

Appeal Decision

Site visit made on 10 March 2017

by Andrew Dale BA (Hons) MA MRTPI

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

Decision date: 29 March 2017

Appeal Ref: APP/C5690/X/16/3155422
45 Ringmore Rise, London SE23 3DE

- 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 (hereinafter "certificate").
 - The appeal is made by BE57 Asset Management against the decision of the Council of the London Borough of Lewisham.
 - The application ref. DC/15/094598, dated 25 November 2015, was refused by notice dated 28 January 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 is sought is described at section 8 of the application form as "Rear extension to existing detached dwelling house".
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Decision

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

Application for costs

2. As part of the original grounds of appeal, an application for costs was made by BE57 Asset Management against the Council. This application is the subject of a separate decision.

Preliminary matters

3. On its decision notice, the Council modified the appellant's original description of the proposed development to "construction of a two storey rear extension". This does not materially affect the appeal.
 4. An application for a certificate enables owners or others to ascertain whether specific uses, operations or other activities are or would be lawful. Lawfulness is equated with immunity from enforcement action.
 5. A certificate is not a planning permission. Thus, the planning merits of the proposed development are not relevant, and they are not therefore issues for me to consider, in the context of an appeal made under section 195 of the 1990 Act as amended.
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6. My decision must rest on the facts of the case and the interpretation of any relevant planning law or judicial authority. The burden of proving relevant facts in this appeal rests on the appellant. The test of the evidence is made on the balance of probabilities. The assessment is based on whether or not the proposed development would be lawful if begun at the time of the application.
7. Of particular relevance to this appeal is the fact that on 5 April 2016 under application ref. DC/16/095434 the Council certified that an almost identical proposal would be lawful based on two plans carrying the Revision A notation. However, it is the case that these same plans were submitted to the Council with an email dated 24 January 2016 shortly before the Council took its decision to refuse application ref. DC/15/094598. I will return to the original plans and the Revision A plans later in this decision but I take the view that the Revision A plans formed part of the application for the certificate that is the subject of this appeal.

Main issue

8. I consider that the main issue is whether the Council's decision to refuse to grant a certificate was well founded.

Reasons

9. The main issue turns on whether the proposed development would have amounted to permitted development at the time of the application.
10. At that time permitted development rights were contained within the Town and Country Planning (General Permitted Development) (England) Order 2015 (hereinafter "GPDO").
11. Schedule 2, Part 1, Class A of the GPDO sets out the permitted development rights and accompanying limitations and conditions as they apply to the enlargement, improvement or other alteration of a dwelling house.
12. Both parties refer to the document titled *Permitted development for households Technical Guidance*, published by the Development for Communities and Local Government and updated in April 2014. A further updated version of this Technical Guidance was published in April 2016; I shall refer to this later version because it is not materially different to the April 2014 version insofar as the issues in this appeal are concerned and because it reflects the layout of the GPDO. Although not a definitive statement of the law, the Technical Guidance indicates how the Government considers the permitted development provisions should be applied. It therefore carries some weight.
13. The Council's evidence comprises the officer's report on the application. As is common in the consideration of such applications, it essentially lists out the various relevant limitations and conditions in the GPDO that apply to the proposal. The Council's reasons for refusing the application are based on the alleged conflicts with Class A.1 (d) and (i) of the GPDO.
14. The appeal property is a two-storey detached house set well above the level of the street. The land in the rear garden continues to rise up away from the house. The house has a half-hipped gable end facing the street. The rear elevation also has a similar half-hipped gable end.

15. GPDO Class A.1 (d) indicates that development is not permitted by Class A if the height of the eaves of the part of the dwelling house enlarged, improved or altered would exceed the height of the eaves of the existing dwelling house.
16. There seems to be no dispute that the eaves height of the proposed two-storey rear extension would be about 3.3 m. At issue here is the eaves height of the existing dwelling house. The Council has rather arbitrarily chosen to compare the proposed eaves against the lowest eaves running along the existing side elevations and eschewed any consideration of the higher rear eaves where the half-hipped roof slope comes down to meet the outside wall across a sizeable and central part of the rear elevation. The proposed eaves would be well under the height of the existing eaves at the rear.
17. The Council's approach flies in the face of the Technical Guidance (page 13) which explains: *"Where the existing house has eaves of different heights, then the restriction on the height of the eaves for the part of the house enlarged, improved or altered is measured against the highest level of eaves on the existing house. However, where a house is built on sloping ground, the height of the eaves on the existing house should be measured in terms of the elevation from which any extension of a house is to be made."* The highest level of eaves on this existing house is where the half-hipped roof slopes at the front and rear meet the outside walls below. Moreover, as the house is built on sloping ground and the extension is being added to the rear elevation only, it is the existing eaves on the rear elevation that are of relevance. The Council misguided itself with regard to this limitation and this is reflected in the Council's subsequent grant of a certificate for application ref. DC/16/095434.
18. GPDO Class A.1 (i) indicates that development is not permitted by Class A if the enlarged part of the dwelling house would be within 2 m of the boundary of the curtilage of the dwelling house, and the height of the eaves of the enlarged part would be exceed 3 m.
19. Page 22 of the Technical Guidance has nothing to say about how the enlarged part of the dwelling house should be measured in relation to being a minimum of 2 m from the boundary of the curtilage. I accept that any overhang should be ignored for the purposes of measuring the eaves height and I am aware that guttering and bargeboards are not included when measuring the depth of an extension beyond a rear wall. However, Class A.1 (i) invites a horizontal measurement from any part of the enlargement and of course many house extensions (admittedly not the one proposed) could be designed with elaborate overhangs which could easily touch a boundary fence even though the outside wall of the extension is more than 2 m away from that same fence. It seems to me that such an outcome could thwart the intentions of the legislation.
20. Thus, looking at the original plans I consider that on balance the lowest roof tiles are part of the proposed extension and that the Council was correct to conclude that they would be marginally within 2 m of the side boundaries. However, equally I consider that the Council was wrong not to consider the Revision A drawings which achieve a separation distance of 2.005 m between those tiles and the side boundaries. The Revision A drawings certainly do not include changes on a significant scale. Rather, the "amended setting out" shown on them simply reflects the available plot width of about 12.70 m, as I measured at my site visit. The Revision A drawings achieve compliance with

Class A.1 (i) and this is reflected in the Council's subsequent grant of a certificate for application ref. DC/16/095434.

21. Paragraph A.3 of the GPDO imposes three relevant conditions subject to which permission is granted under Class A. This means that those conditions must be complied with. In particular, the upper-floor window in each of the side elevations of the proposed extension must be obscure-glazed and non-opening unless the parts of each window which can be opened are more than 1.7 m above the floor of the room in which each window is installed.
22. My reading of this case is that the appellant does not wish to embark on a project that deliberately flouts this condition, even though the drawings are not entirely clear. Failure to comply with the condition relating to the upper-floor side windows (or for that matter the other conditions) would render the development open to enforcement action in respect of a breach of a condition, but would not take the development outside the provisions of Class A. Consequently, the absence of detail on the drawings regarding the non-opening elements of the side windows does not prevent a certificate being issued for the proposal, especially when clear reference to the conditions can be included in the certificate for the avoidance of doubt. Reading the officer's report, this is clearly what would have happened had the Council been minded to issue a certificate and this is what was done on the decision notice for application ref. DC/16/095434.
23. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate was not well founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Andrew Dale

INSPECTOR