The Planning Inspectorate

Appeal Decision

Site visit made on 29 September 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 26 October 2020

Appeal Ref: APP/W2465/C/20/3244520
Land at 11 Morland Avenue, Leicester LE2 2PF

- 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 Roman Mackow against an enforcement notice issued by Leicester City Council.
- The enforcement notice was issued on 4 December 2019.
- The breach of planning control as alleged in the notice is without planning permission, the erection at the Property of brick-built boundary walls in excess of two metres between 9 and 11 Morland Avenue and between 11 and 13 Morland Avenue in the indicative positions shown in blue on the attached plan and also as indicated in blue on the attached photographs.
- The requirements of the notice are: -
  5.1 Reduce the height of the of the rear boundary walls between 9 and 11 Morland Avenue and between 11 and 13 Morland Avenue (in the indicative positions shown in blue on the attached plan and also as indicated in blue on the attached photographs) to a height of no more than 2 metres above ground level.
  5.2 Remove all rubble and building materials from the Property arising from compliance with the above requirements.
- The period for compliance with the requirements is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal succeeds in part and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.

The Notice

1. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority.

2. All parts of an enforcement notice need to be consistent with each other. In this case the requirements of the notice cite a reduction in height of the boundary walls but there is no reference to height in the description of the alleged breach. As such, I intend to add the wording *'in height'* after the word *'metres'* and before the word *'between'* in the description of the alleged breach. I consider that I can carry out this correction without injustice to the parties.

The ground (c) appeal

3. This ground of appeal is that those matters, if they occurred, did not constitute a breach of planning control. In an appeal on this ground the appellant has to demonstrate on the balance of probability that the matters alleged, to have

occurred, in the notice do not constitute a breach of planning control. The appellant submits that the walls form part of extensions that are either permitted development or have prior approval through The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO).

4. The alleged breach of planning control relates to the erection of boundary walls in excess of 2 metres in height between 9 and 11 Morland Avenue (No 9 and No 11) and between No 11 and 13 Morland Avenue (No 13). I observed that the boundary walls extend to a similar distance beyond the rear elevations of the main dwellinghouse and its 2-storey outrigger and that each boundary wall has a pier/return that projects slightly into the garden area of No 11. It also appears that the walls have been constructed as 'cavity' walls and it could reasonably be considered that they could be utilised within an enlargement of a dwelling house. Nevertheless, they also form part of the means of enclosure on the boundaries of No 11.

5. Planning permission[1] was refused by the Council for extensions and alterations to No 11 in 2017. The side walls of the ground floor extension, as shown on the application drawings for that application, would appear to have been in a similar position and of a similar length to the walls cited in the alleged breach.

6. Under Article 3, Schedule 2, Part 1, Class A (Class A) of the GPDO the enlargement, improvement or other alteration of a dwellinghouse is permitted subject to a number of specified limitations and conditions. Development is not permitted by virtue of A.1(f)(i) of Class A if the enlarged part of the dwellinghouse would have a single storey and would extend beyond the rear wall of the original dwellinghouse by more than 4m in the case of a detached dwellinghouse, or 3m in the case of any other dwellinghouse.

7. The appeal property comprises a 2-storey semi-detached dwelling house. I observed there is currently no roof or other walls/glazing that would, in combination with the boundary walls, enable the existing development to be treated as an enlargement/extension. In any case, even if the walls and piers/returns are treated as forming a single storey enlargement of No 11 that enlargement would extend beyond the rear wall of the original dwelling house by more than 3 metres.

8. The appellant has stated that the walls form part of enlargements to No 11 that would be permitted development or to No 9 that the Council determined did not require prior approval in 2015[2]. Nevertheless, permitted development rights only apply when the development fully accords with the limitations set out in the GPDO. If development is commenced but any limitation is exceeded, the courts have held that the whole development would be unlawful, not just the element in excess of those limitations. GPDO rights cannot be claimed retrospectively by the later removal of an element/s so as to return the remaining development to the permitted tolerance.

9. As stated above, even if the wall between No 9 and No 11 is treated as forming part of an enlargement it extends a significantly greater distance than 3 metres beyond the main rear wall of No 11. The development described in the prior approval for extensions at No 9 was for 2 extensions and the one adjoining the

[1] Ref No: 20171487
[2] Ref No: 20152168

boundary with No 11 would not have extended past the rear wall of the outrigger. The condition at A.4 (11)(b) of Class A is that development must be carried out where prior approval is not required in accordance with the information provided under A.4 (2). However, the wall that forms part of the alleged breach extends past the line of the rear wall of the outrigger and it is therefore not in accordance with the information provided with the prior approval.

10. Class A of Part 2 of Schedule 2 of the GPDO permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure subject to certain limitations. There is no dispute that the relevant limitation in this case would be A.1.(b). Under A.1.(b) development is not permitted if the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level. The height of the boundary walls, indicated on the enforcement notice, clearly exceeds 2 metres above ground level.

11. It follows that the development subject to the enforcement notice has not been shown to constitute permitted development under Article 3, Schedule 2, Part 1, Class A or Article 3, Schedule 2, Part 2, Class A of the GPDO. I have no evidence before me to indicate that planning permission is not required or is granted for the development. Accordingly, the appeal on ground (c) fails.

The ground (f) appeal

12. An appeal on ground (f) is a claim that the requirements of the notice exceed what is necessary to remedy the breach of planning control, or to remedy any harm to amenity resulting from the breach. The Council did not specify in the notice whether it was one or both of these purposes that it sought to achieve.

13. Given that the requirements in paragraph 5 of the notice do not require the complete removal of the boundary walls, the purpose of the notice can be treated as to remedy any harm to amenity resulting from the breach. Nevertheless, Section 173(4)(a) of the 1990 Act provides for the remedying of a breach of planning control by making development comply with the terms, including conditions and limitations, of any planning permission granted in respect of the land. This includes a planning permission granted by the GPDO. Requirement 5.1 of the notice would ensure that the boundary walls would comply with Class A of Part 2 of Schedule 2 of the GPDO. Consequently, I consider that the requirements of the notice serve both purposes cited above.

14. However, the appellant considers that the parts of the boundary walls that could be utilised in extensions that could be constructed to comply with Class A of the GPDO should not be removed by the requirements. Nevertheless, the alleged breach of planning control relates to the erection of boundary walls and not to the erection of an extension or extensions. Therefore, the enlargement of the dwelling house does not form part of the development before me.

15. Furthermore, the appellant's argument is not supported with full drawings of the proposed extensions that indicate their dimensions, materials and siting. Consequently, without those drawings I would also be unable to fully assess whether the enlargements to the dwelling house would be in line with permitted development tolerances. Neither would I have been able to vary the notice to the necessary level of precision if the enlargement of the dwelling house formed part of the development before me. I also note that the

appellant has, subsequent to the issuing of the enforcement notice, submitted a planning application for a development to the rear of No 11. Nevertheless, I have not been provided with any details of that development or the decision relating to that application.

16. I am mindful that enforcement action is meant to be remedial, not punitive. There is no evidence to suggest that following removal of part of the boundary walls, the dwelling would then not benefit from permitted development rights. There would undoubtedly be less cost and disruption to the appellant if additional parts of the walls could be retained and utilised within extensions to the dwelling. However, for the reasons set out above there is no mechanism available, in relation to the enforcement notice, that would enable that objective to be achieved.

17. I also note that the wall between No 9 and No 11 has been constructed in accordance with an agreement made under the Party Wall Act 1996 (the 1996 Act). The appellant considers that as such he will not be able to remove all of the parts of the wall required by the notice. However, there is little evidence before me to indicate that the agreement made under the 1996 Act would preclude the appellant from removing the parts of the wall required by the notice.

18. Given that the notice does no more than seek to achieve the purposes of section 173(4)(a) of the 1990 Act, it is not excessive. The appeal on ground (f) fails.

The ground (g) appeal

19. This ground of appeal is that the period for compliance is unreasonably short. The notice requires compliance in 2 months. The appellant argues that a period of 6 months would be reasonable to enable the commissioning of contractors and to carry out the works especially given the current situation with the Coronavirus pandemic.

20. It is unlikely that a small builder would need more than a few weeks' notice to undertake the required works. The removal works are modest in scale, they will not be particularly complex to carry out and they are unlikely to take more than a few weeks to complete. Therefore, in my view 2 months is a reasonable period of time to comply with the requirements of the notice under normal circumstances.

21. However, since the enforcement notice was issued it is of course now clear that the current Coronavirus pandemic has placed restrictions on the ability of people, services and businesses to move about freely and to carry out works. Consequently, it could be more difficult to source a contractor to carry out the works and for the requirements to be complied with.

    I consider that in these circumstances that a reasonable period for compliance would be 4 months whilst also taking into account the Council's reasons for issuing the notice. I will therefore extend the period of compliance to 4 months. The appeal on ground (g) succeeds to that extent.

Formal Decision

22. The appeal is allowed in part, on ground g, and it is directed that the enforcement notice be corrected by: -

- Adding the wording *'in height'* after the word *'metres'* and before the word *'between'* in the description of the alleged breach;

And varied by: -

- Deleting, in paragraph 5, *'2 months'* and substitution of *'4 months'* as the time for compliance.

23. Subject to these corrections and variations the enforcement notice is upheld.

D. Boffin

INSPECTOR