



Appeal Decision

Site visit made on 6 February 2024

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 February 2024

Appeal Ref: APP/B5480/C/22/3312423

130 Corbets Tey Road, Upminster RM14 2ED

- 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 Mr Mark McGhee against an enforcement notice issued by the Council of the London Borough of Havering.
 - The enforcement notice was issued on 4 November 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the installation of two air source heat pump/air conditioning units on an outbuilding in the rear garden.
 - The requirements of the notice are:
 - (i) Remove the two-air source heat / air conditioning pumps from the outbuilding;
 - AND
 - (ii) Remove all materials and debris from the site resulting from taking step (i).
 - The period for compliance with the requirements is 2 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. 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.
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Decision

1. It is directed that the enforcement notice is:
 - corrected by deleting the allegation within section 3 of the enforcement notice (the breach of planning control alleged) and its replacement with:

“Without planning permission, the installation of two air conditioning units attached to the outbuilding in the rear garden.”
 - corrected by deleting the existing requirements and replacing them with the following:
 - (i) Remove the two air conditioning units from the outbuilding; and
 - (ii) Remove all materials and debris from the site resulting from step (i).
2. Subject to these corrections, the appeal is dismissed, and the enforcement notice is upheld.

Procedural matters and matters concerning the notice

3. The site visit procedure was altered from an accompanied site visit to an access required site visit, as the Council Officer was not present when I arrived at the

appeal site during the pre-arranged time and date. Both parties were subsequently written to explaining the change in procedure. As such the appeal will be determined on this basis.

4. I have also dealt with another appeal (Ref: APP/B5480/C/23/3327970) on this site. That appeal is the subject of a separate decision.
5. The allegation referring to two air source heat pumps/air conditioning units is imprecise, and the appellant has provided evidence, comprising a letter from the company who installed the units which confirms that these are air conditioning (AC) units. No firm evidence has been provided by the Council to support the claim that the units are air source pumps. The appellant appears to have understood the allegation and the misdescription does not render the notice unclear. It is necessary however to correct the allegation to remove unnecessary words but retaining the effect of what the Council is trying to achieve. This would not cause injustice and I can therefore use my powers under the provisions of s176(1)(a) of the Act to make this correction.
6. The requirements of the notice should flow from and match the allegation. As a result of the above correction, it is also necessary to correct the requirements to require the removal of the 'two air conditioning units' from the outbuilding. These corrections clarify the allegation and the requirements, and I am satisfied that they do not cause injustice to party.

The appeal on ground (c)

7. Ground (c) arises where an appellant seeks to argue that the matters alleged by the enforcement notice do not constitute a breach of planning control. The onus of proof lies with the appellant, the relevant test of the evidence being the balance of probability.
8. Under s55(1) of the 1990 Act, 'development' comprises 'two limbs':
 - 1) The carrying out of building, engineering, mining, or other operations in, on, over or under land (operational development);
 - 2) The making of any material change in the use of any buildings or other land.
9. It is clear that the allegation is referring to 'operational development,' and that the installation of AC units relates to a 'building operation.' Operational development' comprises activities which result in some physical alteration to land which has some degree of permanence. The term 'building operations' is defined for the purposes of the 1990 Act in s55(1A) as including:
 - (a) demolition,
 - (b) rebuilding,
 - (c) structural alterations of or additions to buildings, and
 - (d) other operations normally carried on by a person in business as a builder. The list is not exhaustive.
10. S55(2)(a) of the 1990 Act excludes from the definition of development works for the maintenance, improvement, or other alteration of any building which:
 - (i) affect only the interior; or

- (ii) do not materially affect the external appearance of the building. (Materially affecting the external appearance means an impact capable of having some effect in planning terms.)
11. With regard to s55(2)(a)(i), the AC units do not affect only the interior of the building. Turning to s55(2)(a)(ii), the AC units have a utilitarian and functional appearance and is located close to the adjoining boundaries of both neighbouring properties and are clearly visible from both of these properties. As a matter of fact and degree, these works materially affect the external appearance of the building as a whole, and therefore are not exempt from the definition of 'development' under s55(2)(a).
12. A Certificate of Lawful Development application under s191 of the Act (LDC) was granted for an "outbuilding used for purposes incidental to the main dwelling"¹. The drawing which accompanied the application for the outbuilding also shows two air conditioning units fixed onto the side elevations of the structure. Therefore, the appellant contends that the two air conditioning units have been approved by the Council and are lawful.
13. S191(1) provides that if any person wishes to ascertain whether (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful – they may make an application for the purpose to the Local Planning Authority, specifying the land and describing the use, operations or other matter.
14. S191 of the Act is clear about what the certificate is granted for. In this case it was for the operations specified in the first schedule of the LDC, that being the "*Outbuilding used for purposes incidental to the main dwelling in accordance with the plan '20/03/PL1'*". This is made clear in the 'Notes' attached to the decision for the LDC which states:
- "1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990.
2. It certifies that the development specified in the First Schedule taking place on the land described in the Second Schedule was lawful, on the specified date and, therefore, was not liable to enforcement action under Part 7 of the 1990 Act on that date.
3. This certificate applies only to the extent of the development described in the First Schedule and the land specified in the Second Schedule and identified on the attached plan. Any development which is materially different from that described or relates to other land may render the owner or occupier liable to enforcement action."
15. Furthermore, section 5 of the application form for the LDC clearly sets out that the application is seeking a lawful development certificate for a "Garden Room". Under section 6 of the application form (Grounds for application of a Lawful Development Certificate), the form states "to clarify that the garden room does not require planning permission and is within permitted development rights". It was further stated that "the size, height and location of the garden room conforms to permitted development rights."

¹ Council ref: E0055.20.

16. The application form does not include any reference that the LDC application was being sought for two AC units. The Officer's Report for the LDC application further confirms that the Officer was considering the "outbuilding for purposes incidental to the enjoyment of the dwellinghouse," and there is no reference to AC units within the Officer's report and decision letter. Therefore, the AC units installed are materially different to the outbuilding which was found to be lawful in the LDC.
17. In any event, no conclusive evidence has been submitted to demonstrate that the installed AC units match those shown on the LDC drawings, and the appellant accepts that no exact dimensions for the AC units had been decided as the exact machinery had not been selected at the time of the LDC application. Indeed, from all the evidence submitted, and from my own observations during the site visit, the size of the units do not match the slenderer AC units shown on the drawings submitted with the LDC. Therefore, the AC units are not lawful.
18. I therefore find that, on the balance of probabilities, the matters stated in the notice amounts to a building operation for the purposes of s55 of the 1990 Act. Planning permission is required for this development. There is none in place, and the works are not permitted development. Therefore, based on all the evidence before me, there has been a breach of planning control and the appellant has not discharged the onus to demonstrate otherwise.
19. Accordingly, the appeal fails on ground (c).

Conclusion

20. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections.

R. Satheesan

INSPECTOR