



Appeal Decision

by **Peter White BA(Hons) MA DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 3 July 2024

Appeal Ref: APP/J1915/X/22/3305228

Penrhyn, London Road, Spellbrook, Hertfordshire CM23 4BA

- 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 I Hussain against the decision of East Hertfordshire District Council.
 - The application ref 3/22/1222/CLPO, dated 12 June 2022, was refused by notice dated 9 August 2022.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended (the Act).
 - The development for which a certificate of lawful use or development is sought is construction of garage with brick walls and pantile roof.
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Decision

1. The appeal is dismissed.

Applications for costs

2. Applications for costs were made by Mr I Hussain against East Hertfordshire District Council, and by East Hertfordshire District Council against Mr I Hussain. These applications are the subject of separate decisions.

Preliminary Matters

3. In the appeal form the appellant stated that it was essential for the Inspector to enter the site to see the height of the ground immediately adjacent to the garage. However, at the site visit scheduled for 16th April 2024 neither the appellant nor a representative for him were present to provide access to the land. Neither did he nor a representative attend a revised visit scheduled for 30th April 2024, or a third on 4th June 2024. I have therefore determined the appeal without a site visit, on the basis of the written evidence put before me.
4. The appellant has constructed a garage, similar to that proposed but with a higher roof, for which planning permission has been refused, and an appeal has been dismissed.
5. The appellant's LDC application, as submitted, was for confirmation of whether a garage similar to that constructed, but with a lower roof, would have been lawful at the time the application was submitted.
6. The Council amended the description of the proposed development to, "Proposed alterations to single storey detached garage to reduce the height" and determined the application on those terms. However, I have not seen any evidence that that change was made with the appellant's agreement.

7. As the Council's description of development is distinctly different to that applied for by the appellant, and would not determine whether the resulting garage building as a whole was lawful, I have considered the application on the basis of the appellant's description of development, as stated on the application form.

Main Issue

8. The main issue is whether the decision of the Council to refuse the application for an LDC was well founded.

Reasons

9. Appeals relating to a LDC are confined to the narrow remit of determining whether the Council's refusal was well founded. The planning merits of the proposal are not for consideration.
10. Appellants are required to provide evidence that is sufficiently precise and unambiguous to justify the grant of a certificate 'on the balance of probability'. The burden of proof is with the appellant to demonstrate that the proposed development would have been lawful on the date the application was made (the relevant date).
11. Section 191(2) of the Act states that operations are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development, or require planning permission, because the time for taking enforcement action has expired, or for any other reason); and, (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
12. I have not seen any evidence of any enforcement notice being in force on the relevant date, and there is no dispute that the proposal amounts to development for which planning permission is required.
13. The primary consideration is therefore whether, at the relevant date, the development would have been granted planning permission by Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), on the basis that it would have constituted 'permitted development' under Class E of Part 1, Schedule 2 of the GPDO.
14. Among other things, Class E of Part 1 of Schedule 2 sets out that the provision of any building or enclosure required for a purpose incidental to the enjoyment of the dwellinghouse, and within its curtilage, is permitted development. But development is not permitted if any of the criteria set out in paragraph E.1 are met.
15. The criterion in dispute between the parties is: E.1.(e)(ii), which states that, "the height of the building, enclosure or container would exceed ... (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".
16. There is no definition of 'height' in the GPDO itself, but the 'Permitted development rights for householders - Technical Guidance' 2019 (the Technical Guidance) defines it as "... the height measured from ground level". A qualifying note states, "... ground level is the surface of the ground immediately adjacent to the building in question, and would not include any addition laid on

top of the ground such as decking. Where ground level is not uniform (for example if the ground is sloping), then the ground level is the highest part of the surface of the ground next to the building.)”

17. In the *McGaw v the Welsh Ministers*¹ Court of Appeal judgement, where the building abutted a boundary wall, the surface of the ground immediately adjacent to the building was considered to be the land immediately beyond the wall, in the neighbouring garden, rather than the wall itself, or the narrow gap between the building and the wall. In coming to that judgement, Sir Timothy Lloyd stated, “‘ground’ must be open, not under a built structure”². Even if those comments are considered *obiter*, and not directly part of the precise matter at issue before the Court, they accord with the approach of the Technical Guidance in excluding additions laid on top of the ground.
18. In the case before me, the plans show the garage proposed would abut the boundary with the neighbouring garden. From its eastern, southern and northern sides the building would be a height of 3.28m. On its northern side, the plans show a patio between the garage and the house, which is shown 0.78m higher than the garage floor, and level with the rear of the house. The plans appear to depict a narrow gap between the patio and the garage, but one that is smaller than that considered in *McGaw v the Welsh Ministers*, and not sufficiently large to constitute the ground immediately adjacent to the building for the purposes at hand.
19. The appellant’s case is that the patio is the highest point of the land immediately adjacent to the proposed garage building and that, measured from its surface, the proposed garage would be 2.5m in height. He states there is no requirement for ground to be defined as earth, and refers to ‘concrete ground’. That is not necessarily consistent with the Technical Guidance and Sir Timothy Lloyd’s comments in the *McGaw v the Welsh Ministers* judgement.
20. The patio is not open ground, and could be considered a built structure, or at least an addition laid on top of the ground. The appellant advises that the patio retains the natural profile of the ground, and that earth has been removed and replaced with concrete. However, comments from the adjoining neighbour suggest it is a recently constructed raised structure, that the ground immediately adjacent in the neighbouring garden demonstrates that, and that the garage would exceed 2.5m in height above the highest immediately adjoining ground level in the neighbouring garden.
21. The appellant also states that the land naturally slopes from the front to the rear of the property, but the plans provided depict all ground levels as flat ground, even those beyond the house and garden. They clearly show stepped level changes and a retaining wall, but provide very limited information in and around the location of the proposed garage. I am therefore able to rely on the plans only to a limited extent insofar as they relate to ground levels in the vicinity of the proposed garage.
22. Without the benefit of a site visit, photographs or a survey plan showing the levels of the land and its context, it is therefore difficult to say whether, or the extent to which, the patio is or reflects the ground level. There is a reasonable

¹ *McGaw v the Welsh Ministers & the Council for the City and County of Swansea* [2020] EWHC 2588 (Admin), [2021] EWCA Civ 976

² Paragraph 24

prospect that the patio is a built structure, or an addition laid on top of the ground, and therefore not the highest level of the ground immediately adjacent to the proposed building.

23. The appellant has referred to another LDC decision made by the Council relating to a development elsewhere. I am not bound by decisions of the Council, but that case relates to Class A rather than Class E of Schedule 2 Part 1 of the GPDO and concerns a development to be constructed on an existing patio set lower than surrounding land levels. That case is therefore distinguishable from the development proposed in this case.
24. It has therefore not been demonstrated that it is more likely than not that the highest adjacent ground level would have been the adjacent patio. With the evidence before me, there is a realistic prospect that the highest surface of the ground immediately adjacent to the proposed garage would have been the land immediately beyond the boundary, in the neighbouring garden.
25. Consequently, the height of the proposed garage would have exceeded 2.5m from the highest surface of the ground immediately adjacent to the building, and the development would therefore not have met the requirements of Schedule 2, Part 1, Class E of the GPDO. It would therefore not have constituted 'permitted development', and planning permission would not have been granted by Article 3(1).
26. Therefore, although the development would not have been a contravention of any of the requirements of an enforcement notice then in force, it would have been development without planning permission. Enforcement action could therefore have been taken at the relevant date. Consequently, the development would not have been lawful under Section 191(2) of the Act.

Conclusion

27. For the reasons given above I conclude the Council's refusal to grant an LDC in respect of construction of garage with brick walls and pantile roof was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act (as amended).

Peter White

INSPECTOR