
Appeal Decision

Site visit made on 31 August 2016

by Wendy McKay LLB Solicitor (non-practising)

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 27 September 2016

Appeal Ref: APP/B0230/C/16/3149454

2 Easingwold Gardens, Luton, LU1 1UD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Amahl Khan against an enforcement notice issued by Luton Borough Council.
- The Council's reference is 15/00421/ISSUE.
- The notice was issued on 22 March 2016.
- The breach of planning control as alleged in the notice is without planning permission the unauthorised erection of a detached building on the land, in the approximate position shown edged green on the plan referenced CM1 attached to the notice.
- The requirements of the notice are: (i) Demolish the recently erected detached building (as defined in para 3 of the notice) (including its foundations/hardstanding etc) and remove it from the land; (ii) Remove all associated building materials and rubble and waste materials arising from compliance with step (i) above from the land.
- The period for compliance with the requirements is three calendar months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed, and the enforcement notice is quashed.

The appeal on ground (c)

1. For the legal grounds of appeal, the burden of proof is on the Appellant and the appropriate test is "*on the balance of probability*". The appeal on ground (c) is directed at whether the matters alleged in the notice, constitute a breach of planning control. The planning merits of the development which has taken place are not relevant to my consideration of this legal ground of appeal.
2. The Appellant claims that the proposed outbuilding does not constitute a breach of planning control as it is permitted development by virtue of Class E, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (GPDO). Development is not permitted by Class E1 if certain specified limitations are not met. These include that the total area of ground covered by buildings, enclosures and containers within the curtilage (other than the original dwellinghouse) would exceed 50% of the total area of the curtilage; if it would have more than a single storey or would exceed 2.5m in height in the case of a building within 2m of the boundary of the curtilage of the dwellinghouse.
3. The Appellant submits that the structure complies with the physical parameters set out in Class E in that it would not exceed 2.5m in height; it would be no

- more than one storey in height and the total area of ground covered by the propose outbuilding would not exceed 50% of the total area of the curtilage. Furthermore, he contends that it is required for a purpose incidental to the enjoyment of the main dwellinghouse.
4. The Council's delegated officer's enforcement report alleges that the building is 2.7m in height and that the floor area is 48m² which is larger than the host dwelling. Apart from the reference to the overall height and floor area, the Council's evidence does not raise any other specific dimensions of the building which are said to be in breach of the Class E limitations.
 5. The GPDO states that: *"Unless the context otherwise requires, any reference in this Order to the height of a building or of plant or machinery shall be construed as a reference to its height when measured from ground level; and for the purposes of this paragraph "ground level" means the level of the surface of the ground immediately adjacent to the building or plant or machinery in question or, where the surface of the ground on which it is situated or is to be situated is not uniform, the level of the highest part of the surface of the ground adjacent to it."*
 6. The Department for Communities and Local Government (DCLG) Permitted Development Rights for Householders Technical Guidance in relation to Class E development states that: *"The height of the building, enclosure or container should be measured from the highest ground level immediately adjacent to the building, enclosure or container to its highest point"*.
 7. The Appellant has had a survey carried out which shows on 'Elevation A' that the height of the building varies from 2.5m to 2.3m at the centre and 2.8m at the boundary end that faces the communal garages. The Appellant contends that the height of the building should be measured from the highest ground level adjacent to it and that from this point the plans show the height of the building to be 2.3m which is under the maximum height allowance. Having regard to the GPDO provisions and the DCLG Technical Guidance on this topic, I concur with that approach. The Council has not questioned the accuracy of the Appellant's survey nor would it seem has it taken its own measurements of the building from within the site. That unchallenged survey evidence leads me to the inevitable conclusion that when measured as advised by the DCLG Guidance, the height of the building complies with the height limitation for Class E development.
 8. As indicated above, the officer's report also makes a comparison between the floor area of the new structure and the floor area of the existing dwelling. The Appellant's survey indicates that the appeal building has a floor space of some 51.828 m². The dwellinghouse has a footprint of about 48.937 m² but since it is built over two storeys it has a total floor space of some 97.874 m² which is significantly larger than the new building. Furthermore, the Appellant's survey evidence confirms that the total area of ground covered by the outbuilding would not exceed 50% of the total area of the curtilage.
 9. In order to comply with Class E, the outbuilding should also be required for a purpose incidental to the enjoyment of the main dwellinghouse as such. The officer's report notes that at the time of the Council's inspection, works to the building were not fully complete and it was not in use or occupied. The Appellant asserts that the building was constructed for the purpose of a residential garage. The garage door allows vehicle access from the road to the

building. Since the communal garages are in a bad state of repair and subject to neglect, he decided to construct a separate garage to store his vehicle and provide an additional storage area. Following implementation of the garage use, he has also constructed a work bench with the building. In my view, both those activities can, in principle, be reasonably regarded as incidental to the primary use of the main dwellinghouse.

10. The Appellant refers to the case of *Emin v SSE [1989] JPL 909*. That case confirmed that regard should be had to the use to which it was proposed to put the building and to consider the nature and scale of that use in the context of whether it was a purpose incidental to the enjoyment of the dwellinghouse. The physical size of the building in comparison to the dwellinghouse might be an important consideration but was not by itself conclusive. In this case, I am satisfied that the building was genuinely and reasonably required in order to accommodate the proposed use or activity and thereby achieve its incidental purpose.
11. I conclude that the outbuilding complies with all the physical limitations set out in Class E and at the time it was constructed, it was required for incidental purposes. It therefore represents permitted development under the GPDO. Since planning permission has thereby been granted for the development which has taken place there has not been a breach of planning control and the appeal succeeds on ground (c).

Formal Conclusions

12. For the reasons given above, I conclude that the appeal should succeed on ground (c). Accordingly, the enforcement notice will be quashed. In these circumstances the appeal under the various grounds set out in section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Formal Decision

13. The appeal is allowed and the enforcement notice is quashed.

Wendy McKay

INSPECTOR