

Appeal Decision

Site visit made on 5 October 2016

by George Mapson DipTP DipLD MRTPI

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

Decision date: 11 November 2016

Appeal Ref: APP/G5750/C/16/3144549

38 Carolina Close, London, E15 1JR

- 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 Habib Choudhury against an enforcement notice issued by the Council of the London Borough of Newham.
 - The Council's references are: 16/00047/ENFNOT and 15/00520/ENFA.
 - The notice was issued on 15 January 2016.
 - The breach of planning control as alleged in the notice is: *"Without planning permission, the erection of an extension."*
 - The requirements of the notice are: *"1. Demolish the extension (as shown edged in blue on the attached plan) and return the affected elevations of the property to their form prior to the unauthorised works being undertaken. 2. On completion of step 1 above, remove all materials and debris from the site."*
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended is fee exempt and falls to be considered.
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Decision

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Background

The appeal site and surroundings

2. No. 38 Carolina Close is a two-storey, end-of-terrace building with a side elevation to Francis Street. It was built as a single dwellinghouse, as part of a modern infill development, but it has been used as a house in multiple occupation.
3. The Council points out that all the properties along Carolina Close have a similar design and materials. In the terrace containing No. 38, each house had a small single-storey pitched-roof rear extension.
4. The decorative brickwork detailing of the garden walls reflect that found on the gable walls of the buildings. These features, together with the consistent proportions of the building frontages, created an attractive symmetry to the street scene on Carolina Close and the nearby stretch of Francis Street.

Planning policy

5. No special policies, controls or designations apply to the appeal property or the surrounding area. The Council has drawn attention to a number of general development plan policies that seek to achieve a high standard of new development. These include policies 7.4, 7.5 and 7.6 of the London Plan, policies SP2 and SP3 of the Core Strategy and saved policy H1 of the Unitary Development Plan.
6. The aim of these policies is to ensure that the design of new development is of a high quality, and that it is based on an analysis of local character and the specific attributes of the site. New development should help to reinforce or enhance the character and local distinctiveness of the neighbourhood.
7. The Council also refers to its Supplementary Planning Guidance document No. 15 (2000) entitled *"Altering and extending your home"* as a material consideration in these appeals. This states that the design of new extensions should relate to the style and character of the existing house and fit in with the street scene. They should also avoid adversely affecting neighbouring properties.
8. The objectives of these policies and this guidance broadly reflect those set out in the National Planning Policy Framework [NPPF] and the DCLG's web-based Planning Practice Guidance. The NPPF explains that the *"Government attaches great importance to the design of the built environment"* and that *"good design is a key aspect of sustainable development, is indivisible from good planning, and should contribute positively to making places better for people"*.

Sequence of events between May 2015 and October 2016

May 2015 - October 2015

9. The Council has submitted several photographs of the site. A Google Street View image of August 2012 shows the site before the unauthorised works commenced. Photographs taken by Council officers on 22 May 2015, 7 June 2015 and 10 October 2015 show the works at various stages of completion.

November 2015 – February 2016

10. On 6 November 2015 the appellant submitted a planning application (Ref. 15/02263/HH) for development that was described as a single-storey side and rear extension. On 4 January 2016 planning permission was refused.
11. The Council's delegated report of 4 January 2016 stated that some development had already taken place at the site which exceeded what had been applied for and that a Temporary Stop Notice had been served to prevent further unauthorised building work at the site. In addition to the proposed, and partially constructed, ground floor rear extension, a 1st floor extension had been built. This had a gable end to Francis Street which was constructed from materials which failed to match the original dwelling.
12. On 15 January 2016 the Council issued the enforcement notice in respect of all the unauthorised work that had taken place at that time.
13. On 19 January 2016 and 14 February 2016 the appellant made appeals against the refusal of planning permission and against the enforcement notice, the latter being the subject of this decision.

April 2016

14. On 1 April 2016 the planning appeal site visit was carried out. The appeal was dismissed by a decision dated 7 April 2016.
15. The decision sets out the extent of the unauthorised development at that time. The Inspector stated that the external works appeared to be complete, but that the building

was largely gutted and internal works were continuing. There were no obvious additions at 1st floor, and the building at this level appeared to broadly resemble its original form.

16. At ground floor level the property had been extended to the rear across the full width of the site to a depth of around 4 metres (but see paragraph 21 below). This addition wrapped around the side of the building and extended to its front corner. The outside wall was immediately adjacent to the back edge of the pavement along Francis Street and had replaced an original enclosure that had run along the splayed angle of the site's side boundary.
17. The Inspector found significant differences between the proposed works that were shown on the application drawings and the works that had been undertaken and presently exist. The most obvious of these was a lean-to roof across the width of the dwelling that rises above the otherwise flat roof of the rear extension and parapet walls to the sides of the extension. These were either not shown on some of the plans and elevations or were significantly higher than depicted.
18. Furthermore, the side elevation on the application drawings failed to show the projection of the single-storey extension to the side of the original dwelling and there were discrepancies between the proportions and positions of window and door openings as proposed and those now existing.
19. The Inspector recognised that the appellant had sought to amend the substantial works that were unauthorised, by completing alternative additions to the original building at single-storey level. Those works were substantially complete but still exceeded those shown as proposed on the application drawings. He explained that the appeal before him was one seeking retrospective planning permission for the works that he had seen on site.

May 2016

20. Following the appeal decision, the appellant appointed a firm of planning consultants – Collins & Coward, Planning and Development Consultancy – to submit representations in respect of his enforcement appeal. Their statement of case dated May 2016 provides, among other things, an overview of the sequence of events that had taken place on the site. It states that, although the appellant progressed substantively with a two-storey extension, what is now in place is a single-storey side and rear extension, linked to form a single entity.
21. The Collins & Coward statement said that measurements of the extension established that it projects some 4.25 metres from the original rear wall of the house. The overall height has not been measured, but it was argued that as the eaves are about 2.4 metres above ground level, the roof height must be well below 4 metres.

October 2016

22. No material differences have been pointed out between the single-storey development that the previous Inspector saw in April 2016 and that which I saw on 5 October 2016.

The appeal on ground (c)

23. An appeal on ground (c) is *"That those matters, (i.e. the matters stated in the notice which give rise to the alleged breach of planning control), if they occurred, did not constitute a breach of planning control"*.

Evidence and burden of proof

24. Where an appeal is made on legal grounds such as this, the decision depends entirely on factual evidence about the history and planning status of the building, structure or

land in question and the interpretation of any relevant planning law or judicial authority.

25. The burden of proof regarding decisive matters of fact rests on the appellant. Where an appellant asserts that the development that has been carried out is lawful, he must adduce enough relevant, clear and unambiguous evidence to demonstrate the truth of that assertion. The relevant test of the evidence is 'the balance of probability' (i.e., that it is more probable than not).

The appellant's case

26. Mr Muhibur Choudhury, the appellant's agent, completed and submitted the appeal form. In section E (*Grounds and Facts*) he states that "*The ground floor extension projects back only 4 metres and the first floor extension projects back less than 2 metres, and thereby this part of the development is within permitted development, if considered separately and in isolation from the 2 storey side extension. Thereby, it is averred that no planning permission would normally be required for the rear extension...*".
27. This opinion is contracted in Collins & Coward's statement. Paragraph 26 states: "*We have to accept that the extension as built was not permitted development*".
28. Paragraph 30 states that "*we can only assume that the development on site was part and parcel of a single building operation to include a second storey extension which is shown on the photographs ... but which was later removed. In addition, even considering the single-storey element on its own, we note that part of it extends more than 3 metres beyond the original rear wall of the property then the applicant would have needed to have invoked the prior approval process. Permitted development rights for larger householder extensions are only valid when the process is invoked and there is no record of any such application*".
29. Paragraph 31 states: "*We are not agents for this appeal and consequently we are not in a position to withdraw Ground (c) ...*".

The Council's case

30. The Council's case is that the works constitute a single development and cannot be divided into some parts that could represent permitted development and other parts which do not. The extension fails to meet all the limitations and conditions for permitted development rights conferred by Schedule 2, Part 1, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 [the GPDO].
31. The limitations exceeded are those set out in paragraphs A.1(c); A.1(f)(i); A.1(h)(ii); A.1(i); A.1 (j) (i) and (ii); and A.1v (k)(iv). The condition breached is that set out in paragraph A.3(a). Furthermore, the prior approval procedure for a large extension, as set out in paragraph A.4, was not followed.

Reasons and conclusions on the appeal on ground (c)

32. Any claim of permitted development rights must be measured against each and every one of the sub-clauses of the relevant Class. If any of the limitations, exemptions or provisos are exceeded, then the whole development is unlawful, not just that element in excess of permitted development rights.
33. Permitted development rights cannot be claimed retrospectively by the later removal of one element so as to return the remaining development to the permitted tolerance. The situation must be judged at the date that the development was carried out, which in the case of operational development is normally the date when the works commenced.

34. The appellant's ground (c) case, as set out on the appeal form, is an assertion of lawfulness, unsupported by any reasoned argument or any relevant, clear and unambiguous evidence. It is telling that it is disputed not only by the Council but also by the appellant's planning consultants. I find that the development enforced against falls outside the ambit of permitted development rights and that no part of it is lawful. Accordingly, the appeal on ground (c) fails.

The appeal on ground (a) and the deemed planning application

35. An appeal on ground (a) is "*That in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted, or as the case may be, the condition or limitation concerned ought to be discharged*".

Procedural matters

36. Where ground (a) is pleaded and the fee is paid for the deemed application (or the deemed application is fee-exempt, as here), and there is no success on any legal ground, then that deemed application must be considered.
37. The limit on the development for which permission can be granted by means of an appeal on ground (a) is governed by the wording of section 177(1)(a) of 1990 Act. This means that planning permission may be granted only for those matters, and there is no power to grant planning permission for something that is substantially different from that enforced against.
38. In this case, although the entirety of the development that was enforced against no longer exists, part of it remains. The power under section 177(1)(a) is to grant planning permission "*in relation to the whole or any part of those matters, or in relation to the whole or any part of the land to which the notice relates*".
39. Although work on site continued after the enforcement notice was issued, the assumption made by both Collins & Coward and the Council is that the single-storey side/rear extension that is on site was part of the unauthorised development that was in existence when the notice was issued. On that basis, I am satisfied that there would be scope for planning permission to be granted for that part of the development as built.

The April 2016 planning appeal decision as a material consideration in this appeal

40. National planning guidance makes it clear that where an appeal follows a recent appeal decision in respect of the same, or very similar, development on the same, or substantially the same, site - where the Secretary of State or Inspector has decided that the proposal is unacceptable - it is necessary for the appellant to demonstrate that circumstances have changed materially in the intervening period. In this case, the intervening period is about six months.
41. The April 2016 decision addressed fully the planning merits of that development. The main issues considered by that Inspector were the effect of the development on the character and appearance of the area and on the living conditions of the occupiers of 39 Carolina Close in terms of the visual impact of the development. He found harm had been caused in respect of both issues and concluded that there was a clear conflict with the aims and objectives of saved Policy H17 of the UDP and Policy SP3 of the Core Strategy, insofar as they both relate to design quality and the effect of development upon an area.

The appellant's case

42. The Collins & Coward statement acknowledges that "*that if this firm had been instructed to defend the two-storey extension it would have advised the appellant to comply with the notice as clearly what is shown in the photograph(s) ... cannot be*

justified against planning policy. They have a clear and adverse impact on the public domain". But the statement goes on to assert that the single-storey side and rear extensions are not incongruous or harmful to the character of the street scene.

The Council's case

43. Following my site visit, I canvassed the Council's views on the development that I saw on 5 October 2016 and on the points raised in the Collins & Coward statement. In its response of 13 October 2016, the Council confirmed its view that the development, as it currently exists on site, is unacceptable. The Council maintains its "*significant concerns with regard to neighbouring amenity, the impact on the character and appearance of the property and its (sic) surrounds and the bulk and massing of the works*".
44. The Council takes the view that "*The updated Statement does little to substantiate a Ground A case, particularly when considered against the lack of plans to clarify what is proposed, and apparent justification of the existing development against its variance from what might be considered Permitted Development rather than any tangible assessment against policy.*"

Main issue

45. From my observations at the site and the facts and evidence before me, I see no good reason to call into question the previous Inspector's planning judgment on the harm that he identified or the conflict with policy that he found. His arguments are comprehensive and well reasoned and I concur with them.
46. From this it follows that the main issue is whether circumstances have changed materially since planning permission was refused for the same, or very similar, development on the same site in April 2016.

Reasons and conclusions on the appeal on ground (a) and the deemed planning application

47. There is nothing in the evidence before me to suggest that there has been a material change in the planning policy context since the enforcement notice was issued or since the April 2016 appeal decision.
48. The changed circumstances cited in the Collins & Coward statement is a fall-back argument, which they say was not a matter that was advanced at the previous appeal. In their submission what the appellant could have built under permitted development rights is a valid material consideration in both the ground (a) and ground (f) appeals.
49. The gist of the fall-back argument is that under permitted development rights the appellant could have built a flat-roofed single-storey rear extension with a height of less than 3 metres, projecting less than 3 metres from the rear wall and a separate side extension. The appellant now confirms that if the whole extension is to be demolished, as required by the enforcement notice, he intends to rebuild parts of it that would fall within permitted development tolerances.
50. The courts have established that permitted development rights under the GPDO can be a material consideration when assessing the planning merits of a development. The judgment in *Nolan v Secretary of State for the Environment and Bury MBC* [1998] EGCS 7 makes it clear that a comparison must be made between the impact of the development enforced against and any other development that could be put up lawfully in its place.
51. The limitations on the size of extensions that can be erected as permitted development are set out in paragraph A.1 (f) and (g) of Class A. Two key points are that the height of the extension must not exceed 4m and the projection beyond the rear wall of the original dwellinghouse must not exceed 3m.

52. For a period of six years between 30 May 2013 and 30 May 2019 householders are able to build larger single-storey rear extensions under permitted development, provided that before development commences the local planning authority is notified and the necessary information is provided to the authority to enable the neighbour consultation process to be followed.
53. The appellant's fall-back argument is that *had* that notification process been followed, and *had* the side and rear extensions been separate from one another rather than linked, the development would have been erected within the permitted development tolerances. The reality, it is argued, is that the development as built is very much the same as could have been built under permitted development.
54. In my planning judgment, the consequences arising from what has been built, compared with those that might have arisen had the development been built in conformity with permitted development rights are significant because of the consequence that flow from them. The rear extension that could have been built without pursuing the prior notification procedure would have been 3 metres at the most. This would have had noticeably less visual impact than the 4.25 metre extension that has been built.
55. Had the appellant followed the prior notification and neighbour consultation procedure for a larger rear extension, it could have resulted in an objection from the neighbouring property on the potential impact on their amenity. If they had raised objections, the Council would have made a decision on whether the impact on their amenity would be acceptable and therefore whether the work could have proceeded.
56. As I have said in paragraph 37 above, I believe that the previous Inspector exercised his planning judgment correctly and I concur with his conclusions on the adverse impact of the appeal development.
57. I have taken account of my observations at the site and all the matters raised in the written representations, and have reached my decision on this appeal on the latest evidence. Although the fall-back argument now advanced is a valid material consideration, it is not one of sufficient weight to sway my decision.
58. Neither this nor any of the other matter raised in respect of the ground (a) appeal alters my view that the part of the unauthorised development that remains on the site is unacceptable and planning permission should be refused.
59. I find that the development causes significant harm, which would not be overcome by planning conditions. Accordingly, the appeal on ground (a) fails and planning permission for the deemed application is refused.

The appeal on ground (f)

60. An appeal on ground (f) is "*That the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters (i.e. the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach*".

The appellant's case

61. It is argued that an obvious alternative to demolition of the unauthorised structure would be to reduce its dimensions to bring it within permitted development tolerances. I take that to include the reduction of the length of the rear extension to no more than three metres, since the option of a larger extension exists only if the correct procedures are followed in their entirety before any works to construct the extension commence.

The Council's case

62. The Council says that it has not received any plans which detail the current arrangement of the property or the future intentions of the appellant. The Council would require these details before offering a formal position. The property has already been altered dramatically with the continuation of unauthorised works throughout the appeal process which has left the Council unsure of the appellant's final intentions.

Reasons and conclusions on the appeal on ground (f)

63. One test for the alternative proposal is whether it relates to "*part of*" the matters alleged in the notice. I am satisfied that that test is met. Another test is whether the alternative proposal has been clearly put. That test is not met because no detailed plans or elevations have been submitted of a worked out alternative to demonstrate how the proposed changes would be brought about.
64. In *Miller-Mead v MHLG* [1963] 1 All E R 459, the Court of Appeal ruled that "*The recipient of an enforcement notice is entitled to say that he must find out from within the four corners of the document what he is required to do or abstain from doing*". In essence, the notice must tell the recipient what he has done wrong and what he must do now to put it right. Imprecise, vague or ambiguous requirements offend that rule.
65. I find that the requirements of the enforcement notice cannot be varied in the manners inferred by the appellant because the alternative requirement that he now has in mind could not be described with the necessary degree of precision. Accordingly, the appeal on ground (f) fails.

Other considerations

Ground (g)

66. No appeal has been made on ground (g), that the period for compliance is too short. Nevertheless, I have considered whether an amendment to the compliance period might be a proportionate response in this case so that the details of an alternative proposal can be properly explored.
67. I am mindful of the need to rectify the harm that has been caused by the breach of planning control that has occurred, including the injury to the amenity of the neighbouring occupiers. This should be done without undue delay.
68. On balance, I consider that the six month compliance period specified in the notice is appropriate. It provides adequate time to draw up a detailed alternative scheme – one that would fall within the parameters of permitted development rights – and submit an application for a certificate of lawfulness to the Council for its approval.
69. There is a need for this matter to be brought to a conclusion, rather than be permitted to drift on, and the six month compliance period should focus minds on the need to make progress. That said, I am mindful that the Council has powers under section 173A of the Act to waive or relax any requirement of an enforcement notice, including extending the compliance period, if satisfied that there is a good reason for doing so.

Overall conclusions

70. For the reasons given above I conclude that the appeal should not succeed. I uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

George Mapson

INSPECTOR