The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Penderfyniad ar yr Apêl

Ymweliad â safle a wnaed ar 12/05/20

gan Alwyn B Nixon BSc MRTPI

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: 26.06.2020

Appeal Decision

Site visit made on 12/05/20

by Alwyn B Nixon BSc MRTPI

an Inspector appointed by the Welsh Ministers

Date: 26.06.2020

Appeal Ref: APP/T6850/X/20/3244125

Site address: Oakcroft, Pentre, Churchstoke, Montgomery SY15 6ST

The Welsh Ministers have transferred the authority to decide this appeal to me as the appointed Inspector.

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr & Mrs A Goodwin against the decision of Powys County Council.
- The application Ref P/2018/0528, dated 11 May 2018, was refused by notice dated 29 January 2020.
- The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is the unrestricted residential use of the dwelling known as Oakcroft.

Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the Council's decision to withhold a lawful development certificate was well founded.

Background

3. Full planning permission (ref. M2003/0372) was granted on 5 January 2004 for the erection of a dwelling, installation of a septic tank and vehicular access at Oakcroft. Condition 2 of the permission required that the development be carried out in its entirety in accordance with the approved plans and specifications. In addition, a planning obligation by way of an agreement pursuant to section 106 of the Town and Country Planning Act 1990 ("the section 106 agreement") was executed in relation to the planning permission. The section 106 agreement restricts the occupation of the permitted dwelling, as set out in the Second Schedule. Occupancy is restricted initially to Mr & Mrs Goodwin, and upon any subsequent disposal of the property to a person meeting local residency or employment stipulations. A further specification within the Second Schedule is that any dwelling (excluding garages) constructed on the land shall not exceed a gross floorspace (including wall thickness) of 130 square metres.

4. The Council had not determined the application for a certificate of lawfulness when the appeal was made. However, it issued its decision within the dual jurisdiction period.

The appellant has produced a revised statement of case in the light of the Council's stated reason for not granting a certificate of lawfulness in respect of unrestricted occupancy of the dwelling.

Reasons

5. The appellants' case in essence is that the dwelling known as Oakcroft, which was signed off as completed for building control purposes in May 2005, was not built in accordance with the plans approved by permission ref. M2003/0372 and exceeds the 130 square metre floorspace limitation specified in the Second Schedule of the section 106 agreement. As such, it is said, the dwelling was constructed without the benefit of planning permission; permission M2003/0372 has therefore not been implemented and the section 106 agreement is void and its provisions restricting occupancy are of no effect. As the dwelling was completed as long ago as 2005 it is now immune from enforcement action and, it is claimed, can lawfully be occupied without any restriction on residency.

6. The Council's view, in short, is that the evidence fails to demonstrate that the dwelling constructed at Oakcroft is materially different to the development permitted by permission M2003/0372. As such, the development is in accordance with that authorised by M2003/0372 and the section 106 agreement regarding restriction on occupancy remains in force.

7. The plans identifying the development permitted by planning permission M2003/0372 are not in dispute. They depict a two-storey dwelling having a rectilinear footprint with a staggered front elevation. The floorplans are dimensioned and show a gross floorspace (including wall thickness and excluding the attached garage and an external chimney stack on the side gable) totalling 131.73 square metres.

8. The appellant's contention that the dwelling as constructed is not that permitted by permission ref. M2003/0372 rests on the claim that the dwelling as built has a significantly greater floorspace than that allowed either by the planning permission or by the associated section 106 agreement. Such argument derives from the Court of Appeal judgement in Handoll v Warner, Goodman and Streat & East Lindsey DC (1995) which established that where the operational development is carried out in a way which differs materially from the approved plans, it amounts to development without planning permission. Also relevant to this argument is the judgement in Commercial Land v SSTLGR (2002), where it was held that in assessing whether a materially different operation is comprised in the development it is necessary to consider not only whether there are differences, but also to consider the significance of the differences.

9. In this case the appellants' agent has professionally surveyed the dimensions of the as-built dwelling, for the purpose of comparison with the dwelling as approved. The linear dimensions as surveyed are not in dispute. Based on these, the appellants' submission to the Council was that the relevant overall gross floorspace of the dwelling as built (calculated on the same basis as the 131.73 square metres for the dwelling depicted on the approved plans and as described above) totalled 133.44 square metres. As such, it was said, the "as built" dwelling is materially different to the details shown on the approved drawings and even more so in relation to the 130 square metres limitation contained in the section 106 agreement.

10. However, the calculation of 133.44 square metres is an error. Calculation of the gross floor area from the detailed linear dimensions taken from the appellants' surveyed "as built" drawing actually produces an "as built" gross floorspace figure of 130.62 square

metres. This arithmetical error has been drawn to the attention of the parties, who have confirmed that this corrected figure should prevail.

11. The corrected figure of 130.62 square metres is actually less (by just 1.11 square metres, or less than 1%) than the floorspace total derived from the dimensions on the plan approved by permission M2003/0372. Study of the discrepancies between the "as approved" and "as built" measurements shows that the resulting difference in floorspace is the product of very minor deviations in the construction of the various lengths of wall concerned, ranging between +20mm (less than 1 inch) and -60mm (about 2.4 inches). Some wall lengths have been built marginally longer than as approved; others are marginally shorter. In my view the extent of the deviations is insignificant; indeed, deviations of this magnitude could be expected to occur almost routinely in translating a stated dimension in millimetres on a drawing to bricks and mortar on the ground. I conclude that the dwelling as built is not materially different to that depicted on the drawings approved under ref. M2003/0372 and is in accordance with the development authorised by that planning permission. The minor differences between "as approved" and "as built" do not impact upon the dwelling's affordability, which underpins the justification for the occupancy restriction imposed.

12. Based on the corrected floorspace figures, the dwelling as built is just 0.62 square metres, or only 0.5%, greater than the 130 square metre limitation stipulated in the section 106 Agreement. There is an unfortunate inconsistency between the floorspace limitation cited in the section 106 Agreement and the slightly greater floorspace permitted by virtue of the plans approved under the associated planning permission. There is no suggestion that this is due to anything other than oversight or inattention to detail. However, while the circumstances are such that the development as built, whilst complying with the approved plans, marginally exceeds the floorspace limitation entered into via the section 106 Agreement, I see no reason why this would invalidate the other clauses in the Second Schedule of the Agreement relating to occupancy restrictions. The development has been carried out materially in accordance with planning permission ref. M2003/0372 and the associated section 106 Agreement remains in effect.

13. The point is made that the attached garage, which has a floorspace of about 37 square metres, has the potential to be converted into a further habitable room, thus increasing the living space still further. However, contrary to the assertion in the application statement to the Council, permission M2003/0372 contains a condition removing all rights to alter or improve the dwelling that would otherwise apply under Part 1 of the Second Schedule to the Town and Country Planning (General Permitted Development) Order 1995. Although about 11.5 square metres of the garage space is currently being used as a utility area, it is commonplace for garage space to be used in part for such purposes, for example to accommodate a freezer or to store other domestic appliances or items. Neither of these matters leads me to conclude that the calculation of dwelling floorspace as built, excluding the garage, should be reckoned as greater than 130.62 square metres.

14. I have also had regard to the judgement cited in Kerrier District Council v SSE (1981). However, in that case, the finding that the development differed materially from the approved plans evidently rested on the fact that a basement shown on the approved plans had not been included in the development as carried. This case plainly concerns a much less significant difference between "as built" and "as approved", which is of an extent and nature that I have found on its facts to be non-material.

15. I note what is said regarding inconsistency between the approved dwelling and the imposed floorspace limitation imposed and the relevant development plan policy

(former UDP policy HP10) at the time that the application for the dwelling was determined. I note also that the current local development plan imposes stricter floorspace limitations than those in force when permission was granted for the dwelling at Oakcroft. However, these matters do not bear on the fundamental question in this LDC appeal (which is not an appeal arising from an application to discharge a restriction contained in the section 106 agreement) of whether the dwelling constructed at Oakcroft constitutes development carried out in accordance with planning permission M2003/0372. They are not relevant to the factual matter of whether the constraints on occupancy imposed by planning permission M2003/0372 and the associated section 106 agreement apply to the dwelling that has been built and I make no comment on these matters.

16. Similarly, whilst I have noted the references to various cases where there have been successful applications to discharge similar restrictions in section 106 agreements at other locations, I find these of little assistance in the context of this LDC appeal. The issue in this appeal concerns whether the section 106 occupancy limitation has effect in relation to the dwelling that has been constructed. The planning merits of the section 106 limitation do not come into this and I therefore do not comment either way as to the comparability of these other cases to the circumstances at Oakcroft.

17. I have taken account of all other points made but find nothing which disturbs my overall conclusion that the dwelling at Oakcroft has been constructed materially in accordance with planning permission M2003/0372 and that the limitations on occupancy contained in the section 106 agreement remain in force. Accordingly, and having taken account of all matters raised, I conclude that the Council's decision to withhold a lawful development certificate in respect of the unrestricted residential use of the dwelling was well founded. I therefore dismiss the appeal.

Alwyn B Nixon

Inspector