



Appeal Decision

Site visit made on 30 July 2024

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 September 2024

Appeal Ref: APP/N5090/X/23/3327528

76 Hamilton Road, Golders Green, Barnet, London NW11 9DY

- 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 Sulaiman Mayet against the decision of the Council of the London Borough of Barnet.
 - The application ref 23/1895/192, dated 1 May 2023, was refused by notice dated 12 July 2023.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is 'To increase the roof height of the existing rear extension and internal changes.'
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appellant described the proposal on their application form as 'To increase the roof height of the existing rear extension and internal changes'. In its decision, the Council describes the development as 'Single storey rear extension to replace existing conservatory (Amended)'. I note the appellant has raised concern with the Council's description of the development and has requested that I determine the appeal on the basis of their application and not the Council's amended description. I have therefore taken the description of development from the application form in the banner heading above.

Main Issue

3. The main issue of the appeal is whether the Council's decision to refuse the certificate of lawfulness is well-founded. This will turn on whether the appeal scheme comprises development for the purposes of the Town and Country Planning Act 1990 (as amended)(the Act) and if so, whether it is granted planning permission by the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(the GPDO) or the Order then in force.

Reasons

4. An application under section 192(1)(b) of the Act seeks to establish whether any operations proposed to be carried out in, on, over or under land would be lawful. Section 192(2) sets out that if on application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect. As pointed out by the Inspector in respect of appeal reference

APP/N4720/X/22/3309985, in an LDC, the onus is on the appellant to make out their case to the standard of the balance of probabilities.

5. Section 191(2) sets out that uses and operations are lawful at any time if: a) No enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and b) They do not constitute a contravention of any enforcement notice then in force.
6. The appellant asserts that a Council planning officer, on its planning advice line, advised in May 2021 that the work did not require planning permission. However, it is a fundamental principle that a local planning authority may not fetter its discretion to issue an enforcement notice by any form of agreement. Even if an officer of the Council did advise verbally that proposed works did not require planning permission in May 2021, the Council is not prevented from taking enforcement action by such advice. Furthermore, when the appellant sought confirmation that the proposed works did not require planning permission in writing, the Council advised the appellant to apply for a Certificate of Lawful Development.
7. The appeal dwelling comprises a mid-terrace brick built property, with a modest rear garden which projects at an obtuse angle to the house. To the rear, the property has a single storey rear extension, off which is a conservatory constructed with a dwarf brick wall, above which are timber framed glass panels and a glass roof. The properties either side have also been extended to the rear, with single storey extensions which are broadly in line with the single storey rear extension at the appeal property.
8. The description of development given in the application form is 'to increase the roof height of the existing rear extension and internal changes'. I have been provided with a series of drawings which were submitted in support of the application. The existing plans do not reflect the conservatory as it exists now but show double doors with double windows either side. The proposed drawings show that the height of the existing rear extension and conservatory would be increased and that 'materials used in the construction of the increased roof will match the main dwelling'.
9. In their appeal statement, the appellant states they propose to remove the glass canopy of the existing conservatory and replace it with a solid roof with two roof windows and raise the walls to either full length or full length on four corners to serve as pillars to support the weight of the solid roof. They also state that there were no plans to alter the height of the existing extension. Although the drawings do not reflect what the appellant states is proposed, they have requested that I consider the appeal on the basis of the facts specified/clarified in the appeal.

Whether the proposal would constitute development

10. Section 55 of the Act sets out the meaning of 'development' as the 'carrying out of building, engineering, mining or other operations in, on, or under land.....'. At section 55 (1A) it is indicated that 'building operations', amongst other things, involve '(d) Other operations normally undertaken by a person carrying on business as a builder'.

11. The appellant proposes a number of physical alterations to the existing rear conservatory, including the removal of the existing roof and its replacement with a 'solid roof', which would be increased in height and the raising of the dwarf wall to support the weight of the roof (either full length or on four corners to serve as pillars). It is not clear what the appellant means by a 'solid roof' or 'normal flat solid roof'. Nevertheless, it seems unlikely the appellant wishes to replace the existing roof with a glass roof.
12. The plans state the 'materials used in the construction of the increased roof will match the main dwelling'. This would suggest the roof would be constructed using roof tiles or brick, though in my experience, flat roofs in rear extensions to residential properties are often constructed using some sort of waterproof membrane, with thermal insulation and a structural roof deck. The raising of the dwarf wall would require someone with skill to lay the bricks, whether raised fully or on four corners. Such works would constitute structural alterations which, it is reasonable to assume, a builder would be likely to carry out.
13. Section 55 (2)(a)(ii), sets out that the carrying out for the maintenance, improvement or other alteration of any building works which 'affect only the interior of the building, or do not materially affect the external appearance of the building' shall not be taken for the purposes of the Act to involve development of the land. Whether or not alterations to the exterior of a building constitute development for the purposes of the Act will involve consideration of the change to the external appearance of the building as a whole and not a part in isolation. The degree of visibility by an observer outside the building; the nature of the building; and the nature of the alterations/works.
14. Given the proximity of the rear to neighbouring dwellings and the use of boundary fences of a modest height, the rear extension and conservatory can be seen from the first floor windows of neighbouring dwellings and from their rear gardens. A change in the height of the conservatory (the appellant states in their final comments that there were no plans to alter the height of the existing extension) would therefore be seen by neighbouring occupants and would materially affect the external appearance of the building, particularly given the sloping nature of the conservatory roof and its projection further towards the rear boundary than the rear extensions of the neighbouring dwellings.
15. A change in the use of materials for construction of the roof (whether roof tiles, brick or a waterproof membrane) and walls of the conservatory (whether raising the current dwarf walls fully, or on four corners to serve as pillars), would also be seen by neighbouring occupants. The replacement of the roof, and the replacement of glass panels and timber frames with brick (or partial replacement with brick pillars), would significantly alter the appearance of the conservatory and in my view, would materially affect the external appearance of building.
16. Thus, I find, on the balance of probability, that the appeal scheme would comprise development for the purposes of the Act.

Whether the proposal benefits from planning permission

17. The appellant states they hired an architect who advised that the existing structure benefitted from planning consent under a prior notification procedure since 2013 [sic]. A planning permission granted by the GPDO is 'crystallised' when the development begins or, in the case of prior approval development, when the local planning authority has stated that prior approval is not required – or failed to make a determination within the specified period. The development undertaken would need to have been permitted by the GPDO in force when the development was begun or the planning permission was 'crystallised'.
18. The appellant has provided me with an email from the Council dated 11 June 2013. Within the email, the Council advises it has served an enforcement notice demanding [sic] the demolition or removal of the conservatory. The Council, with reference to the prior notification procedure, suggests the occupant of the appeal property would like to pursue 'this process' and advises that if it does not receive an objection from a neighbour, it will consider the matter closed and the conservatory will be allowed to remain.
19. The Town and Country Planning (General Permitted Development) Order 1995 (as amended) would not have granted retrospective planning permission and so, because the conservatory had already been constructed, it would not have been possible to regularise the conservatory through the prior approval process. It seems, from the evidence provided, the Council has simply decided not to pursue any failure to comply with the requirements of an enforcement notice. This does not constitute a planning permission.
20. I note the Council does not suggest that Article 3(5) of the GPDO would prevent permitted development rights from applying in this case. Even if the Council withdrew the notice, or waived or relaxed the requirements of the enforcement notice under section 173A of the Act, or if permission were granted on appeal¹, this would not grant planning permission for the development which is currently proposed, since on determination of an appeal under section 174, planning permission may only be granted for the whole or part of the matters stated in the notice as constituting a breach of planning control.

Whether the proposal would be permitted development

21. Part 1, Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(the GPDO) permits the enlargement, improvement or other alteration of a dwellinghouse. Although the appellant is not proposing to replace the conservatory, since I have found the proposed works would be development for the purposes of the Act, they should be considered under Class A.
22. Development is not permitted by Class A if (f) subject to paragraph (g), the enlarged part of the dwellinghouse would have a single storey and (i) extend beyond the rear wall of the original dwellinghouse by more than 4 metres in the case of a detached dwellinghouse, or 3 metres in the case of any other dwellinghouse; (g)(i) extend beyond the rear wall of the original dwellinghouse

¹ The Council refers to appeal decision APP/N5090/C/08/2084652 as 'Appeal Allowed, Awaiting Fee Payment' in its Statement of Case.

by more than 8 meters in the case of a detached dwellinghouse, or 6 metres in the case of any other dwellinghouse.

23. The proposed works would have a depth of 6.48m. I understand the appellant's architect explained to the Council that the depth on the submitted plan was an error and that the depth of the rear extensions would be 6.2m, not 6.45m as shown on the plans. However, no alternative plans have been provided. Furthermore, whether the rear extensions would measure 6.48m or 6.2m, both would exceed 6m and so would exceed the limitations set out under Part 1, Class A, A.1(g).
24. Limitations to the size of development are expressed precisely in the GPDO. There cannot be a 'de minimis' infringement. Moreover, even if the proposal fell within the limitations of A.1(g), there is no evidence to show that the appellant has complied with condition A.4(2), which requires a developer to provide certain information to a local planning authority before beginning the development.
25. Development is also not permitted by Class A if (j) the enlarged part of the dwellinghouse would extend beyond a wall forming a side elevation of the original dwellinghouse and would (iii) have a width greater than half the width of the original dwellinghouse. Although the appellant has confirmed through this appeal that the height of the single storey extension would not be altered, since the conservatory is attached to the single storey extension, the limitations set out in (ja) would apply, which are: any total enlargement (being the enlarged part together with any existing enlargement of the original dwellinghouse to which it will be joined) exceeds or would exceed the limits set out in sub-paragraphs (e) to (j).
26. The Council has provided a historic map of the application site, said to be from 1953, which appears to show that the property had an outrigger to the rear. The appellant suggests this is irrelevant now, as there is no outrigger at the site. However, A.1(j) refers to the 'original' dwellinghouse. The Permitted Development Rights for Householders Technical Guidance advises that 'original' means a building as it existed on 1 July 1948 where it was built before that date, and as it was built if built after that date.
27. The appellant has not shown that the 'original' dwellinghouse did not have an outrigger. From the historic map provided by the Council, it seems likely that the properties along this part of Hamilton Road had outriggers and, since the map is dated 1953, this is likely to reflect the buildings as they existed on 1 July 1948 (or as they were built, if built after 1948). It appears that the outrigger did not extend across the full width of the dwellinghouse but was set well back from the boundary with No 78.
28. The rear extension which is currently in situ projects further towards the rear than the outrigger appears to have done and extends the full width of the dwellinghouse. The conservatory projects from the rear extension at an angle and occupies much of the width of the dwellinghouse. The rear extension is therefore likely to extend beyond a side wall of the original dwellinghouse and, since the rear extension and conservatory are more than half the width of the original house, the proposed works would exceed the limitations set out under Part 1, Class A, A.1 (ja).

29. Thus, I find, on the balance of probabilities, that the proposal is development for which planning permission is required and since planning permission has not been granted, it would not have been lawful if begun at the time of the application. Consequently, the appeal must fail.

Conclusion

30. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 'To increase the roof height of the existing rear extension and internal changes.' 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.

M Savage

INSPECTOR