



Appeal Decision

Site visit made on 17 February 2022

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 01st March 2022

Appeal Ref: APP/E5330/C/21/3271924

19 Leysdown Road, Eltham, London SE9 3LY

- 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 Paul Foster against an enforcement notice issued by Royal Borough of Greenwich Council.
 - The enforcement notice was issued on 4 March 2021.
 - The breach of planning control as alleged in the notice is without planning permission:
 - i) the erection of a single storey outbuilding in the rear garden;
 - ii) excavation and development of the land in the rear garden to provide a sunken development;
 - iii) erection of boundary fencing within the rear garden which exceeds more than 2 metres from the original ground level; and
 - iv) construction of front boundary wall exceeding 1 metre in height adjacent to the highway at the Property.
 - The requirements of the notice are to:
 - i) Reduce the height of the front boundary treatment, to no more than 1 metre in height along the line marked in Blue on the plan attached to the notice;
 - ii) Reduce the height of the outbuilding in the rear garden to no more than 2.5m in height;
 - iii) Restore the land levels by at least 0.3 metres (300 mm / 30cm) within the rear garden at the points where it has been raised to the original level, shown hatched on the plan and on photograph A attached to the notice;
 - iv) Remove all resultant materials from steps i) - iii) above from the land and dispose of it appropriately.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) (b) (c) (f) of the Town and Country Planning Act 1990 as amended (the Act). Since an appeal on ground (a) has been made, the application for planning permission deemed to have been made under section 177(5) of the Act falls to be considered.
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Decision

1. It is directed that the enforcement notice be corrected by deleting "ii) excavation and development of the land in the rear garden to provide a sunken development" in paragraph 3, due to the appeal succeeding to this extent under ground (c).
2. Subject to this correction, the appeal is otherwise dismissed and the enforcement notice is upheld.
3. Planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

Procedural Matters

4. Since the appeal was made, a revised National Planning Policy Framework (the Framework) came into force on 20 July 2021. The main parties were asked for comments and any received have been taken into account.
5. The appellant is correct in pointing out that, notwithstanding what is shown in the enforcement plan, the outbuilding does not directly abut boundaries with neighbouring properties.

Ground(b)

6. For an appeal to succeed under this ground, the burden of proof is on the appellant to satisfy me on the balance of probabilities that matters stated in the notice have not occurred as a matter of fact.

Front boundary wall adjacent to the highway

7. The appellant has made a ground (b) appeal in respect to this matter, but in his submissions states that the wall "has now been reduced to 1m and is therefore no longer breaching planning control". I have also seen photographs showing that there were pillars forming part of the wall exceeding 1m in height. Therefore, as a matter of fact, the notice was correct at the time of issue in alleging the construction of a front boundary wall exceeding 1m in height adjacent to the highway at the property. Therefore this part of the appeal does not succeed and is not affected by the fact that the associated requirement of the notice has been complied with.

Boundary fencing within the rear garden

8. The appellant disputes as a matter of fact that there has been the erection of boundary fencing within the rear garden which exceeds more than 2 metres from the original ground level.
9. However, notwithstanding the burden of proof being upon him, he has submitted very limited evidence to demonstrate to the required level of proof that the Council's allegation in this matter is incorrect.
10. In particular, he has submitted no measurements of ground levels or of the boundary fencing but largely relies on a single photograph taken during the development of the site which he compares to the photograph attached to the notice of the pre-development rear garden. He says that this comparison shows that ground levels have not changed. However, having considered that argument and the photographs carefully, I am not satisfied that that is the case and reject the appellant's assertion that the mid-development photograph "shows the ground level at the same height the full length of the garden as before". The single photograph, which is limited in its view, does not adequately show the lower level of the strip of planted land adjacent to the boundary with No 21 Leysdown Road which in my judgement (following the site visit) is likely to be associated with the original level of the land and is situated somewhat lower than the level of the developed hard surfaces now over much of the site. Further, I have seen a large range of photographs submitted by the Council which in my view clearly evidence that the level of the land has been built up in places and that this has had an effect on the resultant height of boundary fencing. Accordingly, the appeal on ground (b) fails in all aspects.

Ground (c)

11. For an appeal to succeed under this ground, the burden of proof is on the appellant to satisfy me on the balance of probabilities that matters stated in the notice do not constitute a breach of planning control.
12. The appellant states that the boundary fencing within the rear garden is a maximum height of 2m and therefore is afforded general planning permission by the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO). However, it is the Council's allegation that the boundary fencing exceeds more than 2 metres from the original ground level. As the associated ground (b) has failed on this matter of fact, and noting again that the appellant upon whom the burden of proof rests has not supplied any measurements of fence heights, this ground (c) appeal must similarly fail.
13. Turning to the matter of the sunken development, Class E(a) of Part 1 within Schedule 2 of the GPDO provides permitted development within the curtilage of a house for "any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse...". It seems to me that the sunken development, which contains a pool and seating area used incidentally to the enjoyment of the dwellinghouse, meets this class of permitted development and that none of the relevant limits and conditions of that class would prevent it from being lawful. Accordingly, the ground (c) appeal succeeds to this extent.

Ground (a) and the deemed planning application

Main issues

14. The main issues under this ground of appeal are:
 - the effect of the (pre-compliance) height of the front boundary wall on highway safety; and
 - the effect of the outbuilding and boundary fencing within the rear garden on the living conditions of neighbouring occupiers, particularly as regards outlook.

Reasons

Highway safety

15. The pillars serving the front boundary wall, shown in the Council's photographs and said to have been at least 1.5m in height, would in my judgement adversely affect sight lines for the drivers of vehicles using the driveways of the appeal and neighbouring properties. Consequently they would cause an unacceptable impact on the safety of pedestrians and other users of the highway, in conflict with the Framework.

Outlook

16. Notwithstanding the permitted development fallback and the fact that the outbuilding has reportedly replaced a slightly smaller structure in the same location, the height of the appeal development results in a significant amount of its rear wall protruding above the boundary treatments with No 10 Ministry Way (No 10). That neighbouring property has a relatively small rear garden with a patio seating area set at a lower level than the bottom of the boundary

fence, onto which the windows and sliding patio doors of habitable rooms face not far from the new outbuilding on the appeal site. These factors, together with the fact that the protrusion of the new outbuilding extends for a significant length of the boundary separating the rear gardens of the two properties, cause an overbearing sense of enclosure to the occupiers of No 10 and significant harm to their living conditions through adversely affected outlook.

17. Further, the boundary treatments of the appeal property which extend to heights above 2m from the original ground level in my judgement create an oppressive sense of enclosure to neighbouring occupiers. This is particularly unacceptable closest to the rear windows of neighbouring properties, where outlook is most harmed (photographs NCD 09, NCD 10, NCD 11, NCD 12 and NCD 13 within the Council's statement are particularly illustrative of the harm caused).
18. This significant harm to living conditions is contrary to Policy DH(b) of the Council's Core Strategy¹ which seeks amongst other aims to protect the amenity of occupiers adjacent to developments from an unneighbourly sense of enclosure.

Other matters, planning balance

19. The appellant refers to what has been built as sustainable development, but the Framework is clear that the presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making. Where a planning application conflicts with an up-to-date development plan, permission should not usually be granted.
20. The appellant, amongst other submissions, says that the appeal development:
 - provides outdoor space (for relaxation, fresh air and exercise in the vicinity of his own home);
 - has provided local employment and supported the local economy in its development;
 - makes effective use of land and modern sustainable materials; and
 - causes no harm to character and appearance or to the streetscene.
21. I have considered all that the appellant has said in favour of the development, but for the reasons I have given I find that it does not comply with the development plan as a whole and there are no other considerations which outweigh this finding. Accordingly, I will not grant planning permission and the ground (a) appeal does not succeed.

Ground (f)

22. For an appeal to succeed under this ground, I must be satisfied that the requirements of the notice are excessive in achieving its purpose.
23. However, the appellant's arguments under this ground are repetitions of those made more properly under other grounds and which I have addressed in my findings on those grounds.

¹ Royal Greenwich Local Plan – Core Strategy with Detailed Policies (2014)

24. The appellant asks that the outbuilding be reduced to 2.5m as permitted by the GPDO. However, that is precisely what the notice requires and so that is not an argument that the notice is excessive.
25. The appellant has said that it will cause financial (and environmental) costs to comply with the notice requirements but these factors are not determinative of success under this ground.
26. Accordingly, the ground (f) appeal (such as it is) does not succeed.

Conclusion

27. Since the appeal succeeds on ground (c) as regards the lawfulness of the sunken development, the description of the unauthorised development in the enforcement notice is incorrect. I will therefore correct the enforcement notice in this respect in order to clarify the terms of the deemed application under section 177(5) of the 1990 Act as amended.
28. Subject to this correction, the appeal is otherwise dismissed and I uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the Act.

Andrew Walker

INSPECTOR