



Appeal Decision

by Roy Curnow MA BSc(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 October 2020

Appeal Ref: APP/C5690/X/19/3237198

422 Whitefoot Lane, Bromley BR1 5SF

- 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 (LDC).
 - The appeal is made by Mr J Kahan of Whitefoot Estates Ltd against the decision of the Council of the London Borough of Lewisham.
 - The application Ref DC/19/113414, dated 5 August 2019, was refused by notice dated 4 September 2019.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is Single storey rear extension. The proposal would measure 6m beyond the rear wall of the property, with a maximum height of 3m and an eaves height of 3m
-

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation which is found to be lawful.

Procedural Matter

2. Given the issues raised in the appeal, it was my opinion that a site visit was unnecessary and the parties' views were sought on this. Neither had an objection to the appeal being determined without a site visit. As this would not prejudice any party, the appeal has proceeded on this basis.

Application for Costs

3. An application for costs was made by Mr J Kahan of Whitefoot Estates against the Council of the London Borough of Lewisham. This application is the subject of a separate Decision.

Reasons

4. The appellant seeks a certificate to show that the erection of a single-storey ground floor extension on the rear elevation of a two-storey house would be lawful. The burden of proof in the appeal lies with the appellant to make his case on the balance of probability.
5. From the submissions, the relevant planning history of the site is as follows. An application¹ (a 'Prior Notification application') was made to the Council by the appellant to ascertain whether it required prior approval of a proposed rear extension that measured 6m in length with a maximum height of 3m and a height to its eaves of 3m. This was given the Council Reference DC/19/112535

¹ Under Schedule 2, Part 1, Class A, A.4. of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)

- and is referred to below as 'PA1'. This was refused by the Council on 3 July 2019.
6. Following this, a second Prior Notification application was submitted to the Council electronically on 21 June 2019, (Council Reference DC/19/112786 and referred to below as 'PA2'). This was for a similarly described extension; however, it proposed an eaves height of 2.85m. It was refused by the Council on 26 July 2019.
 7. This appeal relates to a further Prior Notification application that was made electronically by the appellant at the same time on the same day as PA2, (21 June 2019). It was, however, submitted in a separate email. It was for the same form of ground floor extension as was proposed in PA1. I refer to this as 'PA3'.
 8. There was clearly some confusion at the Council regarding PA2 and PA3. This led to correspondence between the Council and the agent for PA1. The consequence of this was that whilst PA2 was duly registered and processed, PA3 was not.
 9. The Officer's report into the certificate application, which forms the basis of this appeal, includes the following paragraph in this respect: "Given the similarities between the two applications, the identical timestamps displayed on the emails received by the LPA, and that they were submitted by the same applicant, HPRA 3 [PA3] was wrongly considered by Technical Support Officers to be a duplicate of DC/19/112786 [PA2]. Therefore, HPRA 3 [PA3] was never registered, or allocated to a case officer to assess. Subsequently 42 days have elapsed (on the 02/08/2019) without the LPA notifying the developer whether prior approval is given or refused."
 10. The Council does not make the case in its submissions that the content of PA3 was deficient or incomplete in any way.
 11. Amongst the points made in a legal opinion ('the opinion') submitted by the Council as part of its case is that, having regard to *Murrell v SoSCLG* [2010] EWCA Civ 1367, PA3 was not a new or fresh application. This was because there was no difference between it and PA1 that was being assessed and was still within the period for its determination set out in Class A (A.1(g)) of Part 1 of Schedule 2 to the Town and Country Planning (General Permitted Development Order) (England) 2015, as amended, ('the GPDO'). Furthermore, there was nothing in the application to indicate it was being twin-tracked.
 12. I find the *Murrell* case to be different from that which is before me. There, an applicant applied for a determination as to whether a council's prior approval would be required for an agricultural development. After submitting an application, the Council told him it was incomplete for reasons of a lack of drawings and it had been submitted on incorrect forms. This led to the submission of the required drawings and forms, which, it was held, did not supersede or imply withdrawal of the original application. In contrast, PA3 was made in the correct manner, and did not require additional information to be counted as a valid application.
 13. The Council states that the applicant intended to "bias the neighbour consultation process", with the aim of "non-registration or a lack of objection" and intended to mislead the Council. In support of this contention, I have been

given information regarding a series of prior notification applications that were made at 380 Shroffold Place, Lewisham, in which the agent here was involved. I do not have full details of those applications, but, in any event, they do not render PA3 invalid. Furthermore, I note that the Council was able to refuse all of the applications at 380 Shroffold Place. It could have done the same on this site with regards to the three applications that were made. I have not been given sufficient information to show that the 4 days in which the agent was able to prepare the submissions for the certificate application, which forms the basis of this appeal, was so short as to indicate an aim to mislead. In any event, again, this does not render PA3 invalid.

14. That PA1 and PA3 were identical does not mean that the two should be treated as a single application. Although, as set out in the opinion, there is no suggestion that PA3 was to be 'twin-tracked', neither is there any suggestion that it was to be treated as a single entity with PA1. Indeed, explanation as to why PA3 was a stand-alone application was given in the appellant's appeal statement. He states that, as he had been made aware that a neighbour to the development had objected to PA1, PA3 was submitted to allow him to speak with that neighbour. This may or may not have led to a different outcome for PA3. Although it seems that this did not subsequently occur, I nonetheless find that the appellant was entitled to make his application.
15. On the evidence before me, I find that PA3 was a valid 'stand-alone' Prior Notification application.
16. Where a valid Prior Notification application is made under the terms of the GPDO there can be three outcomes. Firstly, that the Council provide written notice within 42 days that its prior approval is not required; secondly, that the Council provides written notice within 42 days that its prior approval is required; or, thirdly, should neither of these occur, the development can be begun after the 42 days have passed.
17. The judgement in *Keenan v Woking BC* and SoSCLG [107] EWCA Civ 438, which has been cited by the Council, clarified the latter outcome. It states that this can only be the case where the proposal would be permitted development in line with the terms of the GPDO.
18. In this case, the principal dimensions of the proposed single storey extension are that it would extend from the rear wall of the house by 6m, with a maximum height of 3m. As the site is a semi-detached dwellinghouse, which is not on Article 2(3) land, it would accord with the size limits are set out in paragraph A.1(g) of Class A. The Council does not dispute this.
19. The second thrust of the Council's case is that the application was not determined in the correct procedural manner. In this respect, my attention is drawn to the conditions in paragraph A.4 of Class A of the GPDO, and to the judgement in *Keenan*. Its position here is that as no neighbour consultation has taken place – which is amongst the conditions in A.4 of the GPDO – it is not permitted development.
20. These conditions frame areas of responsibility for an applicant and those for a local planning authority (LPA). The former is required to submit information specified in A.4 (2) in the prescribed manner. The appellant submitted the required information for PA3 in line with the conditions. Had he not done so his Prior Notification application would have been invalid. As it was identical to PA1

that had been registered as being valid, I have no reason to find that further information was required. Therefore, he fulfilled his responsibilities.

21. Amongst the procedural requirements for a LPA is that in paragraph A.4(5). This begins "The local planning authority must notify each adjoining owner or occupier about the proposed development by serving on them a notice...". It goes on to list the information should be included within this notice.
22. Whilst notice was served for PA1 and PA2, as PA3 was not processed so no neighbour notification took place. However, this is not a matter over which an applicant has any control. Where, as here, an applicant makes a valid prior notification application, the responsibility then passes to the LPA to fulfil its requirements. Where a LPA fails to undertake its responsibilities correctly or in a timely manner, the fault has to lie with it. Its shortcomings cannot be transferred to the applicant.
23. The Council's failure to move to one of the first two outcomes led to the third occurring by default. Most regrettably, this has had the effect of precluding neighbours to the development from having the opportunity to comment on the proposal. My decision, however, is solely based on the legal standing of PA3. I acknowledge the importance of neighbour notification, but the Council's failure to notify neighbours of PA3 cannot be given as reason to justify refusing to issue the certificate of lawfulness. I consider that the failure of the LPA to comply with condition A4(5) does not take the proposal outside of the parameters of development permitted by paragraph A.1(g).
24. Therefore, following the 42-days from the submission of PA3, (2 August 2019), the development described in that application could have been begun. Consequently, when the application for the certificate was submitted to the Council it should have been approved as the applicant, as he was at that time, could have lawfully erected the extension.

Conclusion

25. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of a 'Single storey rear extension. The proposal would measure 6m beyond the rear wall of the property, with a maximum height of 3m and an eaves height of 3m' was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Roy Curnow

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 5 August 2019 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The development was lawful by reason of the Council's failure to provide written notice that either its prior approval was or was not required within 42 days of the date of the application for Prior Approval, under Schedule 2, Part 1, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), being made to it.

The proposed development was not in breach of contravention of any enforcement notice or breach of condition notice then in force.

Signed

Roy Curnow

Inspector

Date: 27 October 2020

Reference: APP/C5690/X/19/3237198

First Schedule

Single storey rear extension. The proposal would measure 6m beyond the rear wall of the property, with a maximum height of 3m and an eaves height of 3m.

Second Schedule

Land at 422 Whitefoot Lane, Bromley BR1 5SF

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 27 October 2020

by Roy Curnow MA BSc(Hons) MRTPI

Land at: 422 Whitefoot Lane, Bromley BR1 5SF

Reference: APP/C5690/X/19/3237198

Scale: Not to Scale

