The Planning Inspectorate

Appeal Decision

Site visit made on 17 November 2015

by Simon Hand MA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 27 November 2015

Appeal Ref: APP/X5210/X/15/3006433
45 Redington Road, London, NW3 7RA

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Shimshon Torn Hibler against the decision of the Council of the London Borough of Camden.
- The application Ref 2014/5930/P, dated 20 September 2014, was refused by notice dated 16 February 2015.
- 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 the installation of a swimming pool on the lower ground floor, see also drawing nos NW37RA-LDCp-001 & NW37RA-LDCp-002.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the proposed operation which is considered to be lawful. As the drawing numbers for the works themselves are clearly described in the application, I do not consider a separate plan showing the location of 45 Redington Road is necessary.

Costs

2. An application for costs has been made by the appellant and is the subject of a separate decision.

Reasons

3. No 45 is a large house which has already been enlarged with a rear two-storey extension. The appellant has since been granted Lawful Development Certificates (LDCs) for two further enlargements, a single storey rear extension which would be joined to the existing two-storey rear extension and a basement extension, called "internal floor level alterations at lower ground floor". The house stands on two levels so the rear is lower than the front. Consequently, the ground floor when seen from the back, turns into a basement beneath the front of the house and is known collectively as the "lower ground floor". This lower ground floor contains a number of rooms, and the LDC enables several to be extended forward into a larger basement area, but contained entirely within the footprint of the house.

4. The proposed development for which the appeal LDC is sought is to excavate further down to provide a swimming pool. The top of the pool would be level with the existing floor of the 'lower ground floor' as it will be once it has been extended in accordance with the LDC already granted. Effectively a 1.5m deep pool, 14.3m long with a maximum 3.2m width would be sunk into the floor of the house.

Are the works development?

5. Originally the appellant argued the works were not development as they affected only the interior of the building and because the ceiling level of the lower ground floor is entirely above ground level (although only just at the front of the house), they were not caught by s55(2) of the 1990 Act. S55(2)(a) says "*The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land— (a) the carrying out for the maintenance, improvement or other alteration of any building of works which— (i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building, and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground;*" . The last sentence is crucial and I consider that excavating a pool beneath the ground floor of the house is providing "additional space underground", regardless of the relation of the ceiling heights to the ground level. This is implicitly accepted by the appellant who does not pursue this in his appeal statement.

Do they fall within Class E or A?

6. Secondly the appellant argues the works are permitted development either by Class A or Class E of the Town and Country Planning (General Permitted Development) Order 1995. Class E states under the heading "Permitted Development" "*The provision within the curtilage of the dwellinghouse of — (a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure*". The Council contend the works fall outside of Class E because they fail E.1(d) and E.3 both of which deal with development that is not permitted. E.1(d) says "(d) the height of the building, enclosure or container would exceed—(i) 4 metres in the case of a building with a dual-pitched roof, (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, or (iii) 3 metres in any other case;".

7. In this case part of the pool would be built within the part of the lower ground floor that has not yet been excavated. For obvious reasons the appellant wants to carry out the works all in one go. However, in that case the development proposed also has to be seen as a single operation, not one followed by the other. In my view the lower ground floor is being extended in order to house the pool and so the whole works need to meet the requirements of Class E in order to benefit from permitted development rights in exactly the same way as if the room was being constructed outdoors. However, in the latter case the building that housed the pool would be measured from the ground level up to the roof for E.1(d) purposes, not from the base of the pool, inside the building. I can se no reason why this principle should not be extended to a pool within a basement. Consequently, the height of the lower

ground floor which contains the pool is less than 3m and so it falls within the limits of Class E.1(d).

8. E.3 states that where a site lies in a Conservation Area, which is the case here "*development is not permitted by Class E if any part of the building, enclosure, pool or container would be situated on land between a wall forming a side elevation of the dwellinghouse and the boundary of the curtilage of the dwellinghouse*". As the pool is within the footprint of the dwelling it cannot lie "between" the side elevation and the boundary. This restriction only affects development outside of a dwelling.

9. In my view therefore the proposed pool does fall within Class E. However, the basement element also falls within Class A and in the case of a development which falls into a number of Classes it should meet the limitations of all the relevant classes. The Council have already found the basement is permitted development and issued a LDC to that effect. Nevertheless they now argue that it fails A.1(h)(i), which states "*(h) the enlarged part of the dwellinghouse would extend beyond a wall forming a side elevation of the original dwellinghouse, and would—(i) exceed 4 metres in height,*". As for Class E I cannot see why the pool, or that part of the lower ground floor in which it is situated can be said to extend "beyond" the side wall, when the house is clearly wider than the part of the lower ground floor that contains the pool. No argument has been made that the "original" dwelling was narrower, so I can only conclude the basement also falls within the limitations of Class A.

Engineering works?

10. The Council also oppose the LDC on the grounds that it consists of engineering works and so falls outwith the scope of Part 1 of the GPDO altogether. The Council seem to have taken this stance following a legal opinion they received on an application for a basement at 24 Quadrant Grove which led them to refuse that LDC for the same reasons. Since then an appeal against another basement application at 20 Mackeson Road has been issued. In that decision the Inspector found that extensions allowed under Class A often have an element of engineering works in them and so there is no obvious reason to assume that engineering works are excluded from Class A. She also pointed out that Class A is concerned with "development" and the definition of development includes engineering works. Unless a Class specifically excludes some aspect of development, such as engineering works, then again there is no reason to assume they are so excluded. All these reasons are sound and indeed quite obvious from any informed reading of the GPDO. There is no reason to exclude development from the scope of Class A just because it may be partly or exclusively engineering works.

11. The Council refer to several appeal decisions and court cases to support their position on engineering works. In my view the term "engineering works" has become something of a red herring. What the Inspector found in the Turneville Road[1] appeal was that the basement extension also extended under a large part of the garden. This would require considerable excavation and "I consider that, as a matter of fact and degree, in the circumstances of this case this amounts to an engineering operation that falls within the definition of development set out in section 55(1) of the Act. Moreover, there is nothing in the GPDO to indicate that such an operation is permitted development". In

[1] APP/H5390/X/09/2099326

other words he found the engineering works to amount to a separate operation and were not therefore part of the works to construct the basement that could benefit from permitted development rights granted by Class A. This is in accord with a High Court case in Wycombe in 1995[2] which found that the excavation of a sloped site in front of house to provide a hardstanding would constitute separate engineering works that went beyond anything that could be reasonably regarded as incidental to the formation of a hardstanding – which was the relevant part of the GPDO under which permitted development rights were sought. The Court in this case quoted from an earlier case[3] that "a single process may for planning purposes amount to two activities. Whether it does so or not is a question of fact and degree. If it involves two activities, each of substance, so that one is not merely ancillary to the other, then both require planning permission".

12. This last quote is the basic principle that principle that underlies all these arguments. It is not whether the works are an engineering operation or not, but whether, whatever form of development they may be, they amount to a separate activity of substance that is not ancillary to the activity that benefits from permitted development rights. In this case Class E grants permission for a swimming pool. Whether in a basement or a garden, a swimming pool will, if sunken into the ground, require considerable excavation works. Consequently, Class E clearly assumes there may well be excavation works to provide a pool that otherwise benefits from a permission granted by that class. Such works must therefore be reasonable ancillary to the provision of the pool. In this case no works are suggested that would exceed what is reasonably necessary to cater for the pool itself and so I can see no reason why the pool and the excavation of the soil to create the pool should not benefit from the permitted development rights granted by Class E. The Council have already determined that the basement extension would be lawful, so there is no question of any separate engineering works in that context.

Conclusion

13. Consequently, I find the creation of an enlarged basement with a swimming pool would be permitted development under Classes A and E and shall issue the LDC as applied for.

Simon Hand

Inspector

[2] No reference given
[3] West Bowers Farm Products v Essex County Council 1985

The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 20 September 2014 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto, would have been lawful within the meaning of section 192 of the Town and Country Planning Act 1990 (as amended), for the following reason: They benefit from permitted development rights granted by Classes A and E of the Town and Country Planning (General Permitted Development) Order 1995.

Simon Hand
Inspector

Date 27.11.2015
Reference: **APP/X5210/X/15/3006433**

First Schedule: installation of a swimming pool on the lower ground floor, as shown on drawing nos NW37RA-LDCp-001 & NW37RA-LDCp-002

Second Schedule:

Land at 45 Redington Road, London, NW3 7RA

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

The Planning Inspectorate

Costs Decision

Site visit made on 17 November 2015

by Simon Hand MA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 27 November 2015

Costs application in relation to Appeal Ref: APP/X5210/X/15/3006433
45 Redington Road, London, NW3 7RA

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
- The application is made by Mr Shimshon Torn-Hibler for a full award of costs against the Council of the London Borough of Camden.
- The appeal was against the refusal of a certificate of lawful use or development for the installation of a swimming pool on the lower ground floor.

Decision

1. The application for an award of costs is allowed in the terms set out below.

The Case for the Applicant

2. The appellant argues that the swimming pool is expressly permitted under Class A and E and the Council failed to substantiate any reasons for refusing the LDC. The Council also failed to determine like applications in the same way. Finally they delayed the appellant by not providing the information they should have.

The Case for the Council

3. The Council respond that the cases were considered in the same way and their professional opinion was that the engineering works proposed took the swimming pool beyond the scope of Class A. As to the information the Council sent in the questionnaire to the Inspectorate and it is not usual for them to copy it to the appellant.

Reasons

4. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party who have behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

5. The Council did have several reasons for refusing the LDC. They found reasons to consider it was outwith both Class A and E and also that it was beyond the scope of Class A altogether. In terms of Class E, the application of this Class to a basement swimming pool is not obvious or straightforward and I consider their view that the proposal was contrary to E.1(d) was not inherently unreasonable. As to Class A the Council had already found the basement was within the limits of Class A and had issued a LDC to that effect. However they

still opposed the development as it breached one of the Class A limitations. I consider this was unreasonable as it was not founded on a reasonable interpretation of the limitation in question which clearly had nothing to do with the development proposed.

6. The Council's main opposition however was based on their view that the works comprised engineering works which were not permitted under Class A at all. This came from a legal opinion that was submitted by opponents of a basement scheme at 24 Quadrant Grove. That application was refused as was this case on the same grounds. A further case at Mackeson Road went to appeal against non-determination but would have been refused on the same grounds and the appeal decision was not issued until August this year. At the time the Redington Road application was being considered by the Council the Mackeson Road appeal decision was still awaited. The Council wanted to wait until they heard the outcome of that appeal before determining the Redington Road application. In the event they did not do so, although there appeared to be no explanation why, and issued the refusal. However, in the officer's report to committee the Council referred in detail to a decision at 17 Wadham Gardens. This application seems to have been made in November 2014 and was being determined about the same time as Redington Road. The appellant was confused as there is no mention of Redington Road in the substance of the report. It appears to be mistakenly comparing Quadrant Road to Wadham Gardens instead. In fact as the appellant points out a lot of the report is a straight copy from the original Wadham Gardens Report.

7. It seems to me, based on the evidence provided for the appeal and the costs claim that the Council had up until the summer of 2014 considered basement cases to be Class A, and the officers had recommended both Quadrant and Mackeson Road for approval. It was the legal opinion provided by the opponents of Quadrant Road that gave the Committee a reason to refuse that proposal and subsequently those at Wadham Gardens and Redington Road. In this evolving policy context one decision was used as precedent to support the next. Hence the emphasis on Wadham Gardens in the Redington Road report.

8. The appellant however argues that this application was not similar to the others at all. They all involved excavations to create new basements. In this case there was already a basement and its extension had already been deemed to be lawful. It was also different as much of the basement was not underground because of the slope of the land and so was in reality a ground floor. According to the appellant it followed that introducing a swimming pool into a lawful basement that is half ground floor is entirely different from creating a new completely subterranean basement in the first place.

9. Here I agree with the appellant. The Council do not seem to have addressed the obvious differences between this application and the others. The legal opinion referred only to Class A and no mention appears to have been made to Class E and the effect that would have on the question of the provision of a swimming pool. Indeed had there been a discussion of Class E it might have given pause to the wholesale acceptance of the legal opinion, as Class E clearly allows for a considerable amount of excavation for the construction of swimming pools, despite no mention being made of "engineering works" in that Class. The Class E argument appears to have been first made in the appeal statement. There is no analysis in the officer's report why Quadrant Road and Wadham Gardens were analogous to Redington Road. As mentioned above the

report appears to be largely copied from Wadham Gardens when the two proposals had significant differences. In the report the officer states in reference to Quadrant Road "since the proposed basement works would require the involvement of a qualified civil or structural engineer, the works would constitute an engineering operation and in line with the Gwion Lewis opinion, the application should be refused". If this indeed what the committee said then it is clearly wrong. Many ordinary extensions permitted under Class A will require input from a qualified civil engineer and all can still benefit from permitted development rights granted by Class A or other Classes in Part 1. There was no consideration as to whether the excavation of the swimming pool in the basement was engineering works in the first place. The Council seem to have operated on the basis that any digging under the ground was engineering works and no engineering works were allowed by any Class in Part 1 of the GPDO. The Council seem to have extrapolated this from the Gwion Lewis opinion which contradicted their own legal advice and was not from a neutral observer but was provided in order to advance the interests of opponents of basement extensions. Nowhere do they explain why the basement extension at Redington Road was lawful when the swimming pool was not.

10. Consequently, I consider the Council did act unreasonably. Had they approached this application properly, differentiated it from the other applications, considered the implications of Class E and the relevance of the legal opinion in that context they should have come to the view the application for a LDC was well founded and should have been granted. They had ample opportunities to do so and several e-mails from the appellants' agent clearly spelled out the issues and why the cases were different, none of which were addressed by the Council. This is setting aside the question of whether the legal opinion itself was capable of supporting the weight the Council were placing on it.

Conclusion

11. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense as described in the PPG has been demonstrated and a full award of costs is justified.

Costs Order

12. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the London Borough of Camden shall pay to Mr Shimshon Torn-Hibler, the costs of the appeal proceedings described in the heading of this decision. Such costs to be assessed in the Senior Courts Office if not agreed.

13. The applicant is now invited to submit to the Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Simon Hand

Inspector