> "28. Paragraph W(13) of the [GPDO] allows prior approval to be granted unconditionally or subject to conditions. However, this is not a general power and such conditions must be reasonably related to the subject matter of the prior approval. The imposition of a condition to require the completion of other consented development in its entirety as part of the prior approval process would be analogous with one of the circumstances outlined in the PPG9 where it is stated that planning conditions should not be used.
>
> 29. Even if it were possible to word a condition to require the sequencing of otherwise approved operational development before any permitted change of use occurred, this would necessitate work beyond the scope of the permitted development concerned and involve a level of complexity that would go considerably beyond the deliberately light-touch prior approval process described in the PPG10. Accordingly, based on the evidence before me I am not convinced that it would pass the test of reasonableness. Hence, it would not be reasonably related to the subject matter of the prior approval.
>
> 30. Therefore, I find that the change of use of the present building would be incapable of providing adequate natural light to all habitable rooms of the dwellinghouses shown. Whilst physical works could probably address this, such works fall outside of the relevant prior approval regime, and there is no guarantee that they would otherwise be satisfactorily secured. As a result, prior approval should not be given under paragraph O.2(1)(e) of the [GPDO]."

The statutory framework

10. In order to consider the grounds, it will be necessary to compare the regime for applying for planning permission under the 1990 Act on the one hand, with what the inspector called the light-touch prior approval process. It was not in dispute before me that each of these form part of the complete code set out in planning legislation which must be read as a whole. There are several relevant provisions of the 1990 Act.

11. An application for prior approval is not the same as an application for planning permission. The local planning authority in determining the latter type of application must have regard to all material considerations (see section 70(2)). It has wide powers to impose conditions on a grant of such permission, including conditions requiring the carrying out of works (section 72(1)(a)).

12. In contrast, the GPDO specifies those planning matters for which approval must be sought, and those delimit the controls which the local planning authority is able to exercise and the considerations it is entitled to take into account, when determining an application for prior approval (per Holgate J in *Cab Housing Ltd* v *Secretary of State for Levelling Up Housing and Communities* [2022] EWHC 208 (Admin) at paragraph 32). The requirement for prior approval limited to restricted planning issues does not confer upon local planning authorities a power to grant planning permission for

development outside the defined class of permitted development (see Hickinbottom LJ in *New World Payphones Ltd v Westminster City Council & Anor* [2019] EWCA Civ 2250 at paragraph 49).

13. Under section 58(1) planning permission may be granted either (a) by a development order made by the Secretary of State or "(b) by the local planning authority...on an application to the authority...in accordance with a development order".

14. Section 59 provides, in relation to the grant of planning permission by a development order, where material:

> "(1) The Secretary of State shall by order (in this Act referred to as a "development order") provide for the granting of planning permission.
>
> (2) A development order may…itself grant planning permission for development specified in the order, or for development of any class specified."

15. Section 60(1) provides that planning permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order.

16. Section 60(1A) provides that where a development order grants planning permission "the order may require the approval of the local planning authority … to be obtained" for specified matters.

17. In respect of a change of use, section 60(2A) provides:

> " Without prejudice to the generality of subsection (1), where planning permission is granted by a development order for development consisting of a change in the use of land in England, the order may require the approval of the local planning authority, or of the Secretary of State, to be obtained —
>
> (a) for the use of the land for the new use;
>
> (b) with respect to matters that relate to the new use and are
>
> specified in the order."

18. The procedure for applying for such approval is set out in paragraph W of the GPDO. Paragraph W (2) materially provides that the application must be accompanied by (a) a written description of the proposed development…(b) a plan indicating the site and showing the proposed development, and (bc) a floor plan showing the dimensions and proposed use of each room and the position and dimensions of windows.

19. Paragraph W(12) provides that the development must be carried out, where prior approval is required, in accordance with the details approved by the local planning authority. Paragraph W(13) provides that the local planning authority may grant prior

approval unconditionally or subject to conditions "reasonably related to the subject matter of the prior approval."

20. The policy background to the GPDO and the prior approval process is set out in paragraph 7.1 of the explanatory memorandum to the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020, as follows:

> "Permitted development rights have an important role to play in the planning system. They provide a more streamlined planning process with greater planning certainty, while at the same time allowing for local consideration of key planning matters through a light-touch prior approval process. Permitted development rights can incentivise certain forms of development by providing developers with a greater level of certainty, within specific planning controls and limitations. Individual rights provide for a wide range of development and include measures to incentivise and speed up housing delivery."

21. The issue of natural light in habitable rooms of new homes is dealt with in paragraphs 7.19-21. The aim is to improve the quality of new homes delivered under permitted development rights. The requirement of floor plans showing the position and dimensions of windows is to enable local planning authorities to consider the provision of adequate natural light.

Case law

22. There are several relevant principles of statutory interpretation which were not in dispute before me. Common words in permitted development rights should be given their common meaning. The ordinary meaning of the language used is to be ascertained in a broad, commons sense manner (per Lindblom LJ in *Mawbey v Lewisham LBC* [2020] PTSR 164 at paragraph 20). The approach to the interpretation of planning conditions is to ask what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole (per Lord Hodge in *Trump International v Scottish Ministers* [2015] UKSC 74 at paragraph 34).

23. A negative condition may be imposed on a prior approval (*Grampian Regional Council v City of Aberdeen District Council* (1984) 47 P&CF and *Pressland v Hammersmith and Fulham LBC* [2016] EWHC 1763 (Admin)). However, there is no obligation on a planning inspector to cast about for a condition where none is suggested (per Mann LJ in *Top Deck Holdings Ltd v Secretary of State for the Environment* [1991] JPL 961 at 965). On the other hand, as Sir Duncan Ouseley put it in *Thorpe Hall Leisure Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 44 (Admin), paragraph 69:

> "I do not consider that it was for the Inspector to devise a condition to meet her concerns. The authorities do not support any obligation on an Inspector to think of solutions or devise wording for conditions. There might be very obvious cases,

> where the Inspector sees a simple answer by condition to a problem which could be imposed, and there may be nothing wrong with such a condition."

24. The prior approval process is intended to be simple to operate (per Richards LJ in *Murrell v Secretary of State for Communities and Local Government* [2011] 1 P&CR 6 at paragraph 29).

Policy

25. In terms of policy, the PPG on use of conditions explains that conditions can enhance the quality of development and enable it to proceed where otherwise permission may be refused. The objectives of planning are best served when the power to attach conditions to a planning permission is exercised in a way that is clearly seen to be fair, reasonable and practicable (paragraph 1). This is underlined by NPPF, paragraph 55, which provides that local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations.

26. The PPG warns that refusing permission on a planning ground capable of being dealt with by conditions risk an award of costs on the basis of unreasonable behaviour by a local planning authority (paragraph 49). However, examples are given as to when conditions should not be used, one of which is to require development to be carried out in its entirety, as there may be enforcement issues.

Grounds 1 and 2

27. I turn now to consider the first two grounds. Mr Clay submits that the inspector's interpretation of paragraphs W(13) of the GPDO was too narrow. There is nothing in the wording which prevents a suitable condition being imposed restricting occupation of the flats until the windows permitted under the 2019 had been installed. The inspector at paragraph 26 of her decision letter accepted that such installation as so permitted was consistent with the details shown in the proposed layout plans submitted in the prior approval applications. The installation permitted by the 2019 permissions was considered on its merits and had been found to be acceptable. Although, as the inspector says in paragraph 28, she could not require the installation to be carried out, her citation of PPG refers to a different type of inappropriate condition requiring the development permitted to be carried out in its entirety. That does not prevent a condition stipulating that flats should not be occupied before the installation permitted in 2019 was carried out. Such a condition would not derogate from the principle that the change of use is permitted once the prior approval is given.

28. Mr Clay continues that the scope of paragraph W(13) is limited only by the requirement that any condition is reasonably related to the subject matter of the prior approval. As the provision of natural light in every habitable room is a requirement for such approval in the present case, a condition to secure that requirement must reasonably relate to the subject matter of the prior approval. On a common sense reading of the GPDO, there is nothing to indicate that there is no power to impose such a condition. The imposition of such a condition was an obvious and simple solution which would have been familiar to the parties.

29. Mr Clay accepts that, with hindsight, the questions posed by the inspector to the parties may be taken to have raised this issue, but this was not clear at the time and it was obvious from the claimant's responses that this was not clear to the claimant. There was nothing to support the inspector's reference in paragraph 29 of the decision letter that a condition would involve a level of complexity going beyond the light-touch prior approval process. On the contrary, it would enhance that light-touch approach, and it was a simple way of achieving the permitted change of use with the minimum of formalities. By not considering that option, a material consideration was left out of account.

30. Mr Waller for the Secretary of State takes a markedly different approach. He submits that there is simply no power on a Class O prior approval application to give approval on the basis that operational development is carried out, even when that development is permitted by an extant planning permission. Other classes, such as Class Q, which permit a change of use from agricultural buildings to dwellings and building operations, also expressly permits building operations necessary for such a change. In that class, reference is made to the existing building. Class O permits only change of use, and not building operations, necessary or not, and so does not refer to the existing building. Operational development cannot be permitted under Class O. It was misconceived for the claimant to include details of installation of windows in the application for prior approval, when such approval was limited to change of use.

31. Mr Waller continues that the grant of prior approval in the present case subject to a condition that windows would be installed to let natural light into each habitable room would amount to a derogation from the planning permission granted by the GPDO It is inconsistent to grant prior approval for change of use, but on the basis that such change may not take place until operational development, namely the installation of windows, is carried out. The inspector was thus correct to reject the imposition of a condition requiring the sequencing of otherwise approved operational development before any permitted change of use occurred. It was not a very obvious case where the imposition of a condition preventing occupation of flats until the windows permitted under the 2019 permission were installed. This could have been suggested on behalf of the claimant in response to the inspector's queries but was not. The solution should have been for the claimant to install the windows before seeking prior approval.

32. In my judgment, Mr Clay's submissions are to be preferred. It is clear that had there been no planning permission for the installation of the windows, then the inspector had no power to consider the merits of such installation on the prior approval application. However, there was such permission, and so the merits of that operational development had been considered and found acceptable in planning terms by the authority. The imposition of a condition requiring the entirety of the 2019 permission to be carried out may not have been appropriate, but in my judgment there is nothing in the wording of paragraph W(13) or in the PPG to prevent the imposition of a negative condition, relating to occupation, as now suggested on behalf of the claimant. The only requirement was that the condition must reasonably relate to the subject matter of the prior approval, and in my judgment such a negative condition clearly does so.

33. Whilst this was not suggested by anyone, in my judgment it was an obvious solution to allowing the change of use and meeting the requirement for all habitable rooms to

have natural light. By failing to grapple with this, the inspector failed to have regard to a material consideration.

34. That is sufficient for the decision of the inspector to be quashed and to be resubmitted for redetermination. It is not in dispute that the consequential cost order must in that event also be resubmitted and redetermined.

Ground 3

35. For the sake of completeness, I shall also deal with ground 3. There was no procedural requirement for the inspector to disclose to the claimant the authority's supplementary comments. The issue is whether fairness demanded that this should be done, and that involves an objective test (see *R(Patel)* v *Secretary of State for Communities and Local Government* [2016] EWHC 2254 (Admin)).

36. It should have been obvious to the inspector from the replies on behalf of the claimant that the question of a condition to deal with natural light had not been picked up by the claimant. It was picked up by the authority, who gave reasons why it was not appropriate to tie in the prior approval with the 2019 permission. Given that the only ground on which the authority refused to give its approval related to an entirely different matter, then although the inspector had a duty to consider all the requirements under Class O before giving prior approval, as a matter of fairness she should have given the claimant the opportunity to respond to the authority's comments. I cannot be satisfied that the result would have been the same had she done so, and it seems to me that in that event there would have been a real possibility that the condition now suggested and the arguments in support of it would have been put forward and could have made a difference.

37. I would therefore quash the decision and resubmit the same, together with costs, for redetermination. I am grateful to counsel for their assistance. They helpfully indicated that any consequential matters not agreed can be dealt with on written submissions, and a draft order and any such submissions should be filed within 14 days of hand down of this judgment.