



Appeal Decision

Site visit made on 14 December 2021

by K Savage BA(Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd February 2022

Appeal Ref: APP/B5480/W/21/3275388

65 Westland Avenue, Hornchurch RM11 3SD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr & Mrs Gill against the decision of Council of the London Borough of Havering.
 - The application Ref P0057.21, dated 14 January 2021, was refused by notice dated 11 March 2021.
 - The application sought planning permission for 'Retrospective permission merging together of two outbuildings into one and verandah/lean-to to existing outbuilding at rear of garden' without complying with a condition attached to planning permission Ref P1055.13, dated 10 February 2014.
 - The condition in dispute is No 2 which states that: Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 the garage(s)/workshop(s)/utility room(s)/outbuilding(s) hereby permitted shall be used only for purposes incidental to the enjoyment of the dwelling house and not for any trade or business nor as living accommodation.
 - The reason given for the condition is: To restrict the use to one compatible with a residential area, and in order that the development accords with Development Control Policies Development Plan Document Policy DC61.
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Decision

1. The appeal is allowed and planning permission is granted for retrospective permission merging together of two outbuildings into one and verandah/lean-to to existing outbuilding at rear of garden, at 65 Westland Avenue, Hornchurch RM11 3SD, in accordance with the terms of application Ref P0057.21, dated 14 January 2021, without compliance with condition No 2 previously imposed on planning permission P1055.13, dated 10 February 2014, but subject to the other conditions set out in the attached Schedule.

Application for costs

2. An application for costs has been made by Mr and Mrs Gill against the Council of the London Borough of Havering. This is the subject of a separate decision.

Preliminary Matter

3. The Council adopted the new Havering Local Plan (2016 to 2031) (the HLP) on 17 November 2021, during the appeal process, replacing The Core Strategy and Development Control Policies DPD (2008). I have therefore had regard only to policies of the HLP in determining the appeal. The main parties have been afforded the opportunity to comment on this material change in the policy context, and I have taken the replies received into consideration.

Background

4. The appeal relates to an outbuilding at the rear of the dwelling at 65 Westland Avenue. The evidence indicates that, prior to mid-2013, two separate outbuildings existed at the rear of the garden, described in a statutory declaration from the appellants as in use for purposes ancillary to the main dwelling as a living room, kitchen, bedroom and washroom. In June 2013, works were carried out to join the two outbuildings together with an infill extension between them and the addition of a large, covered veranda across the front of the whole structure.
5. Planning permission was granted retrospectively in February 2014 and Condition No 2 imposed, restricting use to purposes incidental to the enjoyment of the dwelling house and not for any trade or business nor as living accommodation. The appellants argue that the condition should not have applied to the pre-existing parts of the outbuilding, but only to the additional structures for which planning permission was sought. In seeking to remove the condition, or alternatively to amend it by replacing the word 'incidental' with the word 'ancillary', the appellants suggest that this would bring the whole of the outbuilding under the same status. The appellants further argue that the Council has misunderstood the application and has not provided any reasoning why ancillary use of the outbuilding would be harmful in planning terms.
6. The Council states that removal of the condition would materially alter the basis on which permission was granted, and it is necessary in order for the unified outbuilding not to become a separate planning unit, which it suggests has already occurred, this being the subject of an enforcement investigation.
7. The National Planning Policy Framework (the Framework) sets out that planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. The Planning Practice Guidance (PPG) adds that each test needs to be satisfied for each condition which an authority intends to apply.
8. The application was made to the Council under section 73 of the Act. Under this provision, the decision maker shall only consider the question of the conditions subject to which planning permission should be granted. In this case, it falls to be considered whether the condition limiting use of the outbuilding accords with the relevant tests for conditions set out in the Framework.

Main Issue

9. Having regard to the evidence before me, I consider the main issue is whether the existing condition is necessary and reasonable, having regard in particular to the nature of the use of the outbuilding and its effect on the character of the area and neighbours' living conditions.

Reasons

10. The use of the outbuilding differs from that originally shown on the proposed plans from 2013. The veranda area is laid out as an open plan living space, with a kitchen and large dining table to one end, and a living area with seating to the other end and numerous storage and display units throughout. Accessed from the veranda are several rooms, laid out as a bedroom with en-suite, an office, an exercise/storage room and a further bathroom. The outbuilding

clearly has additional living space, but there are also considerable areas given over to storage of personal possessions at a scale which suggests they are connected to the main dwelling, rather than the separate possessions of an independent occupant. I also saw no separate means of access or division of the rear garden area.

11. Whilst the outbuilding contains the facilities required for independent living, this does not automatically mean that they would form a separate planning unit to the main dwelling, if shown to be associated with it and not severable. The appellants have submitted a sworn statement attesting that the building has never been occupied as a self-contained dwelling, that it has only ever been used for ancillary living and sleeping purposes by the appellants' own family, and that it is not intended to create a separate dwelling.
12. Nonetheless, the Council maintains its position that a separate dwelling has been or would be created. However, the Council offers no substantive evidence to underpin this assertion or contradict the appellants' evidence. It is simply stated that the *'alleged use is not connected to the host property and will therefore result in a material change of use of the building'*.¹ There is only opaque reference to the Council's enforcement investigation within its submissions, with little detail as to the nature of the complaints made or the evidence gathered by the Council and no clear indication as to the reasons why a material change of use is suspected. Nor is it set out which aspect of neighbours' living conditions would be adversely affected. Ultimately, I am not advised that any formal enforcement action has been taken, and therefore this is a matter of limited weight in my considerations.
13. Much of the evidence before me discusses 'incidental' and 'ancillary' uses. These terms are often used interchangeably, including by the Council in its officer report, though they do not necessarily mean the same thing. Incidental use is primarily used in respect of curtilage structures built under permitted development, and refers to uses that support a residential use, but are not themselves residential use, such as detached garages or parking areas. Additional residential accommodation within an outbuilding would be ancillary to the residential use of the main dwelling, rather than incidental.
14. The reason for the imposition of the condition in 2014 was to restrict the use to one 'compatible' with a residential area. However, at the time, the structure was referred to as an outbuilding in the officer report and was considered acceptable by the Council in terms of visual impact and the effect on neighbours' living conditions. Nowhere in the officer report was it stated that there is evidence of a separate dwelling being created, nor of any trade being carried on. Notably, no substantive reasons were given in the officer report for the Council's decision to impose the disputed condition and prevent use of the outbuilding as additional living accommodation.
15. Indeed, the Council states more than once in the officer report for the current appeal that the use should be ancillary (and not a separate dwelling) and that the condition is *'necessary to control the use of the outbuilding outside ancillary or incidental purposes'*² (my emphasis). This suggests that the Council's principal concern is not the use of the outbuilding for ancillary accommodation, but its use as a separate dwelling.

¹ LPA Officer Report, Pg 3, Paragraph 1

² LPA Officer Report, Pg 3, Paragraph 8

16. However, there is no evidence before me to indicate that the outbuilding has been used for anything other than residential accommodation ancillary to the main house. Whilst this may go beyond the 'incidental' use permitted by the disputed condition, there is no substantive evidence adduced by the Council to demonstrate that this is harmful in planning terms. Moreover, the condition did not specify that the uses shown on the approved plans were the only uses to which the outbuilding could be put. Nor is there any evidence, then or now, of any trade being carried on from the outbuilding causing material harm to neighbours' living conditions, whether that be privacy, disturbance or another factor, that would necessitate its restriction by condition.
17. I saw for myself that the outbuilding is set more than 30 metres back from the main dwelling and a tall boundary fence divides the site from No 63. Indeed, there are several outbuildings, some large, located to the rear of neighbouring gardens. Given the separation distances from the nearest properties, and the lack of ground level views between the sites, I am satisfied that use of the outbuilding for residential purposes ancillary to the main dwelling would not lead to material harm to the living conditions of neighbouring occupants in terms of privacy, noise or disturbance, nor would it have an adverse effect on the residential character of the area.
18. This aside, and irrespective of the terminology used to describe the use of the outbuilding, it is well established in planning law that the creation of a separate residential unit is a material change of use requiring planning permission. This would be the case regardless of whether a condition exists on an earlier planning permission. Therefore, in simple terms, it is not necessary to condition the use of an outbuilding where it is proposed to form a use or uses incidental or ancillary to the primary residential use of the main dwelling.
19. Ultimately, the appeal must be considered on the basis of the development applied for, which was the '*merging together of two outbuildings into one*' and not for a separate dwelling. This defines the planning permission granted and would so define any permission granted under s73. It is not for me to determine through this appeal whether a material change of use has occurred or would occur if the condition was to be removed, such matters being for the Council to consider in the first instance. The removal of the disputed condition would not result in planning permission being granted for a new dwelling, nor would it permit a dwelling to be created without further application to the Council. In light of this, and the lack of harm demonstrated in respect of the ancillary use of the outbuilding, I find that the disputed condition fails the Framework test of necessity.
20. Furthermore, the disputed condition lists several different uses which did not appear to relate to the approved development, and suggests the use by the Council of a standard condition template which has not been tailored to the development in question. In this respect, I find the condition also fails the test of precision.
21. In conclusion, I find no evidence of harm arising from the use of the outbuilding for living accommodation ancillary to the main dwelling. Moreover, the purpose of seeking to prevent the creation of a separate residential unit by condition is unnecessary given this requires planning permission in any event. The same would apply to a change to a trade use. I therefore find no conflict with Policies 7 or 26 of the HLP which require development to be of a high

design quality that ensures that the amenity and quality of life of existing and future residents is not adversely impacted, and that contributes to the creation of successful places.

22. Therefore, and with reference to the Framework and the guidance of the PPG, I find that the disputed condition is not reasonable or necessary to make the development acceptable in terms of protecting the residential character of the area or neighbours' living conditions. It should therefore be removed.

Other Matters

23. I have also considered the other arguments raised in respect of whether the condition should have applied to the whole outbuilding or just those parts subject to the planning application in 2014. However, given my findings above, I do not need to consider these further.
24. The parties make reference to the judgement in *Peche D'Or Investments v SSE (1996)* and to an appeal decision which also refers to this case in terms of incidental and ancillary uses. However, I am not provided with the full text of the judgement to enable me to verify the statements made by the parties, whilst the circumstances of the other appeal appear to differ as it relates to a lawful development certificate and whether works would amount to permitted development. Consequently, the weight I attach to these comments is necessarily limited, and I have considered the appeal on its own planning merits and the case specific evidence before me.

Conditions

25. The original planning permission from 2014 has been implemented, but as I have no information before me about the status of the other conditions imposed therein, I shall impose all those that I consider remain relevant. In the event that some the conditions have in fact been discharged, that is a matter which can be addressed by the parties.
26. The Council has suggested further conditions. A time limit condition is not required in this case, nor can one be imposed on a planning permission granted under s73. The outbuilding has been constructed and no further physical works are proposed. Therefore a condition requiring compliance with approved plans is not necessary. Finally, the Council's suggested condition relating to the ancillary use of the outbuilding is not necessary for the reasons set out above and, in any event, restriction of occupation to immediate family members is vague and would be impractical to monitor and enforce against.

Conclusion

27. Therefore, for the reasons given above, I conclude that the appeal should be allowed.

K Savage

INSPECTOR

Schedule of Conditions

- 1) All new external finishes shall be carried out in materials to match those of the existing building(s) to the satisfaction of the Local Planning Authority.
- 2) That within 6 months from the date of this permission, the side wall of the verandah hereby approved and as detailed on the submitted plans shall be reduced in height from 3m down to 2.5m and appropriately made good in matching materials.

END