Appeal Decision

Hearing held on 4 March 2008

by D Roger Dyer **BA, DipArch, RIBA, FCIArb, Barrister**

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

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date:11th March,2008.

Appeal Ref: APP/N5090/X/07/2053102
21 Selbourne Gardens, London NW4 4SH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 against a refusal to grant a lawful development certificate (LDC).
- The appeal is made by Mr Itzhak Elran against the decision of the Council of the London Borough of Barnet.
- The application (Ref W12917D/07), dated 20 June 2007, was refused by notice dated 7 August 2007.
- The development for which a Certificate of Lawfulness is sought is for a "proposed loft conversion with cable [sic] end roof."

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. At the hearing the appellant made an application for a full award of costs against the Council. That is the subject of a separate letter.

Preliminary Matters

2. Selbourne Gardens is a residential road that lies between the A41 trunk road and the M1 motorway. The appellant's property is a semi-detached house, the back garden of which lies on the M1 side. At the time of the application to the Council he proposed to extend his house by introducing rooms into the roof with a dormer window that would look towards the M1. The proposed extension had been constructed by the time of my inspection. Between the appellant's boundary and the M1 there is a strip of land, about 5m wide, owned by the Highway Agency. The strip is raised above the motorway where it is bounded by a retaining wall.

Reasons

3. The appellants' case is that the proposed dormer roof extension amounts to permitted development by virtue of Class B 1(b) of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 ('GPDO'). Class B 1(b) grants permitted development for the enlargement of a dwellinghouse provided, among other things, no part of the house would, as a result of the works, extend beyond the plane of any roof slope which fronts a highway. In this case it is said on behalf of the appellant that, because of the strip of land between his boundary and the edge of the M1, his roof slope does not front a highway. There is no direct access to that strip of land. Accordingly, the appellant says that his property does not front a highway. That fact is further enhanced by the fact that there is a 4m high retaining wall forming part of the cutting through which the motorway passes and the intervening land is not contiguous with the relevant highway.

4. It is also submitted for the appellant that a highway is land over which people can pass and repass. There is no such opportunity in this case because the strip is fenced off with no easy access from the motorway nor from the gardens behind. If the land is reserved for maintenance and repair, access can only be gained by climbing the retaining wall. Notwithstanding the ownership, it cannot be a highway. Other similar situations, to which I was referred, were said on behalf of the appellant to indicate that intervening land cannot amount to a highway. Case law has not tested the proposition since 1990.

5. As an analogy on the highway point, it is submitted for the appellant that in terms of Class A of part 1 of the GPDO, the Encyclopaedia, at 3B-2067, suggests that 'there are difficulties in applying the rule in a case where the highway does not immediately bound the curtilage; for example, where there is a strip of amenity land in between.' While the appellant recognises that the reference is to a different provision, he says that the principle is established thereby that the pavement of the road (or the hard shoulder) is the point from which measurement should be made.

6. I note that the burden of proof in an application for a Certificate of Lawful Development or Use lies on the applicant. The test to be applied is the balance of probability. A highway is not defined in the GPDO while section 336 of the principal Act refers to the meaning in the Highways Act 1980. The latter does not contain a definition but merely an amplification of its meaning. Nevertheless the motorway is plainly a highway. While I appreciate that the present case is an unusual situation, it is clear that the rear roof slope of the appellant's house faces towards the M1. In that respect it can be said to 'front' a highway. The difficulty here is that not only is there an intervening strip of land, but in addition the highway is at a different level, some 4m below the appellant's garden. The fact that the strip of land is owned by the Highway Agency gives credence to the proposition that it forms part of the highway.

7. It is not an explicit part of the provisions of the GPDO that the purpose of Class B1(b) is to prevent views of an extended roof structure. Nevertheless at my site inspection I saw that trees that have matured on the strip of land above the motorway tend to screen the appellant's roof but not entirely. Of course those trees could be removed at any time even if they do not become liable to disease or the like. I did not attempt to view the roof from the motorway because that would have been a dangerous exercise. I viewed the site and surroundings from the nearby bridge on the A5150 that crosses the M1 and from what I saw from there I judge that the roof is visible from the motorway.

8. In order to take advantage of the provisions of the GPDO the development must fall within all five of the stipulations in Class B1(b). In this case the highway, represented by the motorway, is near enough to the appellant's house to fall outside those provisions. The alteration of the roof faces onto and looks onto the motorway. It must, therefore, fall outside the provisions of the GPDO. The appellant has not proved otherwise. For all those reasons the appeal must fail and, accordingly, I shall not grant the Certificate of Lawful Use or Development sought.

Conclusions

9. For the reasons given above and having regard to all other matters raised, I conclude, on the evidence available, that the Council's refusal to grant a certificate of lawful use or development in respect of a dormer roof extension was well-founded and that the appeal should fail. In reaching my decision I have taken account of all other matters brought to my attention in writing and at the hearing, including the references to other nearby permissions granted in similar circumstances. That would be a matter to be decided by an application for planning permission, not in respect of an application for a certificate of lawfulness. In the circumstances I can find nothing further that outweighs my conclusions on the main planning issues.

Formal Decision

10. I dismiss the appeal and I refuse to grant a Certificate of Lawful Use or Development.

Roger Dyer
INSPECTOR

APPEARANCES

FOR THE APPELLANT

Mr Alvin Ormonde	Planning & Project Management Services.
Mr Itzhak Elran	The appellant.

FOR THE LOCAL PLANNING AUTHORITY

Mr Edward Malcolm Furnival Jones	Principal Planner in the Planning Support Team, London Borough of Barnet.

DOCUMENTS

Document	1	Attendance sheet.
Document	2	Letter from the Highways Agency to the Council.
Document	3	Aerial photographs of the site.
Document	4	Extracts from the Ordnance Survey put in by Mr Ormonde.
Document	5	Clip of photographs of the site and surroundings put in by Mr Ormonde.