N21

Appeal Decision

Hearing held and site visit made
on 30 November 2005

by Chris Anscombe BTP DMS MRTPI

an Inspector appointed by the First Secretary of State

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Date
12 JAN 2006

Appeal Ref: APP/X1165/A/04/1167530
Home Orchard, Brim Hill, Maidencombe, Torquay TQ1 4TR

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
- The appeal is made by Mr & Mrs A N R Davies against the decision of Torbay Council.
- The application Ref P/2004/1271/PA, dated 2 August 2004, was allowed on 28 October 2004 subject to conditions.
- The development permitted is the removal of conditions 3 & 6 (Ref Application P/2002/0370/PA) and conditions 2 & 5 (Ref Application P/2002/1397/PA) (Re: hedgerow and Article 3, GDO 1995, Schedule 2 Parts I & II).
- The conditions in dispute are Additional Conditions Nos. 01 and 02 which state that:
  01. *The boundary hedgerows shall be permanently maintained at a height of not less than 2 metres and any new planting shall be allowed to grow to 2m and retained at this height thereafter. The hedgerow shall not be removed unless agreed in writing by the Local Planning Authority.*
  02. *Notwithstanding the provisions of Article 3 of the Town and Country Planning (General Permitted Development) Order 1995, no development of the types described in Schedule 2, Part I, shall be carried out without the prior written consent of the Local Planning Authority.*
- The reasons given for the conditions are:
  01. *To ensure that the rural character of the land is permanently retained in accordance with Policies LS, L2, L3 and L5 of the Torbay Local Plan 1995-2011.*
  02. *To protect the character and appearance of this part of the Area of Great Landscape Value, Coastal Preservation Area and Countryside Zone, in accordance with Policies LS, L2, L3 and L4 of the Torbay Local Plan 1995-2011.*

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

Procedural Matters

1. At the Hearing an application for costs was made by the appellants against the Council. This application is the subject of a separate Decision.

2. With regard to the description of the development permitted, as set out in the fourth bullet point above, the application form correctly stated that the development was for the retention of a dwelling without compliance with the conditions stated. The dwelling, as now built and occupied, was erected under the planning permission granted under P/2002/1397/PA (that being an amendment to the earlier permission, P/2002/0370/PA) and replaced a smaller, detached bungalow and two dilapidated buildings within its curtilage that previously stood on the appeal site.

Planning Policy

3. The development plan includes the Devon Structure Plan 2001-2016 (SP) and the Torbay Local Plan 1995-2011 (LP). LP Policy LS sets out the landscape strategy and accords priority to maintaining the rural landscape surrounding the built-up area and the green wedges between the main towns and villages. SP Policy CO4 and LP Policy L2 relate to development affecting Areas of Great Landscape Value, SP Policy CO5 and LP Policy L3 to the Coastal Preservation Areas and LP Policy L4 (not L5 as stated in reason 01) to the Countryside Zone. These policies generally seek to protect the character and appearance of the designated areas to which they relate. They do not relate directly to the imposition or removal of conditions.

4. I have also had regard to Government advice in the Annex to Circular 11/95: *The Use of Conditions in Planning Permissions* (C11/95), in particular the tests for conditions (paragraphs 14 to 42) and the general presumption against conditions restricting permitted development (paragraphs 87 and 88).

Main Issues

5. I consider that the two main issues in this case are:

   a) whether condition 01 is necessary, precise and enforceable with particular reference to the advice in C11/95 and the character and appearance of the area; and

   b) whether condition 02 is necessary, relevant to the development permitted and reasonable having regard to the general presumption against such restrictions.

Reasons

Condition 01

6. The appeal site is located in a steep sided valley, immediately to the south of the Maidencombe Conservation Area which is focussed on the historic core of the settlement but extends up the hillside to the west to include a group of properties on Teignmouth Road (the A379). The shape of the conservation area is similar to an hour glass as between the two main parts it squeezes through a small gap on Brim Hill (which snakes up the hill) between dwellings within a ribbon of development that has been excluded from the designated area. The appeal site itself is at the bottom of Brim Hill, where it meets Rock House Lane. It is roughly rectangular in shape, about 100m long and 35m deep, with Brim Hill along its west end and south side and Rock House Lane at its east end.

7. Condition 01 essentially repeats the earlier conditions relating to the retention of hedgerows except that the height of the hedgerow on the road frontages was previously required to be 3m. The Council stated at the Hearing that planning permission would have to be refused if that condition were not to be imposed. The site had been redeveloped with a larger dwelling and the retention of the hedgerows at the height stated was necessary to enable the new dwelling to be well integrated in this rural landscape.

8. Whilst the dormer dwelling erected is larger than the bungalow it replaced it is clear that the site, which rises gently from east to west, was excavated in order to reduce its impact. It stands on a large plot and is at the lower end of a ribbon of development of houses and bungalows of varying sizes rising up the hillside on this side of Brim Hill. In my opinion

the condition was not necessary to enable the development to take place. The dwelling as built sits well on the plot and is not obtrusive in this setting. It does not need to be screened or softened by allowing the pre-existing hedges to grow up to the stated height.

9. The road frontage hedgerows have been layed and strengthened by new planting in accordance with the recommendations of an arboricultural report at the time of the first application. To require them to be allowed to grow and then be maintained at the stated height could harm their future management as it is often necessary to cut back such hedges to stimulate stronger growth. In my view the condition is not necessary.

10. The condition would also be difficult to enforce in practice. It is not precise as it does not state how the required height should be measured. At the eastern end of the site the garden is about 1m above the level of the road outside. At the western end it is some 1.2m below road level. If the hedge were not to achieve the required height naturally how could the condition be enforced? An owner could not make it grow higher. Even if it did reach that height throughout, if a future occupier were to reduce the height of the hedge this would not be an offence in itself.

11. In such circumstances the Council would have to issue an enforcement notice for a breach of the condition. That notice would be required to specify the steps to be taken to comply with the notice and a time period for compliance. Unlike a wall which could be rebuilt, a hedge cannot be raised in height other by allowing it to grow back. In effect the enforcement notice would have to require that nothing be done. In my opinion the condition is unenforceable in practice.

12. Whilst the retention of the hedge is desirable in this attractive coastal setting there is no intention to remove it. It provides an effective means of enclosure. Any proposal to replace the hedge with another means of enclosure, such as a wall or fence (as other properties have further up Brim Hill), would require planning permission if it exceeded 1m in height adjacent to the public highway, which runs along three sides of the site. In my opinion no further control is necessary.

13. On the first main issue I conclude that condition 01 is not necessary, precise or enforceable with particular reference to the advice in C11/95. Its removal would not harm the character and appearance of the area or conflict with the development plan policies set out in paragraph 3 above. The condition should be removed.

Condition 02

14. Paragraph 87 of C11/95 makes clear that conditions such as this should not be imposed, save in exceptional circumstances. The valley (or combe) within which the appeal site is located is undoubtedly very attractive. In the local plan review of landscape designations published in March 1999 the coast of Babbacombe Bay, including Maidencombe, was described as "dramatic in scale and the scenic quality is exceptional". Nevertheless, it is not designated as a landscape of national importance, such as an Area of Outstanding Natural Beauty. Even in such a landscape of national importance (as defined as Article 1(5) land in the Town and Country Planning (General Permitted Development) Order 1995: the *"GPDO"*) permitted development rights are not removed, only more limited.

15. To impose the condition on a replacement dwelling is inequitable. Although I was advised that a similar condition was imposed on another dwelling a little to the north when it

changed its use from a hotel, generally other properties in the area do not have such restrictions. The bungalow formerly on the site had no such restriction as, like many others here, it was erected before 1948. Other dwellings have been altered and extended without serious harm to the landscape. The present dwelling stands on a generous plot which is unlikely to be overdeveloped. If the landscape quality of the area is considered by the Council to be so exceptional as to justify restricting permitted development, then such control should be imposed by making a Direction under Article 4 of the GPDO which would apply equally to all of the properties here.

16. As the appeal site has a public highway on three sides the scope for works under permitted development rights is limited in any event. The dwelling could not be extended to the west or south and no development could take place within the curtilage within 20m of any roadside boundary (if it were nearer than any part of the original building) without permission from the Council. The dwelling has been built with large dormers in the roof so further roof alterations are unlikely. Other minor works, including porches, the provision of a hard surface or a satellite dish, would be unlikely to harm the character and appearance of the area. I consider that the condition is unnecessary and unreasonable.

17. On the second main issue I conclude that condition 02 is not necessary, relevant to the development permitted or reasonable having regard to the general presumption against such restrictions in C11/95. It should also be removed.

Conclusion

18. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed. I will vary the planning permission by deleting the disputed conditions.

Formal Decision

19. I allow the appeal and vary the planning permission Ref P/2004/1271/PA for the removal of conditions 3 & 6 (Ref Application P/2002/0370/PA) and conditions 2 & 5 (Ref Application P/2002/1397/PA) (Re: hedgerow and Article 3, GDO 1995, Schedule 2 Parts I & II) at Home Orchard, Brim Hill, Maidencombe, Torquay TQ1 4TR granted on 2 August 2004 by Torbay Council, deleting conditions 01 and 02.



INSPECTOR