The Planning Inspectorate

Appeal Decision

Site visit made on 28 May 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 12 June 2020

Appeal Ref: APP/A5840/C/19/3228959
11 Drovers Place, London SE15 2RP

- 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 Ergul Salih against an enforcement notice issued by the Council of the London Borough of Southwark.
- The enforcement notice was issued on 12 April 2019.
- The breach of planning control as alleged in the notice is: Without planning permission: the erection of two wooden pergolas, along with associated alterations, to the rear of the property at ground and first floor level ("the Unauthorised Development")
- The requirements of the notice are to:
  1) Demolish the wooden pergola and associated alterations including the wooden planters at the rear garden ground level of the Property as shown edged red for identification purposes only on the attached photograph;
  2) Demolish the wooden pergola and associated alterations including the wooden planters and wooden balustrade above the ground floor rear extension as shown edged yellow for identification purposes only on the attached photograph; and
  3) Remove from the Property any materials and debris resulting from the carrying out of steps 1 and 2.
- The period for compliance with the requirements is: One calendar month from the date this notice takes effect.
- The appeal is proceeding on the ground set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.

Summary of Decision

1. The appeal is dismissed and the enforcement notice is upheld, as corrected, in the terms set out in the Formal Decision below.

Preliminary Matters

2. The appellant comments that the proximity of overhanging oak trees, which he complains affects outlook from, and daylight to, his rear garden was also responsible for a fallen branch which caused injury and his hospitalisation in 2018. This prompted the erection of the lower pergola, whose wooden struts spanning its roof, are to guard against a recurrence.

3. Although the appellant originally lodged an appeal on Ground (b), he subsequently requested that this be changed to Ground (c) whereby he considers that the development does not constitute a breach of planning control. However, in his representations there are matters raised that could only be considered under other grounds that were not specifically referred to on the original appeal form. From my site visit findings I would consider that the appellant has had to lodge his appeal with only limited resources. In such

circumstances, and in order to assess the development on legal grounds, I shall deal with the appellant's claims under the appropriate headings. Nonetheless, the planning merits and impacts of the development, also referred to by the appellant, and the survey which he undertook, can only be weighed up and assessed as part of a deemed planning application through a ground (a) appeal. As no such appeal was brought and the requisite fee was not paid to the Council such matters cannot now fall to be considered.

Background

4. In February 2019, on responding to a complaint received, a Council official visited the property, a two-storey, mid-terrace dwelling, and noted that "a large wooden structure" was being erected, extending over the whole of the rear garden. The garden had already been reduced by some 6m in depth due to the erection of a single-storey rear extension, approved under the Prior Notification procedure. A letter was subsequently sent to the owner/occupier requesting the removal of the wooden structures at both ground and first floor levels, along with the associated planting and other items to the roof area. The appellant disagreed with the Council's request and, following a second site visit in March 2019, the Council saw it expedient to issue the enforcement notice, now at appeal.

The Appeal on Ground (c)

5. The basis of an appeal on ground (c) is that the matters which are the subject of the allegation do not constitute a breach of planning control. The onus of proof is on the appellant, and the test, once again, is on the balance of probabilities.

6. Section 55 of the Act includes in the definition of the word 'development' the carrying out of 'building, engineering, mining or other operations in, on, over or under land.' Section 57(1) goes on to say that, subject to the provisions of the section, planning permission is required for the carrying out of any development of land. Section 336(1) includes in the definition of the word 'building' any structure or erection, and any part of a building, as so defined. Accordingly, the term 'building' has a wide definition, and this has been interpreted by the Courts to include structures which would not ordinarily be described as buildings.

7. The notice refers to two wooden pergolas and also associated alterations to the rear of the property. Although the alleged breach, as described in the notice, does not indicate what the latter element actually entails its requirements refer to a wooden balustrade and wooden planters.

8. The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), under Schedule 2, Part 1, Class A, allows for the enlargement, improvement or other alteration of a dwellinghouse, but subject to certain provisos. One of these, A.1(b) requires that, as a result of the works, the total area of ground covered by buildings within the curtilage of the dwellinghouse (other than the original dwellinghouse) would exceed 50% of the total area of the curtilage (excluding the ground area of the original dwellinghouse).

9. The lower pergola structure extends from the back wall of the rear extension to the full depth, and spans the full width, of the property. It, therefore, does not

fall within the parameters of Class A. With the upper pergola, built over the roof of the ground floor extension, exceeding 4m in height from ground level, and effectively being a raised platform, this structure fails against the limitations of Class A provisos A.1(g), (j) and (k). The pergolas are not, therefore, permitted development and planning permission is required for their lawful retention.

10. Relevant case law reveals that there is no single conclusive answer as to what constitutes a building operation. In *Barvis v SSE* [1971] 22P and CR710 three tests are set out; the size of the building or structure, the degree of permanence, and the degree of physical attachment to the land. No one factor is decisive.

11. In 2000, the Court of Appeal provided clarification in *Skerritts of Nottingham Ltd -v- SSETR & Harrow LBC* (No 2) that the correct approach for any decision-maker is to consider the degree of permanence of any purported building as a question of fact in each particular case. This would then be construed in terms of significance in the planning context.

12. More recently, in 2012, in *R (Save Woolley Valley Action Group Ltd) v Bath and North Somerset Council [2012] EWHC 2161 (Admin)* the Court held that the Council had taken too narrow an approach to the meaning of "development" in s55, as the term "building" in s336(1) of the 1990 Act has a wide definition which includes "any structure or erection."

13. Despite the appellant's claims otherwise, the structures are clearly not temporary. Both are substantial in terms of size and construction, and are not moveable. The fact they do not have weather shielded roofs is not relevant to the issue in hand. The upper pergola has been in place since, at least, April 2017, whilst the lower structure was being constructed in early 2019. That aside, from my observations, I am satisfied that the various wooden planters are moveable, do not constitute development and, irrespective of the dismantlement of the pergolas, can potentially be retained on the land.

14. As a matter of fact and degree I therefore consider that the structures' size, height and permanence constitutes development for which planning permission is required. As this has not been granted the alleged matter constitutes a breach of planning control. The appeal on ground (c) does not, therefore, succeed.

The Appeal on Ground (d)

15. On this ground the Appellant must successfully demonstrate, on the balance of probability, that the breach of control alleged in the notice commenced four years before the date of the issue of the enforcement notice, ie prior to 12 April 2015 (hereinafter referred to as *"the material date"*) and has remained since.

16. Although the appellant indicates that the upper pergola structure was completed in January 2015, this conflicts with the evidence produced by the Council whereby a 'Google Street' photograph of the property from May 2016 does not show the upper pergola structure. It was, though, in situ by April 2017, as shown on a second photograph received from the Council.

17. For the development to be lawful the appellant would need to provide precise and unambiguous evidence that the development enforced against had been in

situ, and had remained so, since the material date. Clearly, this has not been demonstrated, and the ground (d) appeal fails.

Other Considerations

18. The appellant is something of a hoarder, evident by both the large number and variety of items stored at the house, both internally and externally. The appeal papers also make mention of the appellant suffering from clinical depression. Although personal circumstances are rarely an overriding factor I, nonetheless, have had due regard to both the Public Sector Equality Duty and the Human Rights Act. However, as mentioned, in the absence of any deemed planning application, I am unable to give an assessment as to whether any negative impacts of the development – for instance the effect on the neighbouring occupiers - might be ameliorated by the imposition of conditions on any planning permission granted.

19. I have referred to the amount of storage present at the site and, in this regard, I note that the Council has given one month for the enforcement notice to be complied with. The stated time period has not been appealed. Realistically, though, one month might prove difficult to achieve. Nonetheless, the Council does have powers under s173A(1)(b) of the 1990 Act as amended to vary the notice and extend the compliance period should it see fit.

20. As regards the possibility of further branches falling from the trees, this is a matter that the appellant will need to take up with the person or persons on whose property the trees are positioned. Further investigation into this particular matter goes beyond my particular remit.

21. Given my findings, although the allegation in the enforcement notice remains correct, I have deleted all reference to the wooden planters from its requirements.

Formal Decision

22. It is directed that the enforcement notice be corrected by deleting the wording "wooden planters" from the relevant specified requirements.

23. Subject to this correction the enforcement notice is upheld.

Timothy C King

INSPECTOR