



Appeal Decision

Site visit made on 12 July 2022

by L Douglas BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 August 2022

Appeal Ref: APP/Z5060/C/21/3276406

Land and premises at 179 Sheppey Road, Dagenham RM9 4JS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Remi Rozycki against an enforcement notice issued by the London Borough of Barking and Dagenham Council.
- The notice was issued on 4 May 2021.
- The breach of planning control as alleged in the notice is without planning permission, the erection and unauthorised use of an outbuilding in the rear garden.
- The requirements of the notice are to: Remove the unauthorised outbuilding in its entirety or lower the outbuilding to 2.5m in overall height. Cease all unauthorised use of the outbuilding. Remove all subsequent waste material from the property.
- The period for compliance with the requirements is: 3 months
- The appeal is proceeding on the grounds set out in section 174(2) (c) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections in the terms set out below in the Formal Decision.

Procedural Matters

1. The breach of planning control alleged in the enforcement notice refers to the erection of a building and its unauthorised use. The second requirement of the notice requires the cessation of the unauthorised use of the building in the case that its height is lowered in accordance with the first requirement. The notice does not specify what the alleged unauthorised use of the building is, although I note reference to a 'self-contained unit' at Section 4 of the notice. The description of the alleged breach of planning control and the second requirement lack sufficient clarity and would leave any recipient of the notice unclear as to what is required to be done to comply with the notice.
2. Comments were invited from the main parties as to whether the alleged breach of planning control could be varied without causing injustice to any parties. The Council suggested the alleged unauthorised use could be described as 'an annexe to a dwellinghouse' or 'a separate unit of self-contained accommodation'. The appellant has claimed the building is used lawfully as an annexe.
3. Correction of the alleged breach of planning control at Section 3 of the notice to include either use alleged by the Council would cause injustice to its recipients as those alleged uses would substantially change and add to the original allegation. The building's use as an annexe ancillary to the dwellinghouse would not constitute a material change of use of the land, and the notice does not require the removal of any features which would facilitate its use as an annexe, in the event that its height is lowered. I shall therefore correct the notice by removing the text 'and unauthorised use' from the

description of the alleged breach of planning control, and by removing the second requirement of the notice.

4. The appellant's submissions refer to the Council's officer report for an application for a Lawful Development Certificate for existing development¹ (LDC) previously submitted by the appellant in respect of the building the subject of the enforcement notice. The officer report, which pre-dates the enforcement notice, refers to the building as being erected more than 4 years previously. I have not been provided with any evidence which supports this view, and the Council has subsequently advised that the building is 'fresh development requiring planning permission'.
5. The conflicting opinions expressed by the Council and the lack of evidence submitted by the appellant in respect of when the building was erected lead me to doubt the accuracy of the LDC officer report. As the appellant has not made any clear or detailed claims relating to when the building was erected it has not been demonstrated, as a matter of fact and degree, that at the date the notice was issued no enforcement action could be taken. Consequently, had an appeal been made on ground (d) it would have failed.

Ground (c)

6. The appeal on this ground is that the matters alleged in the enforcement notice do not constitute a breach of planning control. The onus of proof is on the appellant. The appellant claims the structure the subject of the enforcement notice was constructed as a building incidental to the enjoyment of the dwellinghouse under the provisions of Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO), and that its subsequent use as an annexe did not constitute a material change of use requiring planning permission.
7. Class E permits buildings incidental to the enjoyment of a dwellinghouse, within the curtilage of that dwellinghouse, subject to limitations. No evidence has been provided to support the appellant's claim that the building was initially constructed as 'a garden building for domestic paraphernalia'. Furthermore, it has not been specified how long the building may have been used for such purposes, or the circumstances which led to a fully functional kitchen and shower room with toilet being installed and the building's first use as annexe accommodation.
8. An incidental use of the building would have been one which was functionally related to the primary use of the land as a dwellinghouse. If the building was erected as an annexe, it would not have qualified as a building incidental to the enjoyment of the dwellinghouse. A garden building used for the storage of domestic paraphernalia could have qualified as a building incidental to the enjoyment of the dwellinghouse, dependent on the nature of that use and whether it was reasonably required for such purposes. There is no evidence before me which demonstrates how the building was first used.
9. The appellant has referred to *Gabbitas v SSE & Newham LBC* [1985] JPL 630. In *Gabbitas* it was found that where there is no evidence to contradict or otherwise make an applicant's version of events less than probable, there is no good reason to refuse an LDC, provided the applicant's evidence alone is

¹ The Council's reference 21/00292/CLUE

sufficiently precise and unambiguous to justify the grant of an LDC on the balance of probability. As no evidence has been submitted by the appellant to support their claims with respect to the initial erection and use of the building, those claims lack precision and are ambiguous. For these reasons it has not been demonstrated, on the balance of probability, that the building was erected and first used for purposes incidental to the enjoyment of the dwellinghouse. As such, it has not been demonstrated that when the building was erected it fell within the description of development authorised by Class E.

10. In addition to the above, limitation E.1(e) of Class E states that development will not be permitted where the height of the building would exceed 2.5 metres in the case of a building within 2 metres of the boundary of the curtilage of the dwellinghouse. The building is within 2 metres of the boundary of the curtilage of the dwellinghouse and the main parties disagree as to where its height should be measured from. Both main parties were invited to measure the height of the building during my site visit, to demonstrate where their measurements were taken.
11. The Council's representative showed me the building measured 2.9 metres in height at a point on the eastern side of its front elevation, from the top of the immediately adjacent lawn level which appeared to be consistent with the remainder of the garden. The appellant's representative showed me the building measured 2.4 metres in height at a point on the western side of its front elevation, from the top of an immediately adjacent raised grassed mound. The raised grassed mound is not representative of the prevailing land levels and there is nothing to explain why it appears unnaturally higher.
12. The Government's Technical Guidance² advises that the height of any building claimed to fall under Class E should be measured from the highest ground level immediately adjacent to the building. The 'General Issues' section of the guidance explains: 'ground level is the surface of the ground immediately adjacent to the building in question, and would not include any addition laid on top of the ground such as decking. Where ground level is not uniform (for example if the ground is sloping), then the ground level is the highest part of the surface of the ground next to the building'.
13. I have also been referred to *McGaw v Welsh Ministers* [2020] EWHC 2588 (Admin), where it was found that the 'adjacent ground' from which the height measurement should be taken can include land which is backfilled to pre-existing land levels and does not have to be within the curtilage of the building.
14. Land levels in neighbouring gardens appear to broadly correlate with those of the appeal site, with the exception of the raised grassed mound. The ground of the appeal site is not sloping, as suggested by the appellant, but the raised grassed mound appears as an addition on top of the pre-existing ground level.
15. The appellant has claimed that because the GPDO does not specifically refer to the existing ground level, the ground level could be 'made up'. However, this view, with regard to the raised grassed mound, is not supported by *McGaw*. The appellant has not identified the other judicial authorities and appeal decisions they have alluded to in support of these claims, and as such I am unable to confirm their relevance.

² Permitted development rights for householders – Technical Guidance – Ministry of Housing, Communities and Local Government, September 2019

16. *McGaw* refers to land levels on a partially excavated site which were to be backfilled to pre-existing levels consistent with the adjacent land levels in a neighbouring property. That is quite different to land levels being raised up beyond their existing level, inconsistent with neighbouring levels, as appears to be the case with the raised grassed mound. Indeed, at paragraph 29 of *McGaw* HH Judge Jarman QC comments that taking existing ground levels for the purposes of calculating the height of a building may well be justified if backfilling was found to be a device to artificially raise the adjacent ground level so as to come within the relevant height limitation of Class E. That is what appears to have happened in this case, with the raised grassed mound having no clear purpose other than to artificially raise the ground level adjacent to the building. There is no evidence to suggest the raised grassed mound was backfilled to pre-existing land levels as part of the development.
17. Taking the height of a building from the top of an adjacent area of land which has been artificially raised above pre-existing land levels would give a misleading measurement. In the case of buildings claimed to accord with Class E, that approach would encourage the raising of areas of land immediately adjacent to buildings to circumvent limitation E.1(e), which seeks to control the size of permitted buildings.
18. On the evidence before me, and for the reasons set out above, I am not satisfied that the raised grassed mound is a true or fair representation of the ground level immediately adjacent to the building. I therefore find that the appellant has failed to demonstrate that the height of the building does not exceed 2.5 metres. Aside from the height of the building, it has not been demonstrated that the building was initially erected as a building incidental to the enjoyment of the dwellinghouse. For these reasons I cannot conclude that the building was erected with the benefit of the planning permission granted by Article 3 and Schedule 2, Part 1, Class E of the GPDO.
19. The appeal on ground (c) must therefore fail.

Conclusion

20. For the reasons given above, I conclude that the appeal on ground (c) should not succeed, and I shall uphold the enforcement notice with corrections.

Formal Decision

21. It is directed that the enforcement notice is corrected by: (a) the deletion of the words 'and unauthorised use' at Section 3; and (b) the deletion of the words 'Cease all unauthorised use of the outbuilding' at Section 5. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld.

L Douglas

INSPECTOR