

Appeal Statement – Local Review Body
22/24 South Street, Duns, TD11 3AH
Planning Application 23/00026/FUL for Alterations & Change-of-Use
to Form Two One-Bedroom Dwellings

Background

The property known as 20-24 South Street was acquired by surveyors Smith & Garratt around 15 years ago. Number 20 was a vacant gap-site providing parking for an ugly, disused shop at Numbers 22 and 24. The firm's intention was to renovate and occupy the building as its offices – about 52 square metres on the ground floor, including WC and kitchenette, and about 45 square metres upstairs. In the event the firm did not base itself there. Instead, we improved the shop and let it, with parking, to Carpet Mart for ten years from October 2011. By agreement with SBC, who were concerned that the stairs were domestic and not compliant with Building Regulations for commercial use, only the ground floor was accessible to the public and the upper floor became Carpet Mart's office. Before the lease came to an end in 2021 Carpet Mart decided to move to larger premises at Clockmill. There being no rental demand we offered the property for sale and found no demand at all, so on 15th September 2021 we applied for planning permission for alterations and change-of-use to convert the shop into two compact two-bedroom dwellings, reference 21/01457/FUL¹. The building would be divided down the middle, each dwelling would be made from half the shop with a bedroom and shower-room on the first floor, and a tight, winding staircase to a coombed second bedroom in the roof void; and each dwelling would have an off-street parking space in the gap-site. By their nature the new dwellings would be affordable in the market sense if not in the planning sense; our selling agents thought they might sell for £140,000 each. On 5th November 2021, only seven weeks after submission, the Case Officer wrote to confirm that planning permission was to be granted for this scheme pending our decision whether to pay developer contributions under a s.69 Agreement or defer them using a s.75 Agreement.

We elected to pay the Developer Contributions of £19,926 under a s.69 Agreement immediately prior to commencement – even signing the document and writing a cheque²; and we applied for a Building Warrant. The council's Building Standards Department was obstructive and difficult. Despite that, Building Warrant 2200556CONAEX was ultimately obtained on 11th January 2023. The Building Standards Department was as obdurate as it could be, for example insisting on double fees on grounds of late submission because they defined the works as beginning in 2011, when we tidied the premises for Carpet Mart. They were appalling to deal with throughout; it should not have taken a year to obtain the Warrant, three or four months should have been ample.

Having arranged for builders to start work and then deferred due to wrangling over Building Standards, we felt obliged to commence as soon as the Warrant was issued. By the time we had the council's authority to commence, 15 months after deciding to redevelop the shop into two little dwellings, the economic landscape had changed.

¹ The layout and decision in principle are in the reference bundle.

² Copies of the signed Agreement and cheque are in the reference bundle.

There was war in Ukraine, rising energy costs, inflation, and interest rates rising to keep a lid on inflation. Rising interest rates make mortgage-lending difficult and expensive, thus affecting our prospects of selling the finished dwellings. Our selling agents advised us to save some money by omitting the coombed attic bedroom from each dwelling, saying we should still obtain £120,000 per unit, maybe £130,000 if the potential to make a second bedroom was obvious. I wrote to the council's Planning Department in December 2022 to enquire how they would deal with the developer contributions. Senior Planner Barry Fotheringham replied confirming the contribution would be that applicable to one-bedroom units (i.e., £1,000 per dwelling instead of £9,963 per dwelling), and our buyers would not have to top-up if they subsequently formed a second bedroom because contributions apply only where new dwellings are created by new-build or conversion, not to subsequent alterations³. Coupled with the savings in building works, this was persuasive. On 15th January 2023 we submitted planning application 23/00026/FUL seeking permission for alterations and change of use to form two one-bedroom dwellings; and we instructed our builders accordingly. The one-bedroom design is just the same as the two-bedroom design except that there are no winding second staircases and the roof voids are for storage only, accessed via hatches from the first-floor landings below⁴. The council's target date for determining application 23/00026/FUL was 16th March 2023 ... which it has missed by a big margin.

Noting that the decision to grant planning permission 21/01457/FUL (the two-bedroom scheme) was made without fuss in only seven weeks, we had no reason to think that application 23/00026/FUL (the one-bedroom scheme) would run over its time. Building Warrant reference 2200556CONAEX was in place and covered everything we wished to do. We were – and remain – happy to pay developer contributions of £1,000 per unit immediately upon the decision in principle to approve this application. We could see no reason to halt works on site.

We know the Building Warrant must be amended to reflect the one-bedroom scheme before we apply for a Completion Certificate, and we are currently working on the amendment application. It will show a handful of site-based edits as well as the reduction from the two-bedroom scheme to the one-bedroom scheme. It is perfectly normal to make site-based edits and to submit an Amendment to Warrant prior to Completion ... this happens in most conversion projects.

Recent correspondence with SBC's Planning Department reveals the planners decline to determine application 23/00026/FUL, holding us in breach of planning until we are forced to pay the developer contributions of £19,926 being the sum applicable to two dwellings with two or more bedrooms, instead of £2,000 being the sum that is properly payable in respect of two one-bedroom dwellings⁵. We believe this is monstrous, and it forces us to appeal to the Local Review Body on grounds of non-determination.

Members of the Local Review Body will understand that we need the planning permission because without it the new dwellings are not marketable. We realise we must pay the appropriate developer contribution in order to get

³ Copies of this correspondence are in the reference bundle.

⁴ The revised layout and registration letter – with target date – are in the reference bundle.

⁵ Copies of this correspondence are in the reference bundle.

the planning permission, and we are fine with that. We will also amend the Building Warrant and obtain a Completion Certificate, as any developer must. We should not, however, be put over a barrel and asked to pay five times the developer contribution that any other developer would be asked to pay.

Primary Reason for Appeal

We appeal to the Local Review Body to determine planning application reference 23/00026/FUL on grounds that the Planning Department has failed to do so within the allotted time. The application was registered on 15th January 2023. The Planning Department's target date was 16th March 2023. There is no planning processing agreement in place. Determination is overdue. The Case Officer has confirmed there is no reason why the application should not be approved⁶.

Secondary Reason for Appeal

Our development at South Street is not just a means of disposing of the property. We intend that it is successful as part of our commercial activities and, in a small way, we expect it to meet local demand and help deliver the council's housing aims. From a commercial perspective, omission of the attic bedroom is a necessary cost-saving measure. It saves construction costs and most of the developer contribution at a time when the market is under pressure and buyers are seeking value. We intend that the potential to convert the attic into a second bedroom will be obvious, so bidders take account of it. Thus, we intend to form one-bedroom units, pay developer contributions applicable to one-bedroom units, and sell one-bedroom units ... albeit with potential for enlargement. This is entirely straightforward, above board, and permissible according to the council's planning and contribution policies.

We ask the Local Review Body to clarify, as part of its determination, that the Planning Department does not have authority to require the developer to enter into a s.75 agreement containing non-standard arrangements for the collection of developer contributions. Members of the Local Review Body will note the e-mail from the Case Officer dated 7th June 2023 suggests the Planning Department is prepared to approve application 23/00026/FUL if we enter into a s.75 Agreement requiring payment of the uplift from the developer-contribution payable in respect of a one-bedroom unit to the developer-contribution payable in respect of a bigger unit should the sleeping capacity Numbers 22 or 24 ever be increased. We believe this is *ultra-vires*, i.e., not within the powers of the Planning Department. Barry Fotheringham's e-mail of 5th December 2022 clearly sets out the council's policy in respect of the developer contributions payable and post-completion alterations. We respectfully request that the Local Review Body approves application 23/00026/FUL subject to conditions as it sees fit, but NOT including a condition requiring us to enter into a s.75 Agreement with non-standard terms for the collection of further developer contributions should the sleeping accommodation be increased. We believe such a s.75 agreement would be non-standard, without precedent, unfair and discriminatory in circumstances where a change in market conditions has driven us to reduce the number of bedrooms post-commencement from two to one.

⁶ Highlighted, third page of e-mail exchange with Case Officer, in the reference bundle.

Notes

The development is well underway with practical completion envisaged next month (July 2023). We find ourselves in breach of planning regulations through no fault of our own. Build-cost inflation and increases in labour rates are pushing the project over budget. We have not appended the budget-v-actual figures to this reference to the Local Review Body, but should Members wish to see them, they will be made available on a commercially confidential basis.

Finally, we take this opportunity to highlight a problem in Scottish Borders Council's policy relating to developer contributions. We are not unhappy to pay developer contributions, and indeed have paid in excess of £10,000 per unit in respect of two detached new-builds near Swinton (our next project, planning reference 16/00243/PPP). Our complaint is that the contribution payable steps up only once, the trigger being more than one bedroom. This means the contribution payable in respect of a tiny, terraced, two-bedroom dwelling in Duns with a prospective sale price of £140,000 is the same as the contribution payable in respect of a four-bedroom detached house in the Berwickshire countryside with a prospective sale price above £400,000. This lacks nuance and discourages development of smaller, more affordable dwellings unless with only one bedroom. It hampers those supplying or demanding two-bedroom dwellings ... which includes all first-time buyers and retirees who either require or would like a second bedroom. We suggest the policy acts to distort supply away from demand and requires revision.

Prepared by:
A H Garratt LL.B FRICS FAAV



The Guildhall, Ladykirk, Berwickshire, TD15 1XL
Tel: 01289 382209
E-mail: ahg@smithandgarratt.com

Photographs



20-24 South Street in May 2007, before purchase.



20-24 South Street ready to let to Carpet Mart, October 2011.



20-24 South Street in March 2021, Carpet Mart having intimated it would not renew the lease. In the absence of another tenant or a buyer, the scheme to convert to two little dwellings with off-street parking was born.