

Appeal Decision

Site visit made on 14 February 2017

by George Mapson DipTP DipLD MRTPI

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

Decision date: 23 March 2017

Appeal Ref: APP/A5270/X/16/3161119
86 Berkeley Avenue, Greenford, UB6 0NZ

- 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 R Sheldon against the decision of the Council of the London Borough of Ealing.
 - The application Ref 162560CPL, dated 1 June 2016, was refused by a notice dated 27 July 2016.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described on the application form as "*Construction of a single-storey outbuilding for workshop/storage in rear garden*".
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation which is considered to be lawful.

Application for costs

2. An application for costs was made on by the appellant against the Council of the London Borough of Ealing. This application is the subject of a separate Decision.

Clarification

The description of the development proposed

3. On the application form, the proposed development is described as the "*Construction of a single-storey outbuilding for workshop/storage in rear garden*". The Council's decision notice describes the development as: "*Single storey detached garden outbuilding for domestic use*". The appellant has used this description of the development on the appeal form.
4. However, it is clear from the details shown on the application drawing No. 2K7081 01 G received 01.06.16¹, and confirmed in paragraph 5.5.3 of the appellant's appeal statement of October 2016, that the proposed outbuilding would be put to four uses; a gymnasium, a shower room, a store and a workshop/hobby room.

¹ This plan is dated "Apr. 2007" and Rev G is dated "24.4". The year is omitted from the date but, judging by the date of previous revisions, it could also be 2007.

5. An application for a certificate must relate to a specific proposed use. The exact terms of the certificate and the development specified will be the base that will provide a datum against which any subsequent change may need to be assessed.
6. Accordingly, I propose to determine the appeal on the basis of the following description: *"Construction of a single-storey outbuilding for use as a gymnasium, a shower room, a store and a workshop/hobby room."*

Evidence in LDC cases

7. A certificate of lawful use or development is not a planning permission. Its purpose is to enable owners and others to ascertain whether specific uses, operations or other activities are or would be lawful. Lawfulness is equated with immunity from enforcement action.
8. The issue of a certificate depends entirely on factual evidence about the history and planning status of the building or land in question and the interpretation of any relevant planning law or judicial authority.
9. The planning merits are not relevant in deciding an LDC application or appeal. Claims made about the effect of the development on the character and appearance of the area (raised in the Council's delegated report) or the potential loss of views enjoyed by occupiers of neighbouring properties (raised by third parties) are not issues for me to consider.
10. The burden of proof regarding decisive matters of fact rests on the applicant, now the appellant. The relevant test of the evidence is 'the balance of probability' (i.e., that it is more probable than not).

Background to the LDC application and appeal

The appeal site and surroundings

11. No. 86 Berkeley Avenue is a two-storey end-of-terrace dwellinghouse that has been substantially altered and enlarged at the side and rear. According to the appellant's appeal statement (paragraph 5.5.3) it now contains 8 habitable rooms, of which 6 are bedrooms.
12. A local resident has asserted that the property is in multiple occupation², but there is no evidence to support that assertion. The application form states that the existing use is a Class C3 dwellinghouse and appellant's agent has confirmed that it is occupied by a single family.

The proposed outbuilding

13. Drawing No. 2K7081 01 G (appended to my decision) shows that the proposed outbuilding would be a flat-roofed single-storey structure some 2.49m high, 10.09m wide at the front and 10.49m wide at the rear, and 8.70m deep on one side and 9.30m deep on the other side.

Previous LDC application; certificate issued on 9 May 2008

14. On 14 March 2008 the appellant made an application (Ref. P/2008/1172-G) for a certificate of lawfulness for a proposed development described as *"Outbuilding for workshop and storage"*. A certificate was granted on 9 May 2008.
15. The plans referred to in the decision notice are *"2K7081/01 Rev E and 2K7081/02 Rev A (received 17/03/2008)"*. A comparison between those plans and drawing No.

² Houses in Multiple Occupation, including those which fall within use Class C4 can benefit from the permitted development rights granted to dwellinghouses by the Town and Country Planning (General Permitted Development)(England) Order 2015, as amended [the 2005 GPDO]. Class C4 use is defined as use of a dwellinghouse by not more than six residents as a "house in multiple occupation."

2K7081 01 G that accompanied the appeal proposal shows that the footprint, layout and proposed uses of the rooms would be the same for both schemes. The only material difference between the schemes is that the appeal proposal would have a flat roof, below 3m high, whereas the outbuilding certified as lawful in 2008 would have had a ridged roof exceeding 3m high, but less than 4m high.

Main issue

16. The appeal is confined to reviewing the Council's decision to establish whether the refusal to grant a certificate of lawfulness was well-founded; that is, the decision itself, not necessarily the reasons for it.
17. The reason for refusal is: *"The proposal falls outside the provisions of Schedule 2, Part 1, Class E of the Town and Country Planning (Management Development Procedure) (England) Order 2015³. It is therefore unlawful."*
18. An 'Informative' note that follows the reason for refusal states that: *"The applicant is advised that the proposed outbuilding would have a floorspace of 92.52m² which, together with the existing side and rear extension, results in a total of 140.8m² of additional floorspace which is more to (sic. than) that of the main dwellinghouse that had 44.7m² as originally built. Therefore the proposed outbuilding would not be considered ancillary to the main dwelling as a result of the scale and size."*
19. The crux of the issue is whether there has been a material change in planning circumstances since the Council certified in 2008 that a very similar development as that now proposed, on the same site, would be lawful.

Reasons

Changes in legislation; the 1995 and 2015 versions of the GPDO

20. At the time that the 2008 LDC application was made, permitted development rights were conferred by the Town and Country Planning (General Permitted Development) Order 1995, as amended [the 1995 GPDO]. In April 2015, this version of the Order was replaced by the 2015 Order (referred to in footnotes 2 and 3).
21. In both versions of the GPDO, Schedule 2, Part 1, Class E covers the provision of buildings and other development on land surrounding a house (the "curtilage"). It states that development within the curtilage of a dwellinghouse involving the erection of *"any building....required for a purpose incidental to the enjoyment of the dwellinghouse as such"* is permitted development subject to a number of limitations and conditions.
22. Any claim of permitted development rights must be measured against each and every one of the sub-clauses of the relevant part of Schedule 2. If any of the limitations, exemptions or provisos are exceeded, then the development is unlawful.
23. The 2015 Order limits the height of development permitted by Class E to 3m, whereas the 1995 Order limited height to 4m, in the case of building with a ridged roof and 3m in any other case. In this case, the proposed outbuilding would have a flat roof not exceeding 3m in height, to comply with the height limitation of the 2015 Order, but it would have the same footprint, internal layout and intended uses as the 2008 proposal that was certified as lawful.

³ This is an error for two reasons. First, the correct title of the document that the Council has cited is "The Town and Country Planning (Development Management Procedure) (England) Order 2015". Second, the reason for refusal should have referred to the Town and Country Planning (General Permitted Development)(England) Order 2015 [the 2015 GPDO], Schedule 2, Part 1, Class E of which deals with permitted development rights for *"The provision within the curtilage of a dwellinghouse of any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure."*

24. The officer's report on the 2008 application (Ref. P/2008/1172-G) confirmed that proposed development would meet all the conditions and limitations of the Class E and would be used for purposes incidental to the enjoyment of the house.

Changes in technical guidance

25. The officer's report on the 2016 application, the appeal proposal, takes a different view on whether the proposed outbuilding would be "*required for a purpose incidental to the enjoyment of the dwellinghouse as such*".
26. It refers to the DCLG document 'Permitted development for householders - Technical Guidance', which was published in April 2014, and draws attention to advice found on page 39. This states that: "*A purpose incidental to a dwelling house would not, however, cover normal residential uses, such as separate self-contained accommodation nor the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen.*"
27. Yet the officer's report does not take issue with the uses to which the proposed outbuilding would be put, which is understandable in view of the fact that the same proposed uses were regarded as acceptable in 2008. The report does, however, take issue with the size of the proposed outbuilding, concluding that its footprint would be more than twice the size of the original dwellinghouse and would cause harm to the character and appearance of the area.
28. The Council should be aware that the decision in an LDC case such as this one turns on a 'fact-and-degree' judgment as to whether the outbuilding, and the accommodation that it would provide, would be reasonably required for a purpose incidental to the enjoyment of the dwellinghouse as such⁴. The effect on character and appearance is not a matter for consideration.
29. Furthermore, the officer's report on the 2008 application raised no such concerns about the size of the proposed outbuilding in relation to the original dwellinghouse or the existing house as altered and enlarged. There appears to be no difference between the sizes of the extended house, or the footprints of the proposed outbuilding, in 2008 and in 2016.
30. On the evidence before me, I find that the development would be permitted by Article 3(1) and Schedule 2, Part 1, Class E of the 2015 Order. That was the view taken by the Council on essentially the same development that it certified as lawful in 2008 and there have no material changes in planning circumstances that would warrant a different view being taken now.

Conclusions

31. For the reasons given I conclude that the Council's refusal to grant a certificate was not well-founded and that the appeal should be allowed. I will exercise accordingly the powers transferred to me under section 195(3) of the 1990 Act as amended.

George Mapson

INSPECTOR

⁴ In *Emin v Secretary of State for the Environment and Mid Sussex DC* [1989] JPL 909, and *Holding v First Secretary of State* [2004] JPL 1405, the courts held that the test to be applied in such cases is whether the uses of the proposed building, when considered in the context of the 'planning unit', are intended to be, and will remain, ancillary or subordinate to the main use of the property as a dwellinghouse. It is correct to consider the nature and scale of that use in the context of whether it is required for a purpose incidental to the enjoyment of the dwellinghouse. The word 'required' should be taken to mean '*reasonably required*'. It is therefore for the appellant to show that what is proposed - the floorspace attributed to each proposed use - is genuinely and reasonably required for a purpose incidental to the enjoyment of the dwellinghouse as such.



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 1 June 2016 operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and shown on the plan attached to this certificate, would have been lawful within the meaning of section 192 of the Town and Country Planning Act 1990 (as amended), for the following reason:

Planning permission is granted by the provisions of section 58(1)(a) of the Town and Country Planning Act 1990 (as amended) and Article 3(1) and Class E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015.

George Mapson

INSPECTOR

Date: 23 March 2017

Reference: APP/J1915/X/15/3134681

First Schedule

Construction of a single-storey outbuilding for use as a gymnasium, a shower room, a store and a workshop/hobby room.

Second Schedule

Land at 86 Berkeley Avenue, Greenford, UB6 0NZ

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

Plan

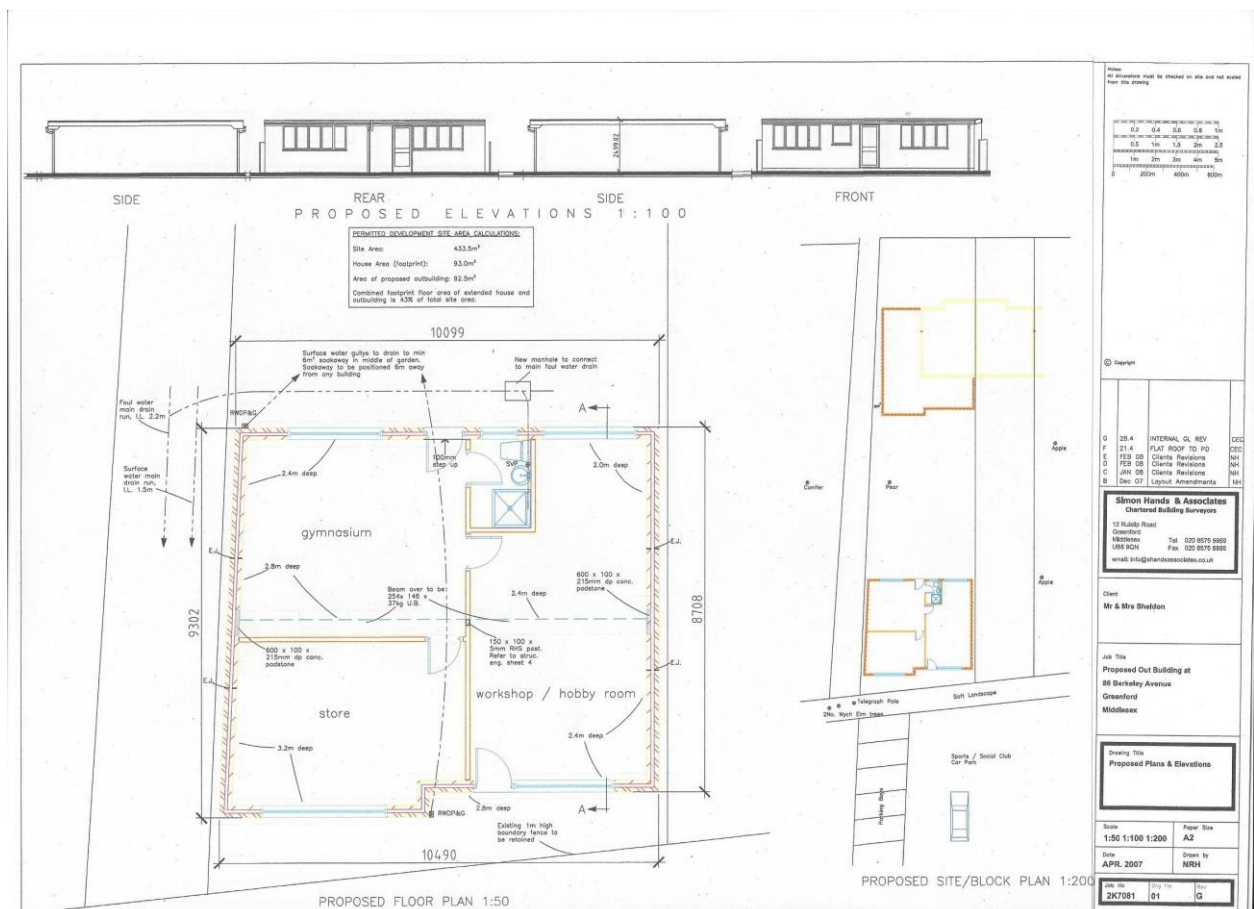
This is the plan referred to in the Lawful Development Certificate dated: 23 March 2017

by **George Mapson DipTP DipLD MRTPI**

Land at: 86 Berkeley Avenue, Greenford, UB6 0NZ

Reference: APP/J1915/X/15/3134681

Scale: NTS



George Mapson

INSPECTOR