The Planning Inspectorate

Appeal Decision

Site visit made on 6 June 2017

by Elizabeth Jones BSc (Hons) MCTP MRTPI

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

Decision date: 11 July 2017

Appeal Ref: APP/P4605/C/16/3165060
183 Gristhorpe Road, Selly Oak, Birmingham B29 7SP

- 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 S Butt against an enforcement notice issued by Birmingham City Council.
- The enforcement notice, numbered 2014/0606/ENF, was issued on 14 November 2016.
- The breach of planning control as alleged in the notice is without planning permission, the erection of a detached structure to the rear of the premises in the approximate position marked in green on the attached plan.
- The requirements of the notice are to demolish the detached structure to the rear of the premises and remove all demolished 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) and (c) of the Town and Country Planning Act 1990 as amended.

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

Application for Costs

1. An application for costs was made by Mr S Butt against Birmingham City Council. This application is the subject of a separate Decision.

Appeal on ground (c)

2. The appeal on ground (c) is that the matters alleged in the enforcement notice do not constitute a breach of planning control. In appeals on legal grounds, the onus of proof is on the appellant to show that there has not been a breach of planning control.

3. No 183 Gristhorpe Road is a semi-detached property. The appellant argues that there is no breach of planning control because the detached structure at the rear of the property is permitted development. He has drawn my attention to Schedule 2, Part 1, Class E1 of the Town and Country Planning (General Permitted Development) (England)(Order) 2015 (2015 Order).

4. The Council's submissions indicate that the construction of the development began prior to 16 June 2014. The 2015 Order came into force on 15 April 2015. Section 56 of the Act states that for the purposes of the Act development of land shall be taken to be initiated if the development consists of the carrying out of operations, at the time when those operations began. Although the evidence does not make it clear the exact date on which the works began, it indicates that the works began prior to 15 April 2015. Thus, the relevant legislation is the Town and Country Planning (General Permitted

Development) Order 1995 (GPDO). However, the provisions of the 2015 Order are similar to those in the 1995 GPDO insofar as they relate to the relevant criteria in Class E concerning the provision within the curtilage of the dwellinghouse of any building, required for a purpose incidental to the enjoyment of the dwellinghouse as such.

5. During the process of the appeal the Council has expressed concerns that the property has been/is being converted into a number of self-contained flats. The appellant argues that the Council considered that the appeal property was in use as a house in multiple occupation (HMO) both at the time it determined the certificate of lawfulness application[1] and at the time the enforcement notice was issued.

6. Case law establishes that the development which has occurred is that which was alleged at the time the notice was issued and not some subsequent altered development. Moreover, the notice attacks the operational development only and not an alleged change of use. The Council's appeal statement refers to the appeal property being in use as a HMO. Following the appeal site visit, the Council submitted additional information[2]. This information provides details of the Council's investigations prior to issuing the enforcement notice and confirms that at the time the enforcement notice was issued, the Council considered the appeal property was not in use as self-contained flats. Thus, based on the evidence before me I consider that at the time the notice was issued the property was in use as an HMO.

7. I note from my site visit that the current layout of the property is different to that shown on Drawing 4380/23 which was submitted with the certificate of lawfulness application. Thus, I have not relied on this drawing.

8. The Council accepts that the structure complies with the limitations set out in paragraph E.1 of the GPDO and that it is built entirely within the curtilage of the property. Thus, the main issue of dispute is whether the structure is "*required for a purpose incidental to the enjoyment of the dwellinghouse".* To this end the Council considers that due to its size and scale the structure is excessive and not required for an *'incidental'* use.

9. Case law resulting from the judgement in *Emin v Secretary of State for the Environment and Mid-Sussex District Council [1989] JPL 909* sets out the test to be applied in this regard as 'whether the use of the proposed building, when considered in the context of the planning unit, is intended and will remain ancillary or subordinate to the main use of the property as a dwellinghouse'. In applying the test regard should be had to '…the use to which it is proposed to put a building and to considering the nature and scale of that use in context of whether it is a purpose incidental to the enjoyment of the dwellinghouse'. It was held that the physical size of the building in comparison to the dwellinghouse might be an important consideration but was not in itself conclusive.

10. The burden of proof in this appeal rests on the appellant and the appropriate test is on the balance of probabilities. The appeal property is an HMO occupied by a number of students/young professionals. The appeal structure provides a

[1] Certificate of Lawfulness Ref: 2015/09725/PA dated 2 February 2016 for the existing single storey rear outbuilding and flat roofed dormer to rear roof.
[2] Email from the Council dated 26 June 2017.

games room containing pool table, table tennis and table football equipment and storage space for bicycles. It also provides a place for the occupants to socialise. Whilst the provision of a games room and storage facility of this nature may not be expected in a shared house it can be regarded as 'incidental' accommodation irrespective of whether or not facilities of this nature may be available to the occupants elsewhere.

11. Whilst the Council considers that in principle facilities of this kind may sometimes be required for incidental purposes, it considers the size of the building exceeds what is required to accommodate these uses. I am informed that the footprint of the building at 67m² is nearly the same as that of the existing dwelling. However, the structure is much less in terms of the overall floor space provided. Having regard to *Emin*, floor space similar to that of the existing dwelling does not in itself preclude the lawfulness of an outbuilding.

12. The appeal structure although large, is of a size reasonably required to accommodate the nature and scale of the activities for which I saw it being used. Moreover, it is my view, on the balance of probabilities, having regard to the use of the property as an HMO, that a building of this size is reasonably required for those purposes and is on a scale that is incidental to the enjoyment of the dwellinghouse as such. Thus, the appeal structure as a whole is provided for incidental purposes and falls within the scope of Class E permitted development.

13. The Council has drawn my attention to an appeal decision (21 March 2015) for a certificate of lawful use or development for *"a detached single storey outbuilding at rear"* (APP/T0355/X/10/2121005). I have considered the previous Inspector's findings and decision based primarily on the grounds that there was insufficient explanation why the size of the building was required for use as a games room. The current appeal differs in that the games room is provided for the occupants of an HMO not a two children family. Moreover, demolition of part of the existing dwellinghouse has not been necessary to accommodate the appeal building. Thus, this appeal decision does not mirror the development before me which I have to determine upon its own merits.

14. The appellant has drawn to my attention an appeal decision dated 18 January 2017 Ref: APP/P4605/C/16/3157608 for: the erection of a single storey rear detached structure on land at 27 Hallewell Road, Edgbaston, Birmingham B16 0LP. The appellant has placed some reliance on this previous decision and I acknowledge the importance of consistency in these matters. The previous Inspector considered that the evidence submitted was sufficient to explain why additional accommodation of the size and scale provided was needed as a games room. Whilst I have determined the appeal before me on its own individual merits, for the reasons given above, I like the previous Inspector consider that the provision of an outbuilding for the use as a games room and storage can be regarded as incidental accommodation.

15. I note the Council's lengthy submissions regarding their view on the current use of No 183 being one of flats but as I have set out I must determine the appeal on the situation at the time the notice was served. This decision would not prevent the Council taking action against a different breach.

Conclusion

16. 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 ground (a) set out in s174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under s177(5) of the 1990 Act as amended does not need to be considered.

Formal Decision

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

Elizabeth Jones

INSPECTOR