



Appeal Decisions

Site visit made on 13 June 2023

by Alexander Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 July 2023

Appeal C Ref: APP/W2465/X/22/3307936

22 Avoca Close, Leicester LE5 4RA

- 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 Muhammad Kharodia against the decision of Leicester City Council.
- The application ref 20220278, dated 8 March 2022, was refused by notice dated 25 April 2022.
- 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 a single storey extension at rear of dwellinghouse of dimensions: 6 metres beyond the rear wall of the original dwellinghouse; maximum height 4 metres; height of the eaves 3 metres (Class C3). Includes internal alterations.

Summary Decision: The appeal is dismissed.

Appeal A Ref: APP/W2465/C/22/3307934

22 Avoca Close, Leicester LE5 4RA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Muhammad Kharodia against an enforcement notice issued by Leicester City Council.
- The notice was issued on 22 September 2022.
- The breach of planning control as alleged in the notice is construction of two and single storey extension to the rear of the property.
- The requirements of the notice are to:
 1. Reduced the single storey element of the two storey and single storey rear extension to 3m.
 2. Clear all debris from the site.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, following correction, and planning permission is granted in the terms set out below in the Formal Decision.

Appeal B Ref: APP/W2465/C/22/3307935

22 Avoca Close, Leicester LE5 4RA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mrs Ronika Kharodia against an enforcement notice issued by Leicester City Council.
- The notice was issued on 22 September 2022.
- The breach of planning control as alleged in the notice is construction of two and single storey extension to the rear of the property.

- The requirements of the notice are to:
 3. Reduced the single storey element of the two storey and single storey rear extension to 3m.
 4. Clear all debris from the site.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, following correction, and planning permission is granted in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by Mr Muhammad Kharodia against Leicester City Council in relation to Appeal A and Appeal B. This application is the subject of a separate Decision.

Procedural Matters

2. The 3 appeals before me relate to the same site and appellants. Furthermore, my findings in relation to Appeal A have a direct bearing on my findings in relation to the grounds of appeal in Appeal B and Appeal C. As such, and to avoid duplication, I have dealt with the decisions together.
3. The description of the development for which an LDC is sought under Appeal A refers to the construction of a single-storey extension to the rear of the appeal property. From the evidence before me, the appellant is seeking to establish that the extension was built in accordance with the prior approval notification application, ref 20191261, for which the Council confirmed that prior approval was not required. I have therefore considered Appeal A on this basis.

The Notice – Appeal B and Appeal C

4. On an appeal, any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellants or local planning authority. Both parties were given the chance to comment on the intended corrections to the requirements.
5. An enforcement notice must tell the recipient clearly what they have done wrong and what they are required to do or abstain from doing. Thus, the requirements should not introduce uncertainty. Requirement 1 under paragraph 5 of the notice states 'Reduce the single storey element of the two storey and single storey rear extension to 3m'. However, it is not clear what is meant by '...to 3m'. This could be interpreted as a number of things, for example 'reduce the height/depth/width to 3m' or '... to 3m from a boundary fence/window/two storey extension'. Consequently, on the face of it, it is not clear what steps the recipient of the notice needs to take in order for them to have reasonable certainty that they have complied with the requirement.
6. Notwithstanding the above, the reasons for issuing the Notice state that the depth of the single storey extension is the cause of the harm. There is no dispute between the parties that '...to 3m' relates to the depth of the extension and that the Notice could be corrected to reflect this.

7. I am mindful of the comments made by Upjohn LJ in *Miller-Mead*¹ that the recipient of an enforcement notice is entitled to find out from within the four corners of the document exactly what he is required to do or abstain from doing. In this context, within the four corners of the Notice, it is clear to the recipient what steps they need to take.
8. Furthermore, Requirement 2 under paragraph 5 of the notice states 'Clear all debris from the site'. Again, there is some uncertainty over what debris the notice is seeking to have cleared. However, based on the evidence before me, it is clear that the debris referred to is that which would be created by compliance with requirement 1.
9. Given the above, I intend to correct the Notice to delete requirements 1 and 2 and replace them with:
 1. Reduce the single storey element of the two storey and single storey rear extension to 3m in depth.
 2. Clear all debris, as a result of the works undertaken to comply with requirement 1, from the site.
10. I consider that I can carry out these corrections without injustice to any parties.

Appeal A

Main Issue

11. The main issue is whether the Council's decision to refuse to grant a lawful development certificate (LDC) was well-founded.

Reasons

12. The onus is on the appellant to demonstrate that, on the balance of probabilities, the development subject of the application is lawful for the purposes of section 191 of the 1990 Town and Country Planning Act (the Act). If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.
13. Planning permission was granted for a two-storey extension on 1 July 2019². A prior approval notification application³ was then submitted to the Council on 3 July 2019 for a single-storey extension at rear of dwellinghouse of dimensions: 6 metres beyond the rear wall of the original dwellinghouse; maximum height 4 metres; height of the eaves 3 metres (Class C3). The application including a block plan showing the footprint of the proposed extension. On 30 July 2019, the Council confirmed that prior approval was not required for the extension.
14. The Council's reasons for refusing to grant the LDC are that the single-storey extension has not been built in accordance with the details submitted with the prior notification application in that the maximum height of the extension is

¹ *Miller-Mead v MHL* [1963] 2 WLR 225

² Council Ref: 20190819

³ Council Ref: 20191261

3.65m and not 4m as set out in the application. Also, the single-storey extension and the two-storey extension were constructed as a single operation with no separation between them.

15. Article 3, Schedule 2, Part 1, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) provides permitted developments rights for the enlargement, improvement or other alteration of a dwellinghouse, subject to a number of conditions and limitations.
16. For development comprising a single-storey extension that would not extend beyond the rear wall of an original dwelling, that is not detached, by more than 4m but no more than 6m, Condition A.4.(2) states:

'Before beginning the development the developer must provide the following information to the local planning authority—

(a) a written description of the proposed development including—

... (ii) the maximum height of the enlarged part of the dwellinghouse;...
17. The prior approval notification application form states that the maximum height of the proposed single-storey extension would be 4m. However, the maximum height of the extension as built is 3.65m.
18. The appellant contends that the term 'maximum height' should be interpreted as the maximum height the roof of the extension would be and therefore, by implication, the height of the extension could be any height providing it does not exceed this height.
19. Limitation A.1.(g) already limits such extensions to no more than 4m in height. The requirement to include the maximum height of the enlarged part of the dwellinghouse as part of the prior approval notification application under condition A.4.(2)(a)(ii) would therefore be superfluous if it could be interpreted as meaning that no part of the extension would be more than 4m in height. Moreover, A.4.(2)(a)(ii) does not necessarily relate to the height of the roof. It covers any part of the enlarged part of the dwellinghouse, which may include, for example, a chimney. Accordingly, the maximum height means the highest part of the extension.
20. Condition A.4.(11)(b), states 'The development must be carried out...(b) where prior approval is not required, or where sub-paragraph (10)(c) applies, in accordance with the information provided under sub-paragraph (2), unless the local planning authority and the developer agree otherwise in writing.' The maximum height of the extension is not 4m, as identified that it would be in the prior approval notification application. There is no evidence before me that the Council and the appellants have agreed in writing that the maximum height of the single storey extension would be 3.65m. Consequently, the extension breaches Condition A.4(11)(b).
21. As I have found that the single-storey extension is unlawful by way of being in breach of Condition A.4(11)(b) I need not consider whether the single-storey extension and the two-storey extension were constructed as a single operation as, regardless of my findings on this matter, it would not be lawful.

22. Taking account of the above factors, and having regard to all other evidence before me, I conclude that, as a matter of fact, the extension does not comply with Condition A.4(11)(b) of Class A, Schedule 2, Part 1 of the GPDO. Therefore, the development for which a certificate is sought is not authorised by the GPDO, and therefore cannot be certified as development that was lawful on the relevant date.

Conclusion on Appeal A

23. For the reasons given above the Council's refusal to grant an LDC in respect of the use of the application site for a single storey extension at rear of dwellinghouse of dimensions: 6 metres beyond the rear wall of the original dwellinghouse; maximum height 4 metres; height of the eaves 3 metres (Class C3) at 22 Avoca Close, Leicester LE5 4RA was well-founded and the appeal fails. The powers transferred in section 195(3) of the 1990 Act as amended have been exercised accordingly.

Appeals B and C - the ground (c) appeal

24. The appeal on ground (c) is whether, on the balance of probabilities, the matters alleged in the Notice do not constitute a breach of planning control. The burden of proof is upon the appellant.
25. The ground (c) appeal is advanced on the basis that the single-storey extension was built in accordance with the details submitted with the prior approval notification application and is therefore lawful. The conclusion reached above for Appeal A is that the extension was not built in accordance the details submitted with the prior approval notification application and therefore is not lawful.
26. It therefore follows that the ground (c) appeal must fail.

Appeals B and C - the ground (a) appeal and the deemed planning application

Preliminary Matter

27. Planning permission is sought for the construction of a two and single storey extension to the rear of the property. Under their ground (f) appeal the appellants seek to reduce the single-storey element of the extension to a depth of 3.65m and not 3m as required by the Notice.
28. Section 177(1)(a) of the Town and Country Planning Act 1990 (the Act) only allows the grant of planning permission in respect of matters stated in the Notice as constituting a breach of planning control "whether in relation to the whole or any part of those matters". The reduction in the depth of the single-storey extension to 3.65m would be part of the matters alleged in the Notice and therefore can be considered under s177(1)(a).

Main Issues

29. The main issues are
- the effect of the development on the living conditions of the occupants of the neighbouring residential property, 20 Avoca Close, with particular regard to outlook and daylight; and

- whether there are material considerations sufficient to outweigh any conflict with the development plan and any other harm arising from the development.

Reasons

Living Conditions

30. The appeal property is a semi-detached dwelling and adjoins 20 Avoca Close, which is similar in scale and design, excluding the rear extensions on the appeal property.
31. The matters alleged in the Notice include the two-storey and single-storey elements of the rear extension. However, the Council raise no objection to the two-storey element and based on the evidence before me I find no reason to conclude otherwise. Accordingly, my consideration of the ground (a) appeal and the deemed planning application has been based on the effect of the single-storey element only.
32. The single-storey extension lies adjacent to the boundary with No 20 and extends approximately 6m from the rear elevation of the pair of semis. No 20 has a large window in the rear elevation that the Council confirm serves a habitable room. This window is very close to the boundary and the flank side elevation of the extension. As a result of the extension rising substantially above the boundary fence, projecting a significant distance along the boundary and being in such close proximity to this window, it would significantly dominate the outlook from the room this window serves, resulting in an unacceptable overbearing impact on the occupants of the property.
33. For the same reasons, the amount of daylight entering this neighbouring window would have been significantly reduced as a result of the erection of the single-storey extension, to the extent that it would have an unacceptably detrimental effect on the occupants of the property. This harm would be exacerbated by the orientation of the extension, resulting in the window likely to be cast in shadow for much of the day.
34. The Leicester City Council Residential Amenity Supplementary Planning Document 2008 (the SPD) sets out a 45 degree rule to ensure rear extensions do not result in undue loss of daylight or outlook for neighbouring residents. It states that a single-storey rear extension deeper than 3m on or close to the boundary should not go beyond a line taken at 45 degrees from the centre of the ground floor window of any principal room in an adjoining property. The single-storey extension clearly breaches this rule. Whilst the SPD is guidance only, and there may be circumstances where a breach of the 45 degree rule may be acceptable, I do not find that to be the case in this instance.
35. Whilst the SPD is of some age and pre-dates the introduction of permitted development rights for large rear extensions, it nevertheless provides useful guidance on assessing the effects of extensions on living conditions. In this instance, I have found that the extension requires planning permission and therefore the SPD is a relevant consideration. The fact that it is not applicable as part of the prior approval notification process does not make it inconsistent with the GPDO.

36. I have also considered the appellants' proposed reduction of the depth of the single-storey element to 3.65m. The effect of such on the living conditions of the occupants of No 20 would be reduced in comparison to the current 6m depth, with regard to outlook and daylight. However, due to its proximity to the neighbouring window, its height significantly rising above the boundary fence and it still projecting some distance from the rear elevation of the dwelling, I find that the proposed 3.65m depth would still be unacceptably harmful to the living conditions of the occupants of No 20, with regard to outlook and daylight.
37. I acknowledge the two-storey extension was granted planning permission with the previous conservatory in situ, which the appellants contend had a depth of 3.65m. However, based on the evidence before me, the conservatory was set further back from the boundary and the eaves were lower than the existing single-storey element of the extension. Consequently, the conservatory would likely have had a significantly lesser effect on the living conditions of No 20 with regard to outlook and daylight compared to the proposed reduction of the existing extension to a similar depth.
38. I have had regard to the letters of support for the development, including from the occupants of No 20. However, my consideration of the effects of the development has been based on the living conditions of existing and future occupants.
39. I find therefore that the single-storey element of the extension significantly harms the living conditions of the occupants of No 20, with regard to outlook and daylight. This harm would not be sufficiently overcome were the extension to be reduced to 3.65m in depth. As such, it is contrary to saved Policy PS10 of the City of Leicester Local Plan 2006, which, amongst other matters, seeks to ensure development takes in account the amenity of neighbouring residents. It would also fail to comply with the guidance set out in the SPD. Furthermore, it would fail to accord with paragraph 130 of the National Planning Policy Framework, which seeks to ensure development provides a high standard of amenity for existing and future users.

Other Considerations – the fall back position

40. The appellants contend that they could implement the development that was the subject of the prior approval notification, which would in fact be higher than the existing and therefore likely to have a greater effect on the living conditions of neighbouring residents.
41. Given that such an extension would be higher than the existing, it is reasonable to conclude that it would have a greater effect on the living conditions of the neighbouring residents of No 20, with regard to daylight and outlook.
42. The Council do not dispute that the prior notification development could be constructed were the appeal to be dismissed. However, they argue that the cost of doing so would be so expensive that there is not a real prospect of it happening.
43. I accept that the cost of building an extension in accordance with the prior notification application would be expensive, particularly as the existing extension would have undoubtedly been costly to build. However, the

appellants have previously submitted a prior notification application for an extension and gone as far as to build what they considered to be said extension. Therefore, they evidently seek to extend their property in such a manner. In the event that I dismiss the appeal, they have confirmed that they would consider erecting the extension under permitted development rights, regardless of the costs.

44. Therefore, it has been sufficiently demonstrated that there is a likelihood or real prospect of such an extension being built in the event that I dismiss the appeal. I attribute substantial weight to this fall back position.

Planning Balance

45. I have found that the single-storey element of the extension significantly harms the living conditions of the occupants of 20 Avoca Close and therefore conflicts with the development plan.
46. However, it has been demonstrated that there is a more harmful fall back position for which there is a likelihood or real prospect of being implemented in the event I dismiss the appeal. I find that this fall back position is a material consideration that outweighs the harm to the living conditions of the neighbouring occupants and justifies allowing the appeal despite the conflict with the development plan.

Conditions

47. I have considered the imposition of appropriate planning conditions, having regard to the six tests set out in the Framework. The Council have not suggested any conditions to be imposed in the event I allow the appeal. Based on the evidence before me and the observations I made on site, I find no reason to conclude otherwise.

Conclusion on the ground (a) appeal and the deemed planning application

48. For the reasons given above, having considered the development plan as a whole and all material considerations, the ground (a) appeal and the deemed application should succeed and planning permission will be granted for the development described in the Notice, subject to conditions set out in the formal decision. The enforcement Notice will be quashed.
49. Given the success on the ground (a) appeals there is no need to go on to consider the ground (f) appeals.

Formal Decision

Appeal A

50. The appeal is dismissed.

Appeal B and Appeal C

51. It is directed that the enforcement notice is corrected by:

- a) The deletion of requirement 1 under paragraph 5 and substituting "Reduce the single storey element of the two storey and single storey rear extension to 3m in depth".

- b) The deletion of requirement 2 under paragraph 5 and substituting "Clear all debris, as a result of the works undertaken to comply with requirement 1, from the site"

52. Subject to the corrections, the appeals are allowed, the enforcement notice is quashed and planning permission is granted on the applications deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the construction of two and single storey extension to the rear of the property at 22 Avoca Close, Leicester LE5 4RA as shown on the plan attached to the notice.

Alexander Walker

INSPECTOR