



Appeal Decision

Site visit made on 29 January 2020

by Andrew Dale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10th February 2020

Appeal Ref: APP/E5330/X/19/3232584

58 Woodhurst Road, London SE2 0HE

- 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 ("certificate").
 - The appeal is made by Mr Antonio Muscat against the decision of the Council of the Royal Borough of Greenwich.
 - The application ref. 19/0429/CP, dated 10 December 2018, was refused by notice dated 26 April 2019.
 - The application was made under section 192(1) (b) of the Town and Country Planning Act 1990 as amended.
 - The proposed development for which a certificate is sought is described at section 4 of the application form as *"An out-building (sic) at the rear of the property clad in cedar and built with reinforced double insulated walls. It will have a flat roof with drainage sloping downwards towards the center (sic) of the roof."*
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Decision

1. The appeal is dismissed.

Matters of clarification

2. 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.
3. A certificate is not a planning permission. There is no planning application for the proposed outbuilding before me. Thus, the planning merits of the project, including some of the matters raised by the appellant, like the development plan, the National Planning Policy Framework, the land use principles of the development and the use of planning conditions, are of no relevance.
4. 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.

Main issue

5. The main issue is whether the Council's decision to refuse to grant a certificate was well founded. I should point out that if I go on to find that the sole reason given by the Council in its decision notice is unsound, I could still be satisfied on the information before me that the refusal is well founded for another reason.

Reasons

6. No. 58 is a two-storey, semi-detached house with a rear garden which slopes down away from the house. The L-shaped, flat-roofed outbuilding proposed would be sited towards the bottom end of the back garden and have a footprint of about 42.40 sq. m.
7. The main issue turns on whether or not the proposed outbuilding would have amounted to permitted development at the time of the application. At that time permitted development rights were contained in the Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO").
8. Article 3(1) and Class E of Part 1 of Schedule 2 to the GPDO permitted the provision within the curtilage of a dwellinghouse of "any building ... required for a purpose incidental to the enjoyment of the dwellinghouse as such ...". Reading the Council's Development Management Delegated Report (DMDR), I see that the Council considered that the physical limitations in paragraph E.1 of Class E, relating to such matters as height, location and the proportion of the curtilage covered, would be met by the proposed development.
9. However, the Council refused the application solely on the basis that:

"The proposed development would involve engineering works and constitute 'development' within the meaning of Section 55 of the Town and Country Planning Act 1990. As such planning permission is required."
10. There was not a reason for refusal alleging that the proposed outbuilding would have more than one storey (including a basement), as alluded to by the appellant. No statement has been submitted by the Council, but its DMDR is quite clear on this point where it says on page 5 that "The building **is** single storey". The appellant may well have got confused with the outcome of a similar previous certificate application for an outbuilding (ref. 18/4309/CP) which did include such a reason for refusal. I must focus on the facts as they have been put to me under application ref. 19/0429/CP. Given the Council's clearly stated position on this matter, I take it no further.
11. Returning to the sole reason for refusal, there could come a point where the sheer extent of the engineering operations (for instance excavation and underpinning) to prepare a site for an outbuilding become an activity different in character from the simple provision within the curtilage of a dwelling house of an outbuilding. Ordinarily, the question would be whether, as a matter of fact and degree, the single process of making the outbuilding amounts to different activities, each of substance, so that the one is not merely ancillary to the other. However, the Council's evidence does not really go to this point.
12. Instead, the second paragraph in the "**Further Consideration**" section of the DMDR states that "...the proposed development would include engineering works, in the form of a sunken garden which would involve the excavation of the garden and would constitute engineering works. As such, planning permission for the proposed works is required." The appellant has not directly responded to the matter of the sunken garden and I have no details of it other than the limited information shown on the plans. An area of less than 9 sq. m inside the corner of the L shape of the outbuilding is labelled "Sunken Garden". That is all the plans show.

13. Such a label would certainly imply that this part of the garden would be at a lower level than the surrounding area. However, as I see it, there are two potential problems with the Council's stance. First, it is possible to argue that a sunken garden was not part of the proposed operations described on the application form or the decision notice. In such a scenario, it was not directly before the Council in the application and the appellant could have been alerted to any concerns the Council might have had through a footnote in the decision. Second, it is clear from the plans that the Council could not have known whether the sunken garden would have been so deep that it would have amounted to engineering operations and therefore development. There are simply no details about the profile of the sunken garden to make such a judgement. As access to it is intended from the rearmost room in the outbuilding, this would have been a very likely constraint on its depth. I have therefore concluded that the reason given by the Council for the refusal of the certificate is unsound.
14. However, the first paragraph in the "**Further Consideration**" section of the DMDR draws my attention to matters concerning the use and internal layout of the outbuilding which mean that a certificate should not be issued, even though they were not carried forward into the Council's decision notice. The document published by the Government titled "*Permitted development rights for householders Technical Guidance*" (TG) and last updated in September 2019 assists with the interpretation of the GPDO on this point.
15. The TG says on page 41 with regard to Class E: "Paragraph E.4 of Class E indicates that purposes incidental to the enjoyment of the house includes the keeping of poultry, bees, pet animals, birds or other livestock for the domestic needs or personal enjoyment of the occupants of the house. But the rules also allow, subject to the conditions and limitations below, a large range of other buildings on land surrounding a house. Examples could include common buildings such as garden sheds, other storage buildings, garages, and garden decking as long as they can be properly be described as having a purpose incidental to the enjoyment of the house. A purpose incidental to a house would not, however, cover normal residential uses, such as separate self-contained accommodation or the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen."
16. The plans submitted with the application for a certificate show that the home office/study area of the proposed building would incorporate a range of kitchen-related facilities. There would also be a separate bathroom with a toilet and a washbasin and a separate living room. Viewed in the round, the building would be dominated by primary living accommodation. Moreover, it could contain most of the facilities necessary to function as a separate self-contained unit of accommodation. I note also that the sunken garden could be a private amenity space for such a unit and that a separate pedestrian access could be readily made available, including off the back unmade lane. In all, the outbuilding could not be reasonably regarded as a building for purposes incidental to the enjoyment of the dwelling house as such.
17. Thus, the outbuilding would not have amounted to permitted development under Class E and would therefore have been development requiring express planning permission. My interpretation is not out of step with the TG. I find, on the balance of probabilities, that the proposed outbuilding would not have

been lawful if begun at the time of the application. None of the examples of other certificate applications granted in the Royal Borough of Greenwich set out in Appendix E of the appellant's statement had identical circumstances to the case before me and all applications and appeals for certificates should be assessed on their own facts.

18. I conclude that the Council's refusal to grant a certificate was well founded, although for a different reason to the one set out by the Council in its decision notice. The appeal has therefore been dismissed in accordance with the powers transferred to me in section 195(3) of the 1990 Act as amended.

Andrew Dale

INSPECTOR