
Appeal Decision

Site visit made on 28 September 2021

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 09 November 2021

Appeal Ref: APP/W2465/X/21/3274370
88 Dorothy Road, Leicester LE5 5DQ

- 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 and Mrs Mulla against the decision of Leicester City Council.
 - The application Ref 20202491, dated 8 December 2020, was refused by notice dated 24 March 2021.
 - The application was made under section 191(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 an existing dwelling, dormer and single storey rear extension.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. The application the subject of this appeal sought a LDC for an existing dwelling, dormer and single storey rear extension. However, the details of the proposal used on the Council's decision notice differs from the application form and is for the construction of a dormer at rear; single storey extension at rear of house (Class C3). The appellant considers that no prejudice is suffered by this change of description, but I have determined this appeal on the basis of the development for which the LDC was originally sought as described on the application form.

Background

3. In April 2018 planning permission was granted conditionally under reference 20180137 for the construction of one dwelling. Subsequently, in December 2018 condition 4 of that permission was discharged under reference 20181878.
4. A LDC for a rear dormer at the house and the installation of two roof lights at the front of the property was granted under reference 20192128 in January 2020. In October 2020 an application for a change of use from a house to three flats was withdrawn. It is my understanding that there is an ongoing enforcement investigation relating to the unauthorised construction of a two and a half storey building containing three flats at the appeal site.
5. The LDC application the subject of the current appeal was then submitted and subsequently refused.

Main Issue

6. The main issue is whether the Council's decision to refuse to issue a LDC was well-founded. In this case that turns on whether the erection of the building has been undertaken in accordance with permission 20180137 and whether or not the single storey rear extension and dormer are permitted development by virtue of the rights Article 3 of the Town and Country Planning (General Permitted Development))(England) Order 2015 as amended (the GPDO).

Reasons

Legal Basis for Determination

7. When dealing with a case such as this, the burden of proof is on the appellant and the standard of proof is the balance of probabilities. Following the judgement of Gabbittas¹ the evidence of an appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, the appeal should be allowed. These represent the legal principles against which I have determined this appeal.

Whether permission 20180137 was lawfully implemented

8. The appellants' own evidence as set out in the Planning Supporting Statement dated 8 December 2020 is that the two storey dwelling was erected with the benefit of permission granted under reference 20180137 on 20 April 2018 and that the dwelling has since been extended by the addition of a box dormer and a single storey mono-pitched roof extension to the rear of the building. Their evidence then goes on to state that the single storey rear extension was erected under permitted development rights.
9. The courts have held² that what is substantially completed should always be decided as a matter of fact and degree. It has also been held³ that whilst there is no definition of the term, 'substantially completed', an holistic approach should be taken when considering the matter. If a building is not carried out internally and externally in full accordance with a planning permission, the whole development is unlawful. In this case that means that if the building has not been implemented in accordance with the approved drawings under planning permission reference 20180137 it is unlawful and a certificate cannot be granted on that basis.
10. The appellants contend that the permission was lawfully implemented and that, as a matter of fact and degree, the dwelling was completed as a dwelling in February 2020 and that construction of the dormer then started on 15 March 2020. It is argued that because it was substantially completed as a dwelling in February 2020 permitted development rights applied from that date since occupation is not a pre-requisite for such rights to apply. Case law⁴ suggest that for such rights to apply actual use need not have commenced, but I agree with the appellants' interpretation that use should be at least imminent or imminently likely.

¹ Gabbittas v SSE & Newham LBC [1985] JPL 630

² Ewen Developments v SSE & North Norfolk DC [1980] JPL 404

³ Sage v SSETR & Maidstone BC [2003] UKHL 22

⁴ Impey v SSE & Lake District SPB [1981] JPL 363; [1984] P&CR 157 and Welwyn Hatfield BC v SSCLG & Beesley [2011] UKSC15

11. However, the Council's evidence contradicts the appellant's evidence and claims that the dwelling, dormer and single storey rear extension were completed as a single operation. If that is the case, it cannot be said that the original permission was lawfully implemented since when considering the development holistically there are clearly material differences between the approved scheme and that which is present.
12. Photographs and other written evidence submitted by the Council relating to site visits and observations in September 2020, October 2020 and March 2021 show that the whole property had only recently been completed and that the host dwelling and its extensions were completed as a single operation. In my judgement the appellants' case is not helped by the fact that they failed to submit a completion certificate for the originally approved house as required by Condition 2 of 20180137. Furthermore, I am concerned about their initial unwillingness to provide elevations and floor plans for application reference 20202491.
13. I have considered the appellant's photographic evidence which show the building before the installation of the dormer. These appear to show a partly constructed new dwelling and partly constructed roof without tiles. This suggests to me that most of the roof structure was in place before the dormer was started but it is insufficient evidence for me to conclude that the house was substantially completed before work on the dormer started.
14. The LDC application for a rear dormer (Reference 20202128) shows an intention to build a dormer as does the steel beam analysis and design for the dormer ridge beam structure by Structskill Structural Services dated 1 February 2020. I have also taken account of the other supporting evidence including dates and details set out on invoices and sales receipts from building material suppliers. Whilst it is likely that these relate to the appeal property and the dormer and rear extension there is insufficient evidence that the originally approved house was substantially completed before the additions were started.
15. I also noted at my site visit that the property has not yet been fitted out for residential occupation and therefore it cannot be said that occupation as a single dwellinghouse is imminent or imminently likely. Therefore, I cannot see how the original dwelling without the dormer and rear extension was completed to the degree that use was imminent or imminently likely.
16. Therefore, in my judgement the appellants have submitted insufficient evidence to show that the dwelling was substantially completed in accordance with the approved scheme in February 2020. In addition, the evidence submitted by the Council contradicts the appellants' version of events and makes the appellants' version less than probable.
17. Consequently, based on all the evidence before me, I conclude that on the balance of probabilities permission 20180137 was not lawfully implemented.

Whether or not the single storey rear extension and dormer are permitted development

18. Article 3 of the Town and Country Planning GPDO grants planning permission for development in Schedule 2 to the Order. However, Article 3(5)a states clearly that the permission granted by Schedule 2 does not apply if the building

operations involved the construction of the building are unlawful. That is what I have found in this case in that the building on the date that the application for an LDC was submitted included substantial unauthorised extensions. Consequently, permitted development rights cannot apply to that unlawful development and the dormer and single storey rear extension are unlawful.

19. My attention is also drawn to the Council's ongoing investigations with respect to the layout of the property and potential alternative use for flats. My site observations confirm that the existing layout lends itself to use as flats and consequently that also brings into question the lawfulness of the development that has taken place, including the dormer and rear extension.

Conclusions

20. Taking account all of the evidence presented to me and for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful development was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

A A Phillips

INSPECTOR