



Appeal Decision

Site visit made on 27 September 2023 by S Wilson LL.B. MSc MRTPI

Decision by A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 March 2024

Appeal Ref: APP/T5720/X/23/3317063

7 Streatham Road, Mitcham, CR4 2AD

- 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 proposed lawful use or development (LDCP).
 - The appeal is made by Mr Tony Mitha against the decision of the Council of the London Borough of Merton.
 - The application ref 22/P2310, dated 26 June 2022, was refused by notice dated 24 January 2023.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which an LDCP is sought, is described as: 'Application for a lawful development certificate in respect of the proposed use and alterations of existing garden outbuilding as office space, gym, shower and storage.'
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Decision

1. The appeal is dismissed.

Appeal Procedure

2. The site visit was undertaken by an Appeal Planning Officer whose recommendation is set out below and to which the Inspector has had regard before deciding the appeal.

Preliminary Matters

3. The description of development was changed by the council and agreed in writing, by email, by the appellant's agent. I have therefore used the description of development as agreed by the parties as it appears in the header above.
4. The appeal outbuilding is subject to an enforcement notice which took effect 8 July 2019 and against which there is no registered appeal. The notice alleges the erection of an outbuilding intended to be used as independent self-contained living accommodation and requires that the building be demolished and all materials and debris resulting from compliance to be removed from the land. I will return to this matter later.
5. The appellants grounds of appeal document states that the appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) ("the Act"). Email communication between the parties agrees that this is an appeal against the refusal of an application under section 192(1)(b) of the Act. The appeal is made under section 195 against a refusal to grant a certificate of proposed lawful use or development (LDC).

6. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as a LDC application, is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. 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. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case. For the avoidance of doubt, the planning merits of the proposal are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the Act.

Main Issue

7. Whether the Council's refusal to issue a certificate was well founded.

Reasons for the Recommendation

8. The Council's reason for refusal was that the proposal would fail to comply with the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (the GDPO 2015) Schedule 2, Part 1, Class E.
9. In order to be successful in this appeal the appellant must show that the development would fall within the provisions of Schedule 2, Part 1, Class E of the GPDO 2015 (Class E), in that the proposed outbuilding would comply with the limitations of Class E, be within the curtilage of the dwellinghouse at 7 Streatham Rd (No.7) and for a purpose incidental to the enjoyment of that dwellinghouse. The Council appears to accept that the proposal is within the curtilage of No.7; would not exceed the limitations set out in E.1 (in terms of the height, location and proportion of the curtilage covered and other limitations). I have no reason to disagree.
10. The Council's reason for refusal is predicated on the size and scale of the proposed development and the lack of justification to demonstrate why it is not possible to accommodate some of the activities in the enlarged dwelling and lack of demonstration that the outbuilding is reasonably required for purposes incidental to the enjoyment of the main dwellinghouse. The Council concluded that the scale of the proposed outbuilding would mean that the use could not be considered as incidental to the enjoyment of the dwellinghouse.
11. The Council report sets out that the proposed development has a 58m² footprint and that the main dwelling has an 109m² footprint. There is no disagreement between the parties on this matter.
12. Case law has established that permitted development rights under Class E extend only to buildings required for a purpose incidental to the enjoyment of the dwellinghouse. An incidental use is one which is functionally related to the primary use. The functional relationship should be one that is normally found and not based on the personal choice of the user. Whether a building is required for an incidental purpose will depend on a fact and degree assessment.
13. The appellant states that the proposed uses of the building as a gym, office, storage and shower are all uses that may be considered incidental to a

residential use. All parties agree. However, the Council state that the cumulative size and scale of the proposed development, taking account of its function, is unreasonably large.

14. The Court in *Emin* (1989)¹ confirmed that regard should be had not only to the use to which the Class E building would be put, but also to the nature and scale of that use in the context of whether it was a purpose incidental to the enjoyment of the dwellinghouse. The physical size of the building in comparison to the dwellinghouse might be part of that assessment but is not by itself conclusive. It is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwelling and answer the question as to whether the proposed building is genuinely and reasonably required in order to accommodate the proposed use or activity and thus achieve that purpose. The use of the building should be subordinate to the use of the house as a dwellinghouse.
15. The appellant has not provided any evidence to justify the size and scale of the proposed development, or any of the proposed uses. The only statement addressing these matters is that the footprint of the outbuilding is subordinate to the house and that the uses meet the accepted uses for incidental use.
16. The dwellinghouse is a large, detached family home set over three floors, with ground floor and roof extensions. It has 6 good sized bedrooms, a large kitchen diner, a large lounge, a number of bathrooms and a storage room. All rooms show evidence of residential family use. Upon my visit the appellant showed me a room on the second floor describing it as a storage room and set in the eaves, with full door height access, windows and electricity. It had a table and computer therein, as well as bin liners and piles of clothing. The room appeared more than adequate to accommodate a functional office and appeared to have been set up for that purpose, amongst other things.
17. The proposal plan shows an office set out over what appears to be two rooms separated by a corridor. I accept one room is unlabelled; however, this leads me to conclude that it is part of the space labelled office. A plausible explanation, as to why such a large space is necessary, has not been advanced, nor has an explanation of the amount and type of office equipment that would be installed. Neither has there been an explanation of the number of people likely to utilise the space or why the office in the house cannot be used. It is unclear why such a large home office is required. I do not consider that the size of the proposed home office is modest and commensurate with an office use incidental to the residential use of the main building.
18. One room within the outbuilding is allocated as a storage room. Despite the lack of explanation given and taking into account the size of the residential property, it would be reasonable to have a storage room as demarcated on the submitted plan.
19. The proposed uses of the outbuilding include the use of one self-contained room as a gym. Whilst the use of a room in an outbuilding as a gym is a use that may be considered incidental to a residential dwelling, there is no justification for the size of the room, a description of the type of equipment to be located therein or a description of the people who may use the facility. It is therefore unclear why the gym is reasonably required.

¹ *Emin v SSE & Mid Sussex DC* [1989] JPL 909.

20. Furthermore, a shower room is demarcated on the plan; however, this is entirely disconnected from the gym and would require a gym user to exit the gym through one set of external doors and enter through another set of external doors having walked past the main dwelling. It is unclear, given the separation, why the gym user could not use the bathrooms located within the house and why the shower is reasonably required.
21. Taking the evidence before me and weighing the balance of probabilities, the nature and scale of the proposed outbuilding does not comply with the requirements of Class E that the use be incidental to the enjoyment of the dwellinghouse.
22. Even if I found that the proposal complies with Class E, there is another issue. The grant of an LDC for the proposed outbuilding would conflict with the requirements of an extant enforcement notice issued on 8 July 2019. The notice alleges the erection of an outbuilding intended to be used as independent self-contained living accommodation and requires that the building be demolished and all materials and debris resulting from compliance to be removed from the land. Section 191(2)(a)(b) of the Act states that a use or operation is lawful if no enforcement action may be taken in respect of them and they do not constitute a contravention of any of the requirements of any notice then in force. The LDC involves the same building, albeit the proposal would result in alterations to the building that is subject to the notice. Essentially, the proposal would be contained within the building that is the subject of enforcement action. It follows that granting the LDC would conflict with the requirements of the notice.
23. For the reasons given above I conclude, on the balance of probabilities, that the Council's refusal to grant a LDC in respect of the erection of a rear outbuilding for use incidental to the dwellinghouse as an office space, gym, shower and storage was well-founded and that the appeal should fail.

Other Matters

24. The appellant has set out that a precedent has been set by other applications. MER993/81, 13/P1617 and 16/P0677 were applications for planning permission which fall to be determined under the Local Development Plan and any other material considerations. In that respect they differ significantly to the current LDC application, which is determined under legislation taking no account of planning policy, and as such I differentiate the three applications from the current appeal and attribute their outcomes little weight.

Conclusion and Recommendation

25. For the reasons given above and having had regard to all other matters raised, I recommend that the appeal should be dismissed.

S Wilson

APPEAL PLANNING OFFICER

Inspector's Decision

26. I have considered all the submitted evidence and the Appeal Planning Officer's report and on that basis the appeal is dismissed.

A U Ghafoor

INSPECTOR