
Appeal Decision

Site visit made on 5 December 2016

by Diane Fleming BA (Hons) MRTPI

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

Decision date: 23 January 2017

Appeal Ref: APP/A5270/C/16/3161262

45 Vyner Road, Acton, London W3 7LZ

- 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 A Mercer against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice was issued on 20 September 2016.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a rear outbuilding and associated fencing.
 - The requirements of the notice are
 - A) Demolish the outbuilding as shown hatched on the plan attached to the notice,
 - B) Remove the line of fencing as shown on the plan attached to the notice,
 - C) Remove all resulting debris and materials from the premises.
 - The period for compliance with the requirements is 3 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.
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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.

Procedural Matter

2. The notice refers to two breaches of control, the erection of an outbuilding and the erection of fencing. At the site visit I saw that most of the fencing had been removed leaving just the line of gravel boards to show where it had been. The position of the fence was approximately parallel to the line of the existing boundary fence with the neighbouring property but set in slightly within the garden. Everything else in relation to the unauthorised development was as shown in the Council's photographs. Although there has been a change on site, it is the layout of both aspects of the alleged unauthorised development at the time when the notice was issued that is the appeal before me now.

The ground (c) appeal

3. Under a ground (c) appeal the onus of proof is on the appellant to show that there has not been a breach of planning control. The appellant's submissions in relation to this ground of appeal are made directly in relation to the fence. He does not dispute that operational development, namely the erection of the fencing, occurred within the meaning of section 55 of the 1990 Act, for which section 57 indicated planning permission was required.
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4. He claims though that the erection of the fencing benefitted from the planning permission granted by Article 3 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO). This is for classes of development described as permitted development (PD) in Schedule 2, Part 2, Class A, as it was no greater than 2m in height.
5. However, I consider the fencing did not comprise PD as it did not comply with all of the provisions of Class A. This is because the height of the fencing in part exceeded 2m above ground level where it abutted the outbuilding, a point now conceded by the appellant in his Final Comments. The Council's photographs show that a section of the fencing was higher than the height of the outbuilding. The appellant includes a copy of a letter from his builder dated 2 October 2016 and attached to this letter is the builder's drawing on which is written the 'height of the roof' is '265cm'. As part of the fence exceeded the height of the outbuilding, it is clear that it also exceeded the 2m limit set out in Class A and as such, the fencing did not benefit from the PD given by this Class.
6. In addition, Schedule 2, Part 1, Class E of the GPDO permits any enclosure, or building, within the curtilage of a dwelling for a purpose incidental to the enjoyment of the dwelling. This is provided the height of the enclosure, or building, would not exceed 2.5m within 2m of the boundary of the curtilage of the dwelling. As the height of the fence in part exceeded the height of the building and appeared to have been within 2m of the boundary I consider that the fencing did not benefit from the PD given by Class E.
7. It is not clear from some of the appellant's comments set out in his Grounds and Facts submission for the ground (a) appeal¹ whether he sought an appeal under ground (c) for the outbuilding. I consider though even if such an appeal had been made, the outbuilding would also not be PD as its height also exceeds the 2.5m limit set out in Class E as it is within 2m of the boundary. The issue of whether the use of the outbuilding is 'incidental' or not, as argued by the appellant in his Final Comments, does not therefore fall to be considered.
8. The Council's submissions refer to the fencing not being PD because it created and facilitated a separate access to the outbuilding from the shared driveway situated between the gable walls of Nos 43 and 45 Vyner Road. However, this submission would only be appropriate if the notice alleged a material change of use of the outbuilding to a single dwelling house, which it does not as it alleges operational development without planning permission. For all these reasons the appeal on ground (c) fails.

The ground (a) appeal and the deemed planning application

Main Issue

9. The main issue is the effect of the development on the character and appearance of the area.

Reasons

10. The appeal site lies within a residential area. Vyner Road is a tree-lined road laid out with semi-detached houses with mature front and rear gardens. In between the houses there are shared access drives sometimes leading to a

¹ Third paragraph of amended Grounds and Facts

garage built in the rear garden. There are views over some of the rear gardens as the road contains two doglegs and there is a gentle rise before the junction with Perryn Road which enhances the view across the row of gardens containing the appeal site. Although some front gardens have been paved over, the pleasing design of the houses and the abundance of trees and shrubs contribute towards the attractive appearance of the area.

11. The appellant has erected a detached outbuilding with a flat roof at the rear of the garden to be used as a gym, spa and for personal storage. The rear portion of the outbuilding, which is faced in brick, spans more or less the full width of the plot and is about 6.75m wide. Access to this part of the outbuilding is from a doorway near the boundary with the garden of No 43. This section of the outbuilding has three rooms and a bathroom with a basin, toilet and an electric shower. The front portion of the outbuilding, which is rendered and painted white, extends across most of the façade of the rear portion and comprises a single room with a bathroom. It is accessed from a doorway near the boundary with the garden at No 47. The overall depth of the outbuilding is in the order of 8.5m and there are a number of windows that overlook the garden, some that look onto a small light well as well as a number of roof lights which provide light to the development.
12. The fence was a solid structure and comprised a line of panels which ran more or less parallel to the dividing boundary fence with No 43. There was a higher section of fencing at right angles to the main line which screened the entrance to the rear portion of the building from the garden.
13. I find the siting of the appellant's development, particularly its partial separation from the garden of the main dwelling when the fence was in situ, causes harm as it is at odds with the surrounding pattern of development. There is no garage at the appeal site, only within the adjacent gardens. Most of the rear garden areas are open and planted with trees and shrubs which back onto the long mature gardens of the older neighbouring houses. This results in an attractive suburban scene.
14. The outbuilding also has a very large footprint which the appellant's drawing indicates is about 47.35 sq m. Together with its depth, three rooms deep in part, and more or less occupying the full width of the plot, the outbuilding is a significant development that intrudes into and results in a loss of openness from the expanse of the rear gardens. The loss of openness was also further emphasised when the fencing was present. Whilst some neighbouring properties also have outbuildings, they are generally of a much smaller scale, such as the garden shed at No 47.
15. The appellant submits that the design of the outbuilding is unremarkable and that it has a flat roof. However, whilst its appearance is simple, its eaves height is still visible well above the height of the neighbouring boundary fences. Due to its depth and width it occupies a significant proportion of the rear garden and consequently is an unduly prominent development in the immediate area.
16. The appellant refers to a fall-back position for the fence and the outbuilding, which is that they would both benefit from PD if re-built with 'similar attributes' and that PD rights are a material consideration. Case law has established that the likelihood of exercising PD rights must be real and not just academic. Furthermore, in order for a comparison to be made, the alternative

development must be adequately identified. With regard to the outbuilding, the appellant points out that it could be larger, be sited nearer to the house and could even have a pitched roof. No details are given about the fall-back position for the fence. As I have not been presented with any detailed drawings to illustrate either the intended siting or design of the replacement PD outbuilding or the PD fence, I give very little weight to this submission as a material consideration.

17. Cultural reasons are also cited by the appellant to support the necessity for the fence to provide screening for his tenants as the occupiers hold the view that men and women should be segregated. Men would use the rear part of the outbuilding and the women would use the front section so there needs to be privacy between them. The Human Rights Act 1998, and, in particular, convention rights under Article 9 relate to the freedom of thought, conscience and religion. Article 9 protects the right to manifest a religion or belief for example, in observance whether alone or with others and whether in public or in private. This aspect of Article 9 is a qualified right, where interference is justified, if necessary, when striking a balance between the rights of an individual and the wider public interest.
18. The reasons for issuing the notice relate to the harm the development causes to the character and appearance of the area. This is, in my view, a strong planning reason for issuing the notice. I recognise that dismissing the ground (a) appeal represents an interference with the tenants to observe their beliefs. As a qualified right this must be balanced against the need to protect the character and appearance of the area. I consider it is right to protect this wider public interest and this legitimate aim can only be adequately safeguarded by dismissing the appeal.
19. For these reasons I conclude that the development has an adverse effect on the character and appearance of the surrounding area. The development therefore does not accord with Policies 7.1, 7.4 and 7.6 of the London Plan² (TLP) or Policies 7.4 and 7B of Ealing's Development Management Development Plan Document³ (DPD). These policies, which are all concerned with different aspects of design, require, amongst other matters, that new development should have regard to the pattern of existing spaces and reinforce the character of the neighbourhood. The development of the outbuilding also fails to have regard to the Council's Supplementary Planning Guidance which seeks to protect the character of an area. I have not had regard to Policy 1.2(f) of the Council's Core Strategy as this appears to be concerned with reducing energy usage. The appeal on ground (a) therefore fails.

The appeal on ground (f)

20. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). In this case the Council require that the building in the garden be demolished. The purpose of the notice must therefore be to remedy the breach of planning control.

² The London Plan: Spatial Development Strategy for Greater London March 2015

³ Adopted 10 December 2013

21. The appellant submits that the requirements of the notice are excessive as he could comply with the notice and then erect a similar building and fence by exercising his PD rights. He makes two suggestions as alternative lesser steps namely, either just the removal of the fence or only the removal of part of the outbuilding which is nearest to the house.
22. Whilst both suggestions would restore some of the openness to the area, it would not remove all of the harm caused by the development and therefore remedy the breach of planning control. This is because the breach of planning control is the action of erecting the outbuilding and the fencing. Reducing the size of the outbuilding would not undo that initial action and would not address all of the harm caused by the development set out in the reason for issuing the notice.
23. The appellant also argues that there is little difference to the character and appearance of the area between the unauthorised development and any fall-back PD positions for the outbuilding and fence. However I have already addressed this point in my consideration of the ground (a) appeal and the deemed planning application. If I were to allow the appeal on ground (f) then I would need to vary the requirements of the notice in such a way that unambiguously sets out what would need to be done. The appellant has not adequately identified the alternative developments and as such I am not able to vary the requirements. As no other lesser steps have been submitted, I therefore find that the steps required by the notice do not exceed what is necessary to remedy the harm caused and the appeal on ground (f) fails.

Conclusion

24. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

D Fleming

INSPECTOR