



Appeal Decision

Site visit made on 3 December 2020

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

an Inspector appointed by the Secretary of State

Decision date: 18 February 2021

Appeal Ref: APP/U5930/C/19/3227528

18 Rosslyn Avenue, Chingford, London E4 6DX

- 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 O Kulah against an enforcement notice issued by the Council of the London Borough of Waltham Forest.
- The enforcement notice was issued on 5 April 2019.
- The breach of planning control as alleged in the notice is without planning permission: the erection of a single storey side extension ("Unauthorised Development").
- The requirements of the notice are: -
 1. Reduce the depth of the single storey side extension by removing the area as shown hatched on the attached plan marked Plan 2.
 2. Remove from the land all resulting debris.
- The period for compliance with the requirements is 4 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (f) of the Town and Country Planning Act 1990 as amended (the 1990 Act). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the 1990 Act.

Summary Decision: The appeal is dismissed and the enforcement notice upheld.

Procedural matters and background

1. Prior to 2014 there was a single storey rear extension (pre-2014 rear extension) on the dwelling and a garage to the side. Since 2014 numerous planning applications and applications for lawful development certificates under section 191/192 of the 1990 Act for extensions to 18 Rosslyn Avenue (No 18) have been determined by the Council. In December 2014 an application for a Lawful Development Certificate (LDC)¹ was approved by the Council in relation to proposed single storey side and rear extensions at the appeal site (the 2014 LDC). There is no dispute that part of the development proposed in the 2014 LDC was begun and that in March 2015 the Council stated that it considered that the construction required planning permission as it was not permitted development.
2. In 2017 the Council granted planning permission for '*the retention of single storey rear extension*'. A dormer roof extension was constructed on the rear of No 18 during 2015/2016. The dormer roof extension does not form part of the development included in the description of the alleged breach of planning control in the enforcement notice. The courts have held that section 173(11) of the 1990 Act only applies to buildings, works or activities included in the

¹ Ref No: 143217/CLP

description of the alleged breach of planning control in the enforcement notice. It does not operate to grant planning permission for other possible breaches of planning control or for everything else remaining on site once the notice has been complied with even if not mentioned in the notice. Nevertheless, the Council stated in July 2020 that no enforcement action would be taken in relation to the dormer roof extension for a number of reasons which include that it was immune under section 171B of the 1990 Act.

3. A number of applications for LDCs under section 191 of the 1990 Act, in relation to the single storey side extension, were refused by the Council in 2017 and 2019. It is not for me to determine, as part of an appeal under section 174 of the 1990 Act, whether the Council's decisions in those LDC applications were well founded.

Application for costs

4. An application for costs was made by Mr O Kulah against the Council of the London Borough of Waltham Forest. This application is the subject of a separate decision.

The ground (c) appeal

5. An appeal on ground (c) is that those matters (if they occurred) do 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.
6. The alleged breach of planning control relates to the erection of a single storey side extension (the side extension) adjacent to the boundary with 16 Rosslyn Avenue (No 16). I acknowledge that the 2014 LDC has not been revoked. However, there is no dispute that the side extension has not been constructed in compliance with the 2014 LDC. Even though, the size of the side extension was altered between 2015 and 2016 there is no evidence before me to indicate that its size has been altered since the date the notice was issued. A large amount of the evidence before me relates to the size and form of the side extension in 2015/2016.
7. Nevertheless, there is no dispute that the side extension was begun in September 2015. As such, it is necessary to assess whether the side extension meets the limitations and conditions of the version of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) that was in force in September 2015 (the September 2015 GPDO).
8. Under Article 3, Schedule 2, Part 1, Class A (Class A) of the September 2015 GPDO the enlargement, improvement or other alteration of a dwellinghouse was permitted subject to a number of specified limitations and conditions. There is no dispute that the side extension does not conflict with the limitations at A.1(a), (b), (c), (e), (g), (h), (i) and (k) of Class A of the September 2015 GPDO and I have no reason to disagree.
9. Development is not permitted by virtue of A.1(d) of Class A if the height of the eaves of the part of the dwellinghouse enlarged, improved or altered would exceed the height of the eaves of the existing dwellinghouse. The term 'eaves' is not defined within the September 2015 GPDO but Article 2 of that Order

states that "existing", in relation to any building or any plant or machinery or any use, means (except in the definition of "original") existing immediately before the carrying out, in relation to that building, plant, machinery or use, of development described in this Order. Based on the evidence before me, even though the main roof of No 18 was altered from a hipped form to a gable there is no evidence to indicate that the hipped roof over the bay window or that the main roof on the house has been altered in any way to amend the height of its eaves since immediately before the carrying out of the side extension.

10. The wording of A.1(d) of Class A has not altered from the September 2015 GPDO to the version of the GPDO that is currently in place. The Ministry of Housing, Communities and Local Government's publication '*Permitted Development Rights for Householders*' Technical Guidance (September 2019) (TG) whilst not determinative provides a useful guide to interpretation of the GPDO. On page 11 it states that '*For the purpose of measuring height, the eaves of a house are the point where **the lowest point of a roof slope**, or a flat roof, meets the outside wall*'. (my emphasis) It goes on to state that '*The height of the eaves will be measured from the ground level at the base of the external wall of the extension to the point where the external wall would meet (if projected upwards) the upper surface of the roof slope. Parapet walls and overhanging parts of eaves should not be included in any calculation of eaves height*'. In addition on page 12 there are diagrams illustrating how eaves height is to be measured.
11. I acknowledge that the Council has considered that this limitation was complied with at the time of the LDC applications in 2017 and 2019 but it seems to me that those assessments were incorrect. The assessments were based on drawing RA.01.02A, submitted with those applications, which indicates that the height of the eaves of the side extension complies with this limitation. However, based on my observations, it does not appear that the section through bay and garage roof on drawing RA.01.02A accurately reflects the as built side extension and bay window as it is clear that the roof over the bay window is a hipped roof rather than a gable. Moreover, whilst the Council appears to have measured numerous parts of the dwelling and the side extension in 2016 the evidence before me only records the overall height of the side extension – 2.9m. No indication is given of any measurements made of eaves heights at that time.
12. At the site visit the appellant's agent highlighted that a black rod had been inserted through the hipped roof of the bay window to indicate the eaves height of the existing house. Nevertheless, based on my observations that rod did not indicate the point of where the lowest point of a roof slope meets the outside wall considering the hipped nature of that roof. The agent also highlighted that the flat roof level of the side extension was indicated by the line of the junction between the white and grey parts of its front parapet. The Council's representative did not dispute that assertion and I have no reason to disagree. I consider the lowest point of the roof slope of the existing house is where it would meet, if projected upwards, the corner of the front and side walls that adjoin the side extension. I observed that the height of the eaves level of the existing house, taking into account my findings on the lowest point of the roof slope, appears to be below that of the eaves level of the side extension.

13. Consequently, based on the above and my observations at the site visit, it appears, on the balance of probability, that the height of the eaves of the flat roof of the side extension exceeds the eaves height of the existing house. The side extension does not therefore meet the limitation at A.1(d) of Class A of the September 2015 GPDO.
14. At the site visit it was agreed that the side extension extends 3m from the rear wall of the original dwellinghouse and that the width of the side extension is 3.75m. As such, the side extension complies with the limitations at A.1(f)(i) and A.1(j)(iii) of Class A of the September 2015 GPDO. Even if, the dimensions of the side extension, as recorded by the Council in August 2016 (3.08m and 3.98m), are taken into account these factors would not alter that the side extension does not meet the limitation at A.1(d) of Class A and is therefore not permitted by that Class.
15. There is reference to the limitation at A.1(ja) of Class A within the evidence before me. However, this limitation was an addition to the GPDO in 2017 and did not form part of the September 2015 GPDO. Therefore, it is not relevant to the ground (c) appeal. However, I will return to this matter later.
16. I acknowledge that the appellant has obtained advice from Counsel as to whether the side extension is permitted development. However, it is not clear on what details/drawings this advice is based on given that the side extension is described as 3.65m in width and the gap between the side and rear extensions is described as 1.2m.
17. 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 of the September 2015 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.
18. There is reference in the evidence before me as to whether the dormer roof extension was/is lawful. The Council also considers that the materials used in the exterior work of the side extension are not of a similar appearance to those used in the construction of the exterior of the existing dwellinghouse. Therefore it considers that condition (a) within paragraph A.3 of Class A of the GPDO is not met.
19. Even if I found that the dormer roof extension was not lawful at the date the notice was issued and/or the materials are not of a similar appearance these factors would not alter that the side extension does not meet the limitations of Class A of the September 2015 GPDO. Therefore, these matters would not alter whether the side extension constitutes a breach of planning control.

The ground (a) appeal and deemed planning application

Main Issue

20. The main issue is the effect of the side extension upon the living conditions of the occupiers of No 16 having regard to daylight and sunlight.

Reasons

21. The adjacent dwelling, No 16, has 2 side facing kitchen windows (the kitchen windows) that are in close proximity to the boundary with No 18. The one flank

- wall of the side extension runs adjacent to the boundary with No 16 and parts of that wall are opposite the kitchen windows.
22. The evidence before me indicates that the existing boundary treatment between Nos 18 and 16 was in place prior to the erection of the side extension. Furthermore, there is a 'Perspex' canopy that extends over the top of the walkway that is adjacent to the kitchen windows and this was also in place prior to the erection of the side extension. Additionally, the kitchen windows face in an approximately westerly direction and as a result would only receive direct sunlight during the afternoon. I acknowledge therefore that, given their proximity and orientation to the kitchen windows, these factors would have influenced sunlight and daylight penetration levels to those windows prior to the side extension being constructed.
23. Nevertheless, as the side extension is positioned largely to the west of, and in close proximity, to the kitchen windows, it is likely that there has been a further loss of direct sunlight at certain times of the day received in the kitchen. In addition, given the height and proximity of the side extension to the kitchen windows it is likely that it also materially reduces the amount of daylight received by those windows. The side extension is appreciably taller than the existing boundary treatment and a boundary treatment that could be erected without planning permission under permitted development rights.
24. As the amount of sunlight and daylight received in the kitchen was already restricted it is more likely than not that further reductions in the amount of sunlight and daylight causes significant harm and detracts from the living conditions of its occupiers. Those reductions in sunlight and daylight are likely to have made the kitchen a dark space that it is difficult to work in without an electric light on and the outlook when in that room is highly likely to be experienced as oppressive. No technical evidence has been submitted, but my assessment of the appeal site and the side extension as built lead me to conclude that it is likely that the development materially reduces the sunlight and daylight received by the kitchen windows of No 16.
25. The appellant considers that the part of the side extension that is required to be removed by the enforcement notice could be rebuilt once the enforcement notice had been complied with and that this constitutes a fallback position. He considers that constructing that part of the extension exactly the same as the existing side extension would be permitted development under Article 3, Schedule 2, Part 1, Class A of the GPDO.
26. I acknowledge that Article 3(5)(a) of the GPDO states that the permission granted by Schedule 2 does not apply if in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful. However, there is little evidence before me to indicate that once the enforcement notice is complied with that No 18 would not benefit from permitted development rights. Moreover, given that the side extension contains the kitchen it is highly likely that the appellant would wish to retain or replace it.
27. Nevertheless, given my findings above in the ground (c) appeal the side extension is not permitted development when considered against the September 2015 GPDO and the eaves height would mean that a rebuilt side extension would also not be permitted by the GPDO. Moreover, the limitation at A.1(ja) of Class A of the GPDO is that any total enlargement (being the

enlarged part together with any existing enlargement of the original dwellinghouse to which it will be joined) exceeds or would exceed the limits set out in sub-paragraphs (e) to (j).

28. The side walls of the side extension and the rear extension that are adjacent to each other do not join and they are 0.75m apart. There is a narrow patio between them and a door into the rear extension is accessed from that patio. However, the roof above that patio overhangs the 3 walls and therefore there is a small part of the roof that is adjacent to the original rear wall of the dwelling that appears to join the side extension to the rear extension (the pre-2014 rear extension). Based on my observations, it appears that if the side extension was rebuilt in the same way as that currently it could be treated as being joined to the rear extension therefore the limitation at A.1(ja) would not be complied with as the width of the total enlargement would exceed the limitation at A.1(j)(iii).
29. In any case, even if the rebuilt side extension was not treated as being joined to the rear extension it would not meet the limitation at A.1(d) of Class A of the GPDO and would therefore not be permitted by that Class. In addition, even if a similar side extension could be built as permitted development it is likely to have a lesser impact on the living conditions of the occupiers of No 16. Consequently, there is not a realistic prospect that the side extension could be rebuilt exactly the same as it is, and it has little weight as a fallback position.
30. In conclusion, taking into account all of the above, it is more likely than not that the side extension significantly harms the living conditions of the occupiers of No 16 having regard to daylight and sunlight. As a result, it conflicts with Policies DM4 and DM32 which, amongst other things, state that the Council will expect development which involves the extension of a residential building to protect the occupiers of properties nearby from suffering any excessive loss of residential amenity and ensure that daylight/sunlight is maintained for neighbours in their homes.
31. These policies are consistent with paragraph 127 of the National Planning Policy Framework (the Framework) which, amongst other things, states that planning decisions should ensure that developments create places with a high standard of amenity for existing and future future users. As such, with regard to paragraph 213 of the Framework the conflict arising in these respects is given full weight.

Other matters

32. The references to other development plan policies have been noted. However, the development plan policies to which I have referred are considered the most relevant to this appeal.
33. I appreciate that the appellant undertook the works in good faith and did not seek to flout the planning regulations. However, this point has not affected my decision, which is based on the planning merits of the development.

Conclusion on ground (a) and the deemed planning application

34. In this case, there are no material considerations to indicate that the appeal should be determined other than in accordance with the development plan. For the reasons given above, and having had regard to all other matters raised, I

conclude that the appeal on ground (a) and the application for deemed planning permission should fail.

Ground (f)

35. 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 injury to amenity resulting from the breach. The Council have stated that the requirements of the notice are to remedy any injury to amenity, and I have no reason to disagree given that the requirements do not require the whole of the side extension to be removed. The removal of the part of the side extension marked on plan 2 would remedy the injury to amenity as it would be likely to alleviate the harm, I have identified above, with regard to the living conditions of the occupiers of No 16.
36. The appellant's case in relation to ground (f) is predicated on the same basis as his case in relation to the fallback position cited above. I have found that the side extension, if rebuilt, would not be permitted development. In addition, there are no other alternative works suggested by the appellant to indicate whether a different form/size of the side extension could be required to be removed by the notice to remedy any injury to amenity.
37. Given that the notice does no more than seek to achieve the purposes of section 173(4)(b) of the 1990 Act, it is not excessive. The appeal on ground (f) fails.

Overall Conclusion

38. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Formal Decision

39. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act.

D. Boffin

INSPECTOR