

Appeal Decision

Site visit made on 29 January 2020

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 03 February 2020

**Appeal refs: APP/D5120/C/19/3222775; APP/D5120/C/19/3222776
11 New Road, Welling, Kent DA16 1QJ**

- The appeals are made by Mr Datatray Thacoor Bissumbhur, (Ref: APP/D5120/C/19/3222775), and Mrs Saraswatee Luchmun, (Ref: APP/D5120/C/19/3222776), under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the London Borough of Bexley Council.
- The notice was issued on 15 January 2019; reference No. 18/00136/ENF.
- The breach of planning control was: Without planning permission, the unauthorised construction of a single story rear extension to the property, shown in the approximate location outlined in blue on the plan attached to the notice.
- The requirements of the notice are:
 - Either
 - 1) Remove the extension, whose location is approximately shown outlined in blue on the plan attached to the notice and remove all resultant materials from the site; or,
 - 2) Rebuild the extension, whose location is approximately shown outlined in blue on the plan attached to the notice, to that allowed under prior approval application (reference: 18/00026/GPDE) and remove all resultant materials from the site.
- The period for compliance with the requirements is two (2) months.
- The appeals were made on grounds (b), (c) and (f) as set out in the amended Act.

Summary of decision: The enforcement notice is upheld

Costs applications

1. The Appellants, Mr Datatray Thacoor Bissumbhur, and Mrs Saraswatee Luchmun made applications for a full award of costs against the Council. Those applications are the subject of a separate decision.

Appeal project

2. The appeal property, No. 11 New Road, Welling, is at the western end of a terrace of 3 houses facing onto New Road. The appeals concern a single storey extension built on to the rear of the house. A cantilevered canopy has been added to the end of the extension.

The appeals on ground (b)

3. An appeal on ground (b) says that those matters, (the matters stated in the notice said to be a breach of planning control), have not occurred. This

ground of appeal was introduced to deal with the somewhat unusual situation whereby what the Council said has happened has not in fact happened.

4. In this case, the appeals on ground (b) were not fittingly addressed. The enforcement notice alleges the construction of a single story rear extension to the property. A rear extension has been built. Whether or not its erection was development within s.55 of the Act or was development permitted by The Town and Country Planning (General Permitted Development) (England) Order 2015 is appropriate to the ground (c) appeals. It cannot be said, as a matter of fact, that works the subject of the enforcement notice's allegation did not take place. The appeals on ground (b) must fail.

The appeals on ground (c)

5. An appeal on ground (c) asserts that there has not been a breach of planning control.
6. In December 2017 the Appellants submitted an application for a single story rear extension at their home. In their formal notice dated 22 February 2018, the Council said prior approval was not required for the erection of a single story rear extension, measuring 4.1m deep from the rear wall of the dwelling, with a maximum height (including roof lanterns) of 3.4m and for which the height of the eaves would be 3m. The notice said the decision was based upon details shown on submitted drawings A102, A104A, A105, (proposed layout); and A106 and A107, (existing layout).
7. Works were said to have started on the extension soon after receipt of the Council's notice. A visit by a Council planning officer in September 2018 followed a complaint by a neighbour. After asking for some bricks on the border of the roof to be removed, the officer said everything was in order. At that time the roof and canopy of the extension were covered with timber and boarded. About 2 weeks later, the planning officer rang to say that the canopy should be removed. The difficulties arising from what the Appellants said was an unexpected change of mind by the Council as to the acceptability of the extension works is dealt with in more detail in the associated but separate costs applications decision.
8. The Council said the canopy took the extension further out from the rear wall of the house to a total depth of 6.15m. The Appellants measured that at 5.98m. Whichever was correct, the Council said that alteration took the extension outside the 22 February 2018 notice limit of 4.1m. That change meant that the appeal extension amounted to a breach of planning control. The Appellants said: "... the development at the property is within permitted planning for which no approval is required."
9. The decision turns on whether the canopy extension addition to the 22 February 2018 notice approval layout was sufficiently different as to amount to works that would necessitate an application for a determination as to whether prior approval was required.
10. In my view, the addition of the canopy to the approved rear extension to the house at No. 11 materially changed its appearance. It was noticeable enough to give rise to a complaint from a neighbour, the earlier layout having elicited none. The canopy has added nearly 2m to the overall depth of the extension. Although the cantilevered canopy has not been infilled with walls, it has effected a not insignificant change to the approved extension. I

consider that the Council's 22 February 2018 approval notice does not apply to the extension as built. In the absence of a further specific prior approval, the current extension does not benefit from permitted development rights. The planning merits of the case to retain the as-built extension do not fall to be considered. The appeals on ground (c) fail.

The appeals on ground (f)

11. Section 173(4) of the Act sets out the purposes of an enforcement notice. Those purposes are —
 - a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
 - b) remedying any injury to amenity which has been caused by the breach.
12. Here, the Council are pursuing the purpose of remedying the injury to amenity as set out in para 4. of the notice. But requirement 2 also goes to remedying the breach of planning control.
13. The Appellants said the appeal extension was legal and did not require any demolition. It was required to satisfy the medical conditions of co-Appellant Mrs Saraswatee Luchmun.
14. The first requirement of the notice seeks the total removal of the extension. That would achieve the purpose in s.173(4)(b) of the Act. On its own, that would be an onerous requirement. Requirement 2, however, provides the alternative of altering the extension to the 22 February 2018 prior approval scheme. That obviates the difficulty that might have arisen in trying to draw up a lesser requirement in the absence of a ground (a) appeal, where it is not appropriate to introduce arguments on planning merits in the context of an appeal on ground (f). In that instance I could only consider whether the steps exceeded what was necessary to remedy the breach; *Wyatt Bros(Oxford) Ltd v SSETR and Oxfordshire CC [2001] CoA*. My view is that requirement 2 to the notice provides an adequate and reasonable remedy. No lesser requirements were suggested. The appeals on ground (f) fail.

Human Rights

15. The Appellants said there was no doubt that the enforcement notice was in breach of Article 8 and Article 1 of Protocol 1 of the European Convention on Human Rights, (ECHR).
16. The general purpose of the ECHR is to protect human rights and fundamental freedoms and to maintain and promote the ideals and values of a democratic society. It sets out the basic rights of every person together with the limitations placed on these rights in order to protect the rights of others and of the wider community. The specific Articles of the ECHR relevant to planning, amongst others, include Article 8 (Right to respect for private and family life, home and correspondence), Article 1 of Protocol 1 (Right to peaceful enjoyment of possessions and protection of property).
17. I note that the Department is satisfied that its processes and practices are compatible with the ECHR. The planning system by its very nature respects the rights of the individual whilst acting in the interest of the wider community. It is an inherent part of the decision-making process for the

Department to assess the effects that a proposal will have on individuals and weigh these against the wider public interest in determining whether development should be allowed to proceed. In carrying out this balancing exercise the Department will of course wish to be satisfied that it has acted proportionately. In that regard, The Human Rights Act 1998 added a new dimension to local authorities decision making and a tougher test than the test of reasonableness - one of 'proportionality' - it looks at whether the action is proportionate to its aim. If a local authority's decision interferes with human rights then the courts generally require stronger proof that the decision was reasonable.

18. It was not explained here how the effect of the enforcement notice would impact adversely on the Appellants' exercise of their rights. In the case of *R (on the application of RLT Built Environment Ltd) v Cornwall Council [2016] EWHC 2817 (Admin)*, Hickinbottom J commented that while Article 8 rights were important, it should not be assumed that they would "outweigh the importance of having coherent control over town and country planning" and that in most cases the courts were unlikely to intervene.
19. In my view, particularly because requirement 2 to the enforcement notice does no more than require that the appeal extension should revert to the form allowed by the Council's 22 February 2018 prior approval, the issue and contents of the notice was entirely proportionate and reasonable.

FORMAL DECISION

20. The appeals are dismissed and the enforcement notice is upheld.

John Whalley

INSPECTOR