



Appeal Decisions

Site visit made on 10 November 2010

by Clive Whitehouse BA(Hons) MCD MRTPI

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

Decision date: 19 November 2010

Appeal A: APP/H1515/X/10/2124574

Thorndon Cottage, Warley Gap, Little Warley, Brentwood CM13 3DP

- 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 M L Atreed & RRJ & CM Dove against the decision of Brentwood Borough Council.
- The application Ref S192/BRW/50/2009, dated 27th October 2009, was refused by notice dated 7th December 2009.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is (i) the construction of a detached outbuilding and (ii) the construction of a side and rear extension and the installation of a rear dormer.

Summary of Decision: The appeal is allowed and a lawful development certificate is issued in the terms set out below in the formal decision.

Appeal B: APP/H1515/A/10/2124622

Thorndon Cottage, Warley Gap, Little Warley, Brentwood CM13 3DP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
- The appeal is made by M L Atreed & RRJ & CM Dove against the decision of Brentwood Borough Council.
- The application Ref BRW/693/2009, dated 27th October 2009, was approved on 14th December 2009 and planning permission was granted subject to conditions.
- The development permitted is a two-storey side extension.
- The condition in dispute is No.5 which states that: "Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995, or any subsequent re-enacting Order, the development hereby permitted shall not be implemented if additional habitable floor space over and above that indicated on the approved plans, is formed prior to the implementation of this permission".
- The reason given for the condition is: "The site lies in the Metropolitan Green Belt, wherein the Authority seeks to restrict the formation of habitable floorspace in the interests of amenity".

Summary of Decision: The appeal succeeds and the planning permission is varied in the terms set out below in the formal decision.

Appeal A

Procedural Matter

1. The application included the re-submission of proposals for side and rear extensions and a rear dormer for which the Council had already issued a lawful development certificate (LDC) in 2009 (Ref. S192/BRW/42/2008). The reason

given by the appellants was that "it is considered more useful to have a single certificate that covered the extensions and the outbuilding if the property is sold in the future". The Council refused the LDC application in respect of the outbuilding, but appears to have declined to make a further decision in respect of the re-submitted proposal. The extension scheme has not been refused and there is no appeal against non-determination and therefore no basis for me to consider an appeal. I will confine my attention to the proposed detached outbuilding.

Reasons

2. The appeal property consists of a modest-sized detached house set in a large plot, and it has a lengthy planning history. The extent of the lawful residential curtilage has previously been established by the grant of a LDC, and there is no dispute that the proposed outbuilding would be within the curtilage.
3. The issue is whether the detached outbuilding constitutes permitted development under the terms of Part 1, Class E of the schedule to the Town and Country Planning (General Permitted Development) (No.2) (England) Order 2008 (GPDO). Development under this class is permitted within the curtilage of a dwellinghouse, subject to certain ground coverage and height limitations and provided the building is "required for a purpose incidental to the enjoyment of the dwellinghouse as such"
4. The proposal is for a building about 30m long by 10.5m wide for the purpose of a swimming pool, gym, sauna and stables.
5. Drawings showing three slightly different versions of the building are amongst the appeal documents, and I sought to establish at the site visit which is the plan on which the Council made its decision. One version (200 rev.A) shows the stables as a separate building, but that is dated after the Council's decision and is not to be the basis for the appeal. Another drawing shows a kitchen, "breakout area" and shower room within the area originally indicated as stables but the status of that drawing is unclear and it did not appear to be within the Council's file. I will base my decision on the drawing carrying the Council's date stamp of 30 Oct 2009, which shows a single building annotated for the purposes of a swimming pool, gym, sauna and stables.
6. It is common ground that the proposal would comply with the ground coverage and height limitations set out under Class E.1 of the Order. However, the Council considers that the large size of the proposed building (having a footprint about four times that of the existing house) is such that it can not be justified as being reasonably required to serve purposes incidental to the enjoyment of the existing dwellinghouse. The Council describes the proposal as a "lavish leisure complex" that would not be ancillary or subordinate to the dwellinghouse.
7. Both parties make reference to the case of *Emin v SSE and Mid Sussex DC* [1989], which deals with the questions of building size and incidental uses. The Court held in that case that whereas the relative sizes of the proposed leisure building and the house might be an important consideration, it is not by itself conclusive in determining whether uses meet the "incidental" test. It is also necessary to consider the incidental quality of the uses in relation to the enjoyment of the dwelling house and whether the building is genuinely and reasonably required for its intended purposes.

8. A building to house a swimming pool would clearly be “incidental”, as indicated in the wording of paragraph E(a) of Class E. The proposed pool in this case would not be unusually large for domestic family use and I consider that that element of the building would be permitted development.
9. The proposed gym and sauna would also in my view be for a purpose incidental to the enjoyment of the dwellinghouse as such and would not be excessively large.
10. The keeping of pet animals or other livestock is defined in the Order as a purpose incidental to the enjoyment of the dwellinghouse, and a small group of stables within the residential curtilage would satisfy the “incidental” test.
11. Apart from the ground coverage and height limitations set out in E.1 of the Order, the question of “reasonableness” applies to incidental uses. The Judge in the Emin case stated that the scale and type of accommodation could not “rest solely on the unrestrained whim” of the occupier.
12. I consider that each of the elements proposed in this case is capable of being reasonably required for an incidental purpose. It would also in my view be feasible that a family occupying the house could reasonably require each of the elements. The uses would be ancillary to the residential occupation of the house in functional terms, even though the scale of the leisure building would be substantial.
13. I conclude as a matter of fact and degree that the proposed detached leisure building would be permitted development under Class E of the GPDO.

Formal Decision

14. I allow the appeal and I attach to this decision a lawful development certificate describing the extent of the proposed development which I consider to be lawful.

Appeal B

15. Having previously issued a LDC for single storey extensions and a dormer, the Council granted planning permission for a two-storey side extension, but attached a condition that sought to ensure that only one of those schemes would be implemented. The reason given was that the house is in the Green Belt where policies set a limit to the scale of extensions to houses.
16. The 2008 amendments to the GPDO removed the volume limitation that formerly applied to house extensions, making it difficult for the Council to achieve its objective in this case. No additional GPDO limitations apply to houses in the Green Belt compared to the general housing stock.
17. The disputed condition seeks to prevent the two storey extension from being implemented if permitted development extensions such as those covered by the 2009 LDC were carried out first. However, as the appellant points out, the condition does not prevent extensions permitted by the 2008 GPDO from being carried out after the two-storey extension had been built. Consequently, the disputed condition would be ineffective for its stated purpose and therefore unnecessary.
18. Furthermore, a condition does not come into effect until the development to which it is attached is implemented, so the disputed condition could not in fact prevent works under the 2008 GPDO from being carried out before the two-

storey side extension is commenced. To achieve its objective in this case the Council would have had to secure a legal agreement to give up permitted development rights before the permission was issued.

19. The Council refers to an unimplemented planning permission granted on appeal for a replacement dwelling on the same site, where the Inspector attached a condition withdrawing permitted development rights for extensions. The difference in that case was that the condition would come into effect when the new house was completed and it would override the permitted development rights enjoyed by the existing dwellinghouse.

20. I conclude that the disputed condition is unreasonable and unnecessary.

Formal Decision

21. I allow the appeal, and vary the planning permission Ref BRW/693/2009 for a two-storey side extension at Thorndon Cottage, Warley Gap, Brentwood granted on 14th December 2009 by Brentwood Borough Council by deleting conditions No.5.

C Whitehouse

INSPECTOR



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 27TH October 2009 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 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed detached building is permitted development under the terms of the Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2008.

Signed

C Whitehouse

Inspector

Date 19.11.2010

Reference: APP/H1515/X/10/2124574

First Schedule

Proposed detached outbuilding as shown on drawing No.200 date-stamped 30 October 2009 by the local planning authority.

Second Schedule

Land within the residential curtilage of Thorndon Cottage, Warley Gap, Little Warley, Brentwood.

NOTES

1. This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the 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 not liable to enforcement action, under section 172 of the 1990 Act, on that date.
3. This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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.
4. 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.