



Appeal Decision

Site visit made on 18 September 2023

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date 19 October 2023

Appeal Ref: APP/X5990/C/22/3306623

The buildings and associated land at 55 Avenue Road, London NW8 6HR

- 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 Yarborough Management Ltd against an enforcement notice issued by City of Westminster Council.
- The enforcement notice was issued on 11 August 2022.
- The breach of planning control as alleged in the notice is Without the requisite planning permission and within the last 4 years, the installation of a metal structure at the rear of the Property, shown outlined red in Photographs A and B, and associated fixtures, fixings and cabling.
- The requirements of the notice are Remove from the Property the black metal structure supporting retractable awnings and four external heaters, shown outlined red in Photographs A and B, together with all associated fixtures, fixings and cabling.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

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

Preliminary Matter

1. The appeal form indicated that the appellant intended to make an appeal on ground (a). However, the appellant later confirmed in written correspondence that they only wished to appeal on grounds (c), (f) and (g), and so I deal with these grounds below.

The appeal on ground (c)

2. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control.
3. The appellant argues that there is no breach of planning control on the basis that the metal item attacked by the notice is permitted development ('PD') pursuant to the Town and Country Planning (General Permitted Development) (England) Order 2015 ('GPDO').
4. The operational development attacked by the notice is an 'E' shaped metal frame supporting retractable awnings on each side. It is located in the rear garden of the dwelling but is not attached to the rear wall of the house. It

measures some 3.5m in height according to the Council and immediately abuts both side boundaries.

5. The appellant first submitted that the object is PD under Class A of Schedule 2, Part 1, which relates to the enlargement, improvement or other alteration of a dwellinghouse, citing case law¹ in support of this position. In my view, as the metal object is not attached to the dwelling, it does not represent an improvement 'of' the dwellinghouse and so does not fall to be considered under Class A.
6. The Council assessed whether the metal object is PD under Class E of Schedule 2, Part 1 to the GPDO. This permits buildings, enclosures and other limited items which are incidental to the enjoyment of the dwellinghouse, subject to specified limitations and conditions. The Council is satisfied that the metal object would comply with the conditions and limitations contained in Class E save as regards the height limitations at E.1(e), which I return to below.
7. As regards Class E, the appellant submitted that the object is an 'enclosure'. In my view, it is not an enclosure as it provides no function of enclosure at ground level. In any event, as the Council highlights, the GPDO definition of a 'building' includes 'any structure or erection'² and so is wide enough to encompass the metal object attacked by the notice as described above.
8. Turning to the height limitations in E.1(e) then, this subsection states that development is not permitted by Class E if:
'the height of the building, enclosure or container would exceed—
 - i. '4 metres in the case of a building with a dual-pitched roof,*
 - ii. 2.5 metres in the case of a building, enclosure or container within 2 metres of the boundary of the curtilage of the dwellinghouse, or*
 - iii. 3 metres in any other case;'*
9. The appellant argues that E.1(e)(i) to (iii) are alternatives and that the metal structure falls to be assessed only under (i) on the basis that it is a building with a dual-pitched roof. It is submitted thus that the relevant height limit is 4 metres, regardless of the fact that the metal structure falls within 2 metres of the boundary of the curtilage of the dwellinghouse.
10. My reading of the E.1(e) limitation is that development is not permitted by Class E if *any* of the height restrictions at (i) to (iii) are breached. This is consistent with how the whole of the E.1 paragraph is structured i.e. development is not permitted if it breaches *any* of the limitations in E.1(a),(b), (c), (d), (e), (f), (g), (h), (i), (j) 'or' (k). The use of the term 'or' is thus indicative that development is non-compliant with Class E if *any* of the subsections (a) to (k) are breached. The same is therefore true if any of the E.1(e)(i), (ii) or (iii) height limitations are breached.
11. Further, as outlined above, 'building' is a defined term in the GPDO and is defined as including 'any structure or erection'. In E.1(e)(i), the use of the wording 'with a dual-pitched roof' necessarily restricts the 'building' definition here to only those structures or erections which have dual-pitched roofs. The

¹ Cowen v Secretary of State for the Environment and Another (2000) 79 P.& CR 4

² Article 2(1) to the GPDO

same is not true of the E.1(e)(ii) height restriction. This refers to the term 'building' but there is no qualification to this term. As such, the definition of 'building' in Article 2(1) as 'any structure or erection' applies to E.1(e)(ii) without restriction. Consequently, the 2.5m height restriction applying within 2 metres of the boundary of the curtilage of the dwellinghouse applies to *any* structure or erection; there is no indication that this excludes dual-pitched roof buildings.

12. Thus, E.1(e)(i) applies to dual-pitched roof buildings which are not within 2m of the boundary; E.1(e)(ii) applies to *any* building within 2m of the boundary; and E.1(e)(iii) applies to buildings not having a dual-pitched roof and which are not within 2m of the boundary. If any of these height limitations is breached, the development will not be PD under Class E.
13. Indeed, bearing in mind that the only measurable fixed size limitations in E.1 are in relation to height³, it would seem logical that the height limitation at E.1(e)(ii) regarding objects within 2 metres of the boundary of the dwelling would apply irrespective of whether the building had a dual-pitched roof. Otherwise, this would potentially allow 4m high dual-pitched roof buildings with very large footprints immediately adjacent to a boundary without a specific grant of planning permission.
14. At some 3.5m in height and immediately abutting both side boundaries, the metal structure attacked by the notice does not comply with the height limitation in E.1(e)(ii). It is therefore not PD under Class E and does not benefit from a specific grant of planning permission. It is a breach of planning control, and the ground (c) appeal fails.

The appeal on ground (f)

15. This ground of appeal is that the requirements of the notice exceed what is necessary.
16. Section 173 of the Town and Country Planning Act 1990 indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first is to remedy the breach of planning control which has occurred; the second is to remedy an injury to amenity which has been caused by the breach. The fact that the notice in this case requires removal of the black metal structure and associated items suggests that its purpose is to remedy the breach of planning control since compliance with the notice has the effect of restoring the land to its condition prior to the breach.
17. Under the ground (f) appeal, the appellant makes various planning merits submissions in relation to the appeal development. However, where there is a ground (f) appeal but no appeal on ground (a) and the purpose of the notice is to remedy the breach, general planning considerations or arguments about amenity cannot be considered; the ground (f) appeal does not provide an alternative route for obtaining planning permission. This also means that I cannot take into consideration representations from interested parties related to planning merits.

³ With E.1(b) only restricting the footprint of the development by reference to the total ground already covered by buildings, enclosures and containers within the curtilage of the dwelling, rather than a fixed size restriction measurable in metres.

18. The appeal on ground (f) is therefore limited here to whether, as a matter of fact, the steps in the notice go beyond what is necessary to restore the land to its condition before the breach took place. Whilst I acknowledge that the planning enforcement regime is remedial and not punitive, the costs and inconvenience of complying with the notice do not justify retention of the appeal structure as this plainly would not represent a lesser step that would remedy the breach.
19. The appellant has though submitted detailed evidence in relation to the cost and inconvenience of the works comprised in the requirements, with particular regard to potential damage to the garden slab over the basement. The Council has indicated a potential lesser step which seeks to reduce this cost and inconvenience. This is that the requirements of the notice could be modified to stipulate only the removal of 'above-ground' associated fixtures, fixings and cabling.
20. The Council argues that such a lesser step is not necessary on the basis that at the time of its visit in August 2021, the metal structure was not in place, but foundations of the hardstanding had been installed. It is submitted thus that installation of the metal structure did not require adjustment to the structural integrity of the building envelope and consequently removal of the structure would not impact upon structural integrity.
21. However, evidence from the appellant's contractor states that the metal structure is 'prohibitively difficult to remove' since it is 'incorporated with the ground slab'. It is explained that the slab over the basement is part of the building envelope and that removal of the metal structure from it may cause issues with structural integrity. It is also submitted that the slab waterproofing would be at risk by removal of the metal columns and that reintegrating patches to the waterproofing barriers would risk water ingress.
22. Whilst the appellant has not commented on whether this lesser step would reduce the cost and inconvenience of compliance, based on the appellant's evidence above this seems probable. Given the evidence that the metal frame is incorporated with the ground slab, in my view the variation proposed would not alter the substance of the notice in its purpose to remedy the breach of planning control and would not turn the notice into something that requires less than remedying the breach of planning control.
23. Since the appellant has not commented on whether this variation would indeed result in less cost and disruption, I shall couch this as an alternative requirement. Then, if the appellant instead wished to remove all below-ground fixtures, fittings and cabling as well as those above ground, it would be clear that this would be in compliance with the notice requirements. The ground (f) appeal succeeds to this limited extent, and I shall vary the notice accordingly.

The appeal on ground (g)

24. The appeal on ground (g) is that the period for compliance with the notice falls short of what is reasonable.
25. The appellant requests 'a minimum period' of 24 months for compliance to enable a planning application to be prepared and submitted, and potentially for an appeal and legal challenge if required. Correspondence from the appellant's

contractor indicates that the works required would be likely to take 'up to and beyond 6 months'.

26. As regards the compliance time being extended to facilitate a planning application for the appeal development, it would not be reasonable to extend the time for compliance in a ground (g) appeal to enable an application for planning permission when this could have been made as a ground (a) appeal.
27. Whilst the appellant's contractor does not detail how long beyond 6 months would likely be necessary to complete the works specified in the notice, there is no substantive evidence that these would be so complex as to require a 24 month compliance period. In my view, a period of 9 months would allow some flexibility beyond the 6 months indicated by the appellant's contractor and would also factor in some time for arranging the works. The ground (g) appeal succeeds to this extent, and I shall vary the notice accordingly.

Conclusion

28. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations.

Formal Decision

29. It is directed that the enforcement notice is varied by:

- In paragraph 5 deletion of the wording from and including 'Remove' to and including 'cabling.' and substitution of:

'Remove from the Property the black metal structure supporting retractable awnings and four external heaters, shown outlined red in Photographs A and B, together with all associated fixtures, fixings and cabling; or

Remove from the Property the black metal structure supporting retractable awnings and four external heaters, shown outlined red in Photographs A and B, together with any associated above-ground fixtures, fixings and cabling.'
- and the substitution of 'nine months' as the time for compliance.

30. Subject to the variations, the appeal is dismissed and the enforcement notice is upheld.

V Bond

INSPECTOR