



Appeal Decision

Site visit made on 10 January 2023

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27TH JANUARY 2023

Appeal Ref: APP/D5120/X/22/3295610

2 West Heath Road, London, SE2 0RX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr and Mrs I Khun Khun against the decision of the Council of the London Borough of Bexley.
 - The application ref 21/02509/LDCP, dated 2 August 2021, was refused by notice dated 28 September 2021.
 - The application was made under section 192(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 erection of an L-shaped dormer.
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. Whether an LDC should be issued in respect of the proposed development is strictly a matter of fact and law. Therefore, the Council's approach to a planning enforcement investigation and the handling of other applications concerning the appeal property can have no bearing on my decision.

Main Issue

3. The main issue in this appeal is whether the Council's refusal to grant an LDC for the proposed L-shaped dormer was well-founded. This turns on whether the appellant has shown that, on the balance of probability, planning permission is granted for the proposed dormer by Article 3, Schedule 2, Part 1, Class B of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO).

Reasons

4. The property contains a two storey semi-detached dwelling. At the rear of the dwelling is a two storey outrigger, with a two storey flat roof extension and further single storey extensions. At the time of the application an L-shaped dormer was already present on the rear and side-facing roof slopes of the dwelling. An enforcement notice attacking works including the unauthorised dormer was upheld at appeal in February 2020¹. The proposed dormer would replace the unauthorised structure and would occupy most of the dwelling's rear-facing roof slope, as well as the side-facing roof slope of the outrigger.

¹ Appeal Ref: APP/D5120/C/19/3227448.

5. The GPDO at Article 3, Schedule 2, Part 1, grants planning permission for certain development within the curtilage of a dwelling. This includes in Class B the enlargement of a dwelling consisting of an addition or alteration to its roof, where the limitations and conditions in paragraphs B.1 and B.2 are met. However, Article 3(5)(a) of the GPDO provides that the above planning permission shall not apply where, in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful.
6. Article 3(5)(a) does not only relate to where, for example, a new dwellinghouse has been erected without planning permission or not in accordance with the approved drawings. In Article 2(1) of the GPDO, the definition of a 'building' includes part of a building, whilst 'existing' in relation to a building means existing immediately before the carrying out of development. Therefore, Article 3(5)(a) can apply to an existing building which, as in this case, has been enlarged unlawfully. Relevant case law² confirms that where building operations involved in the construction of any part of an existing building are unlawful, the rights granted by the GPDO in connection with that building cannot apply. The Court's interpretation of Article 3(5)(a) is of wider application than the individual circumstances of that case and is of direct relevance to this appeal.
7. I acknowledge that the application is forward-looking, erection of the proposed dormer being predicated upon removal of the unauthorised structure. It is entirely possible that the building operations proposed at the property would have been lawful following the removal of the unauthorised dormer and all of the enforcement notice requirements had been complied with. Also, I am aware that the unauthorised dormer has since been removed and that following a further application, the Council have issued an LDC for works including a proposed L-shaped dormer³.
8. Even so, the starting point for determining whether planning permission is granted by the GPDO has to be the existing building at the time of the application, not the theoretical condition of the building at some subsequent date. There is no provision in the Act for determining the lawfulness of a development that, as in this appeal, is contingent on other prospective works being undertaken at some future date before it can commence. At s192(2) the Act provides that it is whether the operations described in the application would be lawful '*if instituted or begun at the time of the application*' that is relevant when determining whether an LDC should be issued. Also, the National Planning Practice Guidance advises that when determining an application for a prospective development under s192 of the Act, the relevant question is whether, if the proposed operation had commenced on the application date, it would have been lawful for planning purposes⁴.
9. At the time of the application, the existing building would clearly have included the unauthorised dormer. The unauthorised structure would have had to be removed before works on the proposed dormer could commence. Approaching the application as if the unauthorised dormer had already been removed would not reflect pertinent facts in this case, as a part of the existing building would have had to be put to one side when considering the lawfulness of what is

² *Evans v SSCLG* [2014] EWHC 4111.

³ Council Ref: 22/00719/LDCP.

⁴ Paragraph: 009 Reference ID: 17c-009-20140306.

proposed. Consequently, at the time of the application part of the existing building was not lawful and Article 3(5)(a) prevented the proposed dormer from benefitting from the planning permission granted by the GPDO.

10. Moreover, to meet the condition in Class B paragraph B.2(b), the proposed dormer would have to be set back a minimum of 0.2 m from the eaves of the original roof, measured along the roof slope from the outside edge of the eaves. The side elevation drawing accompanying the application does not clearly show that the proposed dormer would be set back from the outrigger roof eaves by the required distance. Therefore, I am not persuaded that the proposed dormer would meet the condition in paragraph B.2(b). Development which exceeds one or more of the Class B limitations and conditions cannot benefit from the planning permission granted by the GPDO in any event.
11. Accordingly, on the balance of probability the appellant has been unable to show that the proposed dormer is granted planning permission by the GPDO at Article 3, Schedule 2, Part 1, Class B. It follows that the proposed dormer would not be lawful if its erection had commenced at the time of the application.

Conclusion

12. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of an L-shaped dormer 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.

Stephen Hawkins

INSPECTOR