



Appeal Decision

Site visit made on 30 August 2023

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date 11 September 2023

Appeal Ref: APP/A5270/X/22/3301542

17 Old Oak Road, London W3 7HN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Miles Samaratne against the decision of the Council of the London Borough of Ealing.
 - The application Ref 216418CPL, dated 5 November 2021., was refused by a notice dated 10 December 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 basement extension within original footprint of dwellinghouse.
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Decision

1. The appeal is dismissed.

Main Issue

2. Section 192(2) of the Town and Country Planning Act 1990, as amended (1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or began at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The planning merits of the proposed development are not relevant in this appeal and the burden of proof is on the appellant to make out their case on the 'balance of probabilities'. The main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded.

Reasons

3. The appeal property is a substantial two storey semi-detached dwelling with rooms in the roof. It has a generous rear garden which extends beyond a raised patio.
4. The proposed development is described as a basement extension within the original footprint of the dwelling. The existing plans show that there is an existing space within the property at lower ground level. However, that space is only accessible by a hatch in the floor, beneath the staircase in the ground floor entrance hall. I observed on my site visit that this space has a restricted head height of approximately 1.3metres and is not habitable.

5. The proposal is to excavate the existing lower ground floor to a depth 2.7m below ground floor level, construct an internal staircase to access it and create a number of rooms within the basement to provide a cinema/TV room; storage/utility room; WC; and a playroom, all served by a central lobby. No lightwell or window openings are proposed. There is no dispute that the works would be development as defined in Section 55 of the 1990 Act. The matter in dispute is whether the proposal would be permitted by any general development order.
6. The appellant contends that the proposed development is an enlargement, improvement or other alteration of a dwellinghouse and is permitted by Class A, Part 1, Schedule 2 of Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order, 2015, as amended (GPDO). The Council argue that the development would require significant engineering operations to both the host dwelling and neighbouring property which amount to a separate activity of substance, and that such works are not permitted by the GPDO.
7. In support of their case the Council have referred to the case of *Eatherley v London Borough of Camden & Ireland* [2016] EWHC 1861 Admin. This case involved a proposed basement enlargement of a dwellinghouse, where the Court held that the excavations and underpinning involved amounted to a separate activity of substance from the construction of the basement which would follow. The judgement upheld the decision of *West Bowers Farm Products v Essex County Council* [1985] 50 P & CR 368, where the Court held that the excavation of sand and gravel to create a reservoir to serve a farm constituted a separate operation for which there was no deemed planning permission under the GPDO for those works.
8. In *Eatherley*, the Court held that the appropriate question to be asked was whether the engineering operations required were a separate activity of substance, and that the assessment was a matter of planning judgement.
9. It is clear from the application plans that the space beneath the building would need to be increased by over 100% to allow for the construction of the basement. From observations on my site visit, it seems to me that the existing void has been created because of the depth of the existing foundations, the existing dwelling being constructed on sloping land. I have not been provided with any evidence that those existing foundations extend to the depth required to construct the basement proposed. In conjunction with the excavation of a considerable volume of ground and soil, an engineering operation with material planning impacts in terms of noise, dust, impact on ground water and associated traffic movements, there would be extensive works of structural support required for both the host building and indeed the adjoining property, which shares a party wall. Those works would all need to take place before the works on the construction of the basement could commence. That said, and in the absence of any substantive evidence that would lead me to a different conclusion, it seems to me that the development proposed would involve two activities, each of substance, such that one is not merely ancillary to the other.
10. The proposed "*basement extension*", which I have found involves a separate activity of substance (i.e. engineering operations required to excavate and support the building), does not benefit from any permitted development rights granted under the GPDO. Nor do the works have express planning permission.

Conclusion

11. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a proposed basement extension within original footprint of dwellinghouse was well founded, and that the appeal should fail. I will exercise the powers transferred to me in section 195(3) of the 1990 Act.

Elizabeth Pleasant

INSPECTOR