



Appeal Decisions

Site visit made on 29 May 2024

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 July 2024

Appeal A Ref: APP/J0350/X/23/3318353

107 Blunden Drive, Slough, SL3 8WQ

- 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 Hamza Hameed against the decision of Slough Borough Council.
 - The application ref P/20093/000, dated 1 November 2022, was refused by notice dated 2 March 2023.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as 'outbuilding is used as an additional storage place to the main dwelling and not for habitable purposes'.
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Appeal B Ref: APP/J0350/C/23/3324649

Land at 107 Blunden Drive, Slough, SL3 8WQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Hamza Hameed against an enforcement notice issued by Slough Borough Council.
 - The notice was issued on 26 May 2023.
 - The breach of planning control as alleged in the notice is, without planning permission:
 - the development of an unauthorised side extension shown outlined in blue on the attached plan, and
 - the erection of fencing as outlined in green on the attached plan.
 - The requirements of the notice are to:
 - Demolish the unauthorised side extension in its entirety as shown outlined in blue on the attached plan; and
 - Remove the fence in its entirety as shown outlined in green on the attached plan; and
 - Remove from the land all materials, rubbish, debris, plant and machinery resulting from compliance with the aforementioned requirements of this notice.
 - The period for compliance with the requirements is four months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended).
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Decisions

Appeal A

1. The appeal is dismissed.

Appeal B

2. It is directed that the enforcement notice is corrected by deleting the words 'development of an unauthorised side extension' in paragraph 3.1 and substituting with the words 'erection of an outbuilding'.

3. Subject to the correction, the appeal is dismissed and the enforcement notice is upheld.

Appeal A

Preliminary Matters

4. An application under s191(1)(a) and (b) of the Town and Country Planning Act 1990 as amended (the 1990 Act) seeks to establish whether, at the time of the application, any existing use of buildings or other land, and any operations which have been carried out, are lawful. The burden of proof lies with the appellant to make his case on the balance of probabilities.
5. S191(2) of the 1990 Act explains that uses and operations are lawful if - (a) no enforcement action may be taken in respect of them because they did not involve development or require planning permission or because the time for enforcement action has expired, and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
6. The enforcement notice, subject to Appeal B, was issued after the LDC application, subject to Appeal A, was determined so did not amount to a contravention of any of the requirements of any enforcement notice then in force.
7. By the time of my site visit, the outbuilding had been removed. However, lawfulness is determined based on the circumstances that existed at the time of the application.
8. I note the appellant's submissions about matters relating to character and appearance. However, such considerations, insofar as they relate to the planning merits, can form no part of the assessment of an application for a LDC, which must be considered in the light of the facts and the law.
9. The appellant's case also seeks to argue that the fence erected around the outbuilding is permitted development. That is understandable because the Council has included why it takes the opposite view in its fourth reason for refusing the LDC application, on the basis that the fencing forms part of the same building operation. However, the fencing did not form part of the LDC application, and the appellant seeks to stress that they were separate entities, and that the fencing should remain outside the scope of the LDC application and appeal.
10. Although the fence and the outbuilding were evidently very close, the photographs show that they were separate structures. Indeed, the outbuilding has been removed, whilst the fencing still remains. I therefore see no reason to treat them as a single act of development.
11. Accordingly, I have not considered whether the fence is lawful in respect of Appeal A. Nevertheless, the fence is part of the alleged matters subject to Appeal B and I have considered those repeated arguments as part of the same.

Main Issue

12. The main issue is whether the Council's decision was well-founded. From the evidence, that turns on whether the outbuilding would have been lawful on the date of the LDC application on the basis that it would have been granted

planning permission by the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO).

Reasons

13. The LDC relates to an outbuilding previously located on the side of the two storey, end of terrace appeal dwelling.
14. Part 1 of Schedule 2 of the GPDO provides permitted development rights for development within the curtilage of a dwellinghouse. The Council's first reason for refusal is, in short, that the outbuilding was constructed on land which does not form part of the curtilage of the appeal dwelling, and so did not benefit from Part 1 permitted development rights.
15. The term 'curtilage' describes an area of land that has an intimate association with a building. The Technical Guidance¹ defines it as '*land which forms part and parcel with the house. Usually it is the area of land within which the house sits, or to which it is attached, such as the garden, but for some houses, especially in the case of properties with large grounds, it may be a smaller area*'.
16. The photographs of the pre-existing arrangement show the land on which the outbuilding was sited as displaying the characteristics of 'amenity land'. That is essentially an area that is landscaped for the benefit and enhancement of the estate as a whole, rather than a private garden associated with a residential use. I saw other similar areas of 'amenity land' close by on Blunden Drive.
17. Moreover, the outbuilding was positioned adjacent to the side elevation of the dwellinghouse and outside any associated walled enclosure of its residential garden.
18. For the appellant's part, he has not shown that the land on which the outbuilding was sited was not amenity land or that it was included in the planning unit of the appeal dwelling, or that it has been lawfully incorporated through a grant of planning permission for a change of use to residential garden.
19. It is therefore unlikely that the land on which the outbuilding was positioned had an intimate association with the appeal dwelling and that it was part and parcel of it. Accordingly, the outbuilding did not amount to development within the curtilage of a dwellinghouse and thus did not benefit from the permitted development rights of Part 1 of Schedule 2 of the GPDO.
20. In any event, Article 3(6) of the GPDO states² that the permission granted by Schedule 2 does not authorise any development which creates an obstruction to the view of persons using any highway used by vehicular traffic, so as to be likely to cause danger to such persons.
21. I appreciate that the pre-existing planting on the land would have caused a degree of obstruction. Although the appellant refers to shrubs between three and five metres in height, the photographs show that for the most part the pre-existing planting was fairly low, particularly towards the outer edge, save for the tree which is still in place. Moreover, there would have been opportunity to

¹ Permitted development rights for householders Technical Guidance - Ministry of Housing, Communities and Local Government September 2019

² Subject to exclusions which do not apply to this case

- manage that planting to ensure that it did not create an obstruction to the views of persons using the highway.
22. In contrast, the height, width and solid form of the outbuilding would have precluded any views across the corner to oncoming vehicles. The effects can clearly be appreciated by the Council's photographs which show a significantly greater degree of visual permeability prior to the outbuilding being erected behind the fencing (which as not as high as the outbuilding and runs to a similar alignment).
23. The appellant seeks to highlight that the fencing is situated behind the line of the footway, which is for pedestrians rather than vehicles. However, the corner of the fencing/outbuilding runs close to the corner edge of the footway and reduces the degree of intervisibility for drivers of vehicles approaching the corner from opposite directions. Indeed, the faceted lines in the image provided by the appellant demonstrates that a straight line of sight across the corner cannot now be achieved.
24. It is therefore likely that the outbuilding would have created an obstruction to the view of persons using the highway used by vehicular traffic and the appellant has not demonstrated that the obstruction would be unlikely to cause danger to such persons.
25. Thus, even if Part 1, Schedule 2 permitted development rights were applicable, the outbuilding would have been precluded from being permitted development by Article 3(6) of the GPDO, on the balance of probabilities.
26. The Council's third reason for refusal is that it is not satisfied that the structure amounts to an 'outbuilding' within the meaning of the GPDO, as it is positioned so tight to the dwelling that it has the visual appearance of being an extension. On that basis it argues that it doesn't amount to permitted development within Class A of Part 1 of Schedule 2 because it has a width greater than half the width of the original dwelling, it fronts onto a highway, and does not use matching building materials, so fails to meet Class A limitations in paragraphs A.1(e)(ii) and (j)(iii) and Condition A.3(a).
27. In that context I note the Council's reference to an appeal decision in the Royal Borough of Windsor and Maidenhead³, where the Inspector found that a garage not directly attached to a house, because of its close proximity and use in connection with it, led him or her to conclude that it should be regarded as an extension to the main dwelling. However, I have not been provided with a copy of that decision so I am unaware of whether it related to the application of permitted development rights or whether it was a general observation in terms of appearance and perception.
28. Nevertheless, I have been provided with the caselaw⁴ referred to by the Council, which held that to fall within a National Planning Policy Framework exception of inappropriate development within the Green Belt, a structure said to be an extension did not have to be physically attached to the building of which it was purportedly an extension.

³ Appeal Ref: APP/T0355/D/16/3158107

⁴ *Warwick DC v SSLUHC, Mr J Storer & Mrs A Lowe* [2022] EWHC 2145 (Admin)

29. However, that judgement was made from reading the relevant exception in the context of the Framework as a whole, and, more particularly, in the light of Green Belt purposes. That is materially different to that which is before me.
30. As explained in the Technical Guidance, Class A covers the enlargement, improvement or alteration to a house such as rear or side extensions. Although the structure was evidently very close to the appeal dwelling, such that it may have appeared to a casual observer as a side extension, the plans show that they were separated by a small gap and there was no internal connection between the two elements. Therefore, as a matter of fact, the structure did not amount to an enlargement of the dwellinghouse, so would not have been permitted under Class A, even putting aside the failure to meet the limitations and conditions highlighted by the Council (as well as the curtilage and Article 3(6) issues).
31. Class E of Part 1 of Schedule 2 of the GPDO provides permitted development rights for the provision of buildings within the curtilage of a dwellinghouse, required for a purpose incidental to the enjoyment of the dwellinghouse. Notwithstanding being precluded from Part 1, Schedule 2 permitted development rights, for the reasons explained, the Council disputed that the use of the building was for domestic storage purposes because at the time of its site visit, it appeared to be used as a second lounge with a sofa and cinema style projector, as well as a desk and desk chair meaning that it could also be used as a home office. Those observations are corroborated by the photographs provided.
32. The appellant has provided little evidence which contradicts that. The photograph that he has provided appears to show part of the same room/space with its painted finish, skirting boards and electric sockets. There are various items in the room, including what appears to be a projector and a sound bar. Although not set up, their presence appears to correspond with the Council's observations, such that it was likely being used as primary living accommodation, rather than an incidental use (storage), as required by Class E.
33. I therefore find on the evidence before me and on the balance of probabilities, the outbuilding was not granted planning permission by the GPDO.

Other Matters

34. The appellant has provided a series of emails through which he sought preliminary advice from a number of different Councils and private consultancies. Whilst some of those responses received are positive, they are largely caveated. In any case, even putting to one side they are not from the relevant Council, such informal advice is normally given without prejudice to any application that may be submitted. They therefore carry little weight and do not, in any event, alter my above reasoning.
35. I note that the appellant raises concern that the Council took longer than the prescribed period to make a decision. However, that is not a matter for this appeal.

Conclusion

36. For the reasons given above I conclude that the Council's refusal to grant a LDC 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.

Appeal B

Preliminary Matters

37. I note the appellant's concerns that the enforcement notice should not have been issued whilst the appeal in respect of the LDC was still on going. However, there is no reason why an enforcement notice should not be issued while a planning or LDC application or appeal remains undetermined.
38. The alleged breach refers to the fencing and a side extension. The latter is evidently what is referred to as an outbuilding for the LDC, subject to Appeal A. As part of my consideration of the same, I have not found that it should be treated as a side extension, so for accuracy and consistency purposes I shall correct the notice to refer to the erection of an outbuilding and refer to it in those terms hereafter. I am able to make such a correction to the notice under the powers transferred to me by s176(1)(a) of the 1990 Act, without injustice to any party.
39. As noted, by the time of my site visit, the outbuilding had been removed. Nevertheless, s181(1) of the 1990 Act provides that compliance with any of the requirements contained in an enforcement notice shall not discharge the notice.
40. I note the appellant's submissions relating to character and appearance. However, I am unable to consider such matters, insofar as they relate to the planning merits, because the appellant has not made an application for planning permission through a ground (a) appeal, which requires payment of a fee.

The Appeal on Ground (c)

41. A ground (c) appeal is that the matters alleged in the notice do not constitute a breach of planning control.
42. For the reasons explained under Appeal A, I have not found that the outbuilding was granted planning permission by the GPDO, on the balance of probabilities. Express planning permission was therefore required and is not shown to have been obtained.
43. Again, for the reasons explained under Appeal A, the outbuilding and fencing amount to separate building operations and should not be treated as a single act of development, on the balance of probabilities.
44. It is not shown that planning permission has been sought from or granted by the Council for the fencing. Therefore, the issue in dispute is whether it is permitted development.
45. Article 3 and Schedule 2, Part 2, Class A of the GPDO grant planning permission for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. Paragraph A.1 of Class A limits the height of such development to not exceeding 1m where it is adjacent to a highway used by vehicular traffic (paragraph A.1(a)(ii)) and up to 2m elsewhere (paragraph A.1(b)).

46. The term 'highway' is not defined in the GPDO for the purposes of Part 2. Section 336 of the 1990 Act defines the term by reference to the meaning within the Highways Act 1980, which is that it means the whole or a part of a highway⁵. The appellant argues that the footpath is for foot traffic only and not for vehicular traffic on a highway. However, as defined in the Highways Act 1980, 'footway' means '*a way comprised in a highway which also comprises a carriageway, being a way over which the public have a right of way on foot only*'. The footway is therefore the part of the highway set aside for pedestrians.
47. The appeal fencing is situated behind the footway of Blunden Drive and is separated from it by hard landscaping of varying depth. As the fence is clearly greater than 1m in height, it is necessary to establish whether it is 'adjacent' to the highway.
48. The meaning of the word 'adjacent' is not defined in the GPDO, or in the 1990 Act. A normal everyday dictionary definition is 'lying near, close or contiguous'. In past Orders where the word 'abutting' was used, the Courts⁶ declined to rule that 'abutting' equated to touching. Even though 'abutting' has since been replaced by 'adjacent', in practice there is little difference in how both terms have been interpreted. The assessment of what constitutes 'adjacent' must therefore amount to a question of fact and degree.
49. The appellant argues that the fence itself is well behind the adjoining footpath and that there is a considerable gap between the fence ending and the footpath starting on its two sides. He refers to a 1m gap to the front and a 2.5m to the side. However, those are likely to be the greatest separations. In any case, because of the curved geometry of the footway other parts of the fence are considerably closer, as its alignment runs to the corner point, which is almost at the back edge of the footway.
50. Moreover, there are no built features or structures between the fence and the back edge of the footway. To a casual observer it would be perceived as being a boundary fence visually screening and physically protecting what is beyond it from the highway. For persons using the footpath, there is likely to be a sense of real proximity to the fence and they would easily be able to touch it.
51. Whilst the rear facing part of the fence faces towards an area of car parking, it is not shown that isn't part of the highway. In any event, it is part of the same, single structure and act of development, which faces out onto the footway and carriageway of Blunden Drive.
52. Therefore, as a matter of fact and degree and on the balance of probabilities, I find the fencing to be 'adjacent' to the highway. As it exceeds the 1m height limit of Class A paragraph A.1(a)(ii), it is not granted planning permission by the GPDO.
53. In any event, as explained under Appeal A, Article 3(6) of the GPDO states that the permission granted by Schedule 2 does not authorise any development which creates an obstruction to the view of persons using any highway used by vehicular traffic, so as to be likely to cause danger to such persons.

⁵ other than a ferry or waterway

⁶ *Simmonds v SSE & Rochdale MBC* [1980] 40 P & CR 432

54. Although the fencing is not as high as the pre-existing outbuilding, the difference is not sufficient to alter my reasoning insofar as it should be applied to the fence, as well as the outbuilding. For those same reasons, the fence has likely created an obstruction to the view of persons using the highway used by vehicular traffic and the appellant has not demonstrated that the obstruction would be unlikely to cause danger to such persons.
55. Accordingly, it is not shown, on the balance of probabilities, that the fencing would not be precluded from being permitted development by Article 3(6) of the GPDO.
56. Therefore, for the reasons explained, the matters alleged in the notice constitute a breach of planning control. The ground (c) appeal fails.

The Appeal on Ground (d)

57. An appeal under ground (d) is that at the time the enforcement notice was issued, it was too late to take enforcement action. In order to succeed on this ground, it is for the appellant to demonstrate, on the balance of probabilities, that the outbuilding and fencing were substantially completed four years before the date of the enforcement notice, so as to be immune from enforcement action through the passage of time⁷.
58. However, the appellant's ground (d) submission appears to be restricted to his view that the enforcement notice should not have been issued when the appeal against the LDC remained undetermined, which is a matter I have already addressed in the preliminary matters above.
59. The appellant does not seek to argue or show that the outbuilding and/or fencing were substantially completed by 26 May 2019. The ground (d) appeal must therefore fail.

The Appeal on Ground (f)

60. An appeal on ground (f) is that the requirements of the enforcement notice are excessive to remedy the breach of planning control or the injury to amenity caused by the breach.
61. The appellant's ground (f) arguments solely relate to the fence, and do not relate to the outbuilding, which, as noted, has been removed.
62. In respect of the fence, the enforcement notice requires that it is removed in its entirety, and all resulting materials removed from the land. The purpose of the notice must therefore be to remedy the breach. Accordingly, the ground (f) appeal can only succeed if it is shown that the steps are excessive to that end.
63. The appellant has evidenced a letter from the Council dated 11 October 2022, which states that the options open to him included reducing the height of the fencing abutting the highway to 1m. However, the letter also makes clear that the advice contained within it, and any suggested actions, are made without prejudice to any formal action or decision decided upon by the Council.
64. The Council's view now is that the fence needs to be removed to comply with the breach of planning control, and that the fencing and the outbuilding were erected as one operation and are inextricably linked.

⁷ Pursuant to s171B(1) of the 1990 Act

65. Whilst, I have not found the latter to be the case, reducing the height of the fence to 1m would not remedy the breach of planning control because the GPDO does not grant retrospective permission. The fence is unlawful as a whole, not just the parts of it that exceed the permitted development rights limits. It could only be permitted by the GPDO if it met the height limitations under Paragraph A.1 when it was erected. As the fence exceeded those limits, it would not be permitted under the GPDO if later altered.
66. Nevertheless, there is an argument that requiring complete removal would be unlikely to achieve anything and is therefore excessive, if the grant of planning permission under the GPDO represents a realistic fallback position and is an 'obvious alternative' that could be achieved with less cost and disruption. However, in this case, the reasons for issuing the enforcement notice highlight that the fencing has been erected on land outside the curtilage of the dwelling, which in turn raises issues over the use of the land. In the circumstances it is unclear whether there is a realistic prospect of the permitted development right being utilised, such that it would be appropriate to vary the enforcement notice to provide the option of requiring the fencing to be modified to the height limitations of paragraph A.1, or is removed.
67. Accordingly, it is not excessive for the notice to require the removal of the fence. The appeal on ground (f) fails.

The Appeal on Ground (g)

68. The ground (g) appeal is that the four months given to comply with the notice is too short. The appellant requests a period of 12 months having regard to the availability of a building team to carry out the works, the time it would take for appropriate dismantling and recycling of material and re-purposing the area.
69. However, the most significant requirement of the enforcement notice is the removal of the outbuilding, which has already been complied with. The removal of the fence in comparison would be a relatively straight forward matter for which four months would be ample.
70. I note the appellant's concerns over the significant disruption and increased stress which would be caused at a time when his wife was due to give birth. However, I do not consider that the removal of a fence outside the curtilage of his home within four months to be unduly or unacceptably disruptive.
71. I therefore find the period of compliance strikes a reasonable and proportionate balance between any difficulties and disruption the appellant may encounter and the public interest in this case.
72. The appeal on ground (g) fails.

Conclusion

73. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction.

Richard S Jones

INSPECTOR