The Planning Inspectorate

Appeal Decisions

Site visit made on 4 September 2020

by Jean Russell MA MRTPI

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

Decision date: 05 October 2020

Appeal A: APP/B5480/C/19/3227603
Appeal B: APP/B5480/C/19/3227604
The land known as 74 Parkstone Avenue, Hornchurch, Essex, RM11 3LS

- Appeals A and B are made by Proprio Investments Ltd under section 174 of the Town and Country Planning Act 1990 (TCPA90) as amended against two enforcement notices issued by the Council of the London Borough of Havering on 27 March 2019.
- **The breach of planning control as alleged in Notice A** is *without the benefit of planning permission, the unauthorised use of the outbuilding in the rear garden as a self-contained two bed roomed residential unit located as shown hatched on Plan B.*
- The requirements of Notice A are to:
  1. *Cease the residential use of the outbuilding in the rear garden; AND*
  2. *Remove all kitchen units, beds, shower cubicle, toilet facilities and all residential paraphernalia including appliances associated with the uses; AND*
  3. *Remove from the site all debris and materials accumulated as a result of taking the above steps.*
- The period for compliance with the requirements of Notice A is three (3) months.
- **Appeal A** is proceeding on the grounds set out under section 174(2)(a), (c), (d), (e), (f) and (g) of the TCPA90. Since an appeal is brought on ground (a), an application for planning permission is deemed to have been made under s177(5) of the TCPA90.
- **The breach of planning control as alleged in Notice B** is *without the benefit of planning permission, the erection of a building (shown hatched on Plan A) comprising a swimming pool enclosure measuring approximately 20m x 13.2m x 3.35m high attached to [a] single storey rear extension.*
- The requirements of Notice B are to:
  1. *Remove the single storey rear extension comprising a swimming pool enclosure attached to the single storey rear extension; AND*
  2. *Remove from the site all debris and materials accumulated as a result of taking the above steps [sic].*
- The period for compliance with the requirements of Notice B is three (3) months.
- **Appeal B** is proceeding on the grounds set out under section 174(2)(a), (d), (e) and (g) of the TCPA90. Since an appeal is brought on ground (a), an application for planning permission is deemed to have been made under s177(5) of the TCPA90.

FORMAL DECISIONS

1. Appeal A is allowed and Enforcement Notice A is quashed.

2. Appeal B is allowed, Enforcement Notice B is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Town and Country Planning Act 1990 as amended for the development already carried out, namely the erection of a building comprising a swimming pool enclosure measuring approximately 20m x 13.2m x 3.35m high attached to a single storey rear extension at the land known as 74 Parkstone Avenue, Hornchurch, Essex, RM11 3LS as shown on the plan attached to the notice.

PRELIMINARY MATTERS

3. It appears that the Council issued an enforcement notice on 15 February 2019 which alleged the same breach of planning control as Notice A but was served on fewer people. I assume that the February notice was withdrawn and replaced by Notice A. Appeal A was certainly made against Notice A as dated 27 March 2019.

4. The allegation in Notice A is not precisely described: it refers to 'the unauthorised use…' but it is a 'material change of use' that requires planning permission. It is not necessary for me to consider whether Notice A may be corrected because it shall be quashed anyway pursuant to my conclusions on ground (c).

5. There is also an error in Notice B; it alleges 'the erection of a building…attached a single storey rear extension' but requires the removal of the 'extension'. Again, it is not necessary for me to correct the requirements because Notice B will be quashed through my decision to grant permission for what is alleged[1].

6. Appeals A and B were mistakenly made in the name of Mr Harman Bhangu. The agent confirmed that the appellant in both cases is Proprio Investments Ltd, the freehold proprietor of 74 Parkstone Avenue. Mr Bhangu is the company director.

7. The appellant acquired the property on 10 December 2018, but some grounds of appeal require consideration of how the site was before then. The previous occupier is not party to Appeals A or B, and I shall refer to him simply as 'PG'.

8. The appellant has submitted the following signed witness statements[2]:

   - HB1 and HB2: statements by Mr Bhangu dated 26 April 2019 and 30 July 2020.
   - SJ1: statement by Mr Jaffery dated 24 April 2019. Mr Jaffery was a 'friend and business associate' of PG.
   - JH1 and JH2: statements by Mr Hare that are dated 26 May 2020 and undated. Mr Hare is director of Anami Holdings Ltd (AHL).
   - SP1 and SP2: statements by Mr Panesar that are dated 29 May and 31 July 2020. Mr Panesar is Mr Hare's solicitor and the appellant's agent.

9. The appellant withdrew ground (e) for both Appeal A and Appeal B[3].

10. Appeal A was made with ground (c) pleaded and the appellant has given evidence relevant to this ground. However, they presented that evidence with reference to ground (b). The Council had an opportunity to respond to the appellant's actual case. I shall treat Appeal A as proceeding on grounds (b), (c), (d), (a), (f) and (g).

11. The appellant's concerns about the Council's enforcement procedures and the expediency and financial implications of Notices A and B are outside of my remit.

THE SITE AND ITS SURROUNDINGS

12. Parkstone Avenue is a quiet street lined by dwellinghouses which generally stand in substantial plots. The road is within the Emerson Park area, described in the Council's Supplementary Planning Document (SPD) 5 as a '*mature and pleasant residential district…[with] a distinctive character of varied and well maintained single family detached dwellings in spacious and well-landscaped grounds*'[4].

[1] The enclosure is in fact an extension, but the term 'building' can mean 'part of a building' and it is helpful to distinguish the enclosure from the extension that it is attached to.
[2] The witness statements do not take the form of statutory declarations as suggested.
[3] Ground (e) is that copies of the enforcement notice(s) was or were not properly served
[4] SPD5: Emerson Park Policy Area

13. Like other properties in this area, the appeal house has been altered and extended over time, largely in accordance with permissions granted. The outbuilding subject to Appeal A stands close to the rear (or southern) boundary of the site, while the swimming pool enclosure subject to Appeal B is attached – as suggested above – to an existing and permitted single storey rear extension to the house. There is lawn between the appeal structures and a play area beside the outbuilding.

APPEAL A – THE RESIDENTIAL USE APPEAL

Appeal A on Grounds (b) and (c)

14. Ground (b) is that the 'matters' stated in the notice have not occurred; ground (c) is that the matters do not constitute a breach of planning control. The onus is on the appellant to make their case on the balance of probabilities. Their evidence must be accepted where it is sufficiently precise and unambiguous and there is no evidence to contradict their version of events or make it less than probable.

15. The appeal outbuilding is capable of being used as a dwellinghouse, containing as it does a kitchen, bathroom and habitable rooms. The appellant accepts that the structure was in fact 'lived in'. It follows that the 'use of the outbuilding…as a self-contained two bed roomed residential unit' has probably occurred and the appeal on ground (b) must fail.

16. However, it does not automatically follow that the use was in breach of planning control. The appellant's case is that the outbuilding was used for purposes incidental to the lawful residential use of the main house – and that cannot be right, but it is not uncommon for the term 'incidental' to be misunderstood.

17. An 'incidental' (or 'ancillary') use must be different from but functionally connected to the 'primary' use in a normal way. Since the outbuilding was 'lived in', it was put to the same use as the main house. It was in residential use and not a use that is incidental to residential use. However, a family may use a garden annex for living purposes without making a material change of use of the property.

18. The key question here is whether the outbuilding was used as 'part and parcel' of the lawful residential use of the dwelling at 74 Parkstone Avenue, or as a separate dwelling in a separate planning unit on the balance of probabilities. The planning unit is usually the unit of occupation, unless a smaller area is physically and/or functionally separate as a matter of fact and degree.

19. I am told that PG and his family lived at the site from November 2010, but he was subject to a high court judgment on 17 July 2014 in respect of debt to AHL. On 19 December 2014, a legal charge was made between Enilo International Ltd (EIL) as the mortgagee and Berkeley Realty Ventures Ltd (BRVL) as the mortgagor of no. 74. BRVL, at the request of PG, charged the property as security for payment of the debt due to EIL. It was EIL which later sold no. 74 to the appellant – and so PG was not the legal owner of the site, at least from December 2014 onwards.

20. Mr Jaffery described visiting the site some three or four times a week during the period from 2010 to late 2014. He stated that the outbuilding was '*always used by [PG] and his family for residential purposes including any domestic staff*'. I do not know if Mr Jaffery still has a relationship with PG, friendly or otherwise. Either way, there is nothing before me to show that his statement is not reliable.

21. Mr Hare and Mr Panesar visited the site on 12 December 2014 before finalising the legal charge described above. The former stated that the swimming pool enclosure which is subject to Notice B '*appeared to be used by the tenants…the outbuilding also appeared used and lived in. I had previously been informed that the building*

was being used for ancillary accommodation for the use of a live in caretaker'. The 'tenants' must have been PG and his family, since he was not the owner and there is no record of anyone else living in the main house.

22. There is nothing to contradict Messrs Jaffery, Hare and Panesar's accounts. Where domestic staff 'live in', they are usually considered to be part of the family household; this is true whether they live in a room in the main dwelling or an annex in the grounds. The appellant's evidence indicates, therefore, that the planning unit probably remained in single family occupation at least until late 2014 and the use of the outbuilding was part and parcel of the use of the house.

23. The Council's report shows that Notice A was issued after the third investigation into the alleged residential use of the outbuilding. The report does not say why the first case (ENF/204/10) was opened or closed, or why the second (ENF/92/15) was opened either. However, it states that the second investigation was closed because of '*the owner's claim at the time that the outbuilding was no longer intended to be rented out to a tenant'*. Even if PG then owned the site, or the Council thought he did, the report does not show that the outbuilding was let to an unrelated person.

24. For the final enforcement investigation, the report describes that a Council officer on 5 May 2017 visited the site '*with OB, someone in property present, did not open the door*'. I can assume that 'OB' was the outbuilding and the person 'present' was living there, but the note still does not amount to evidence of *separate* residential use. The report also shows that the Council obtained an entry warrant, but not that anyone other than PG and members of his household ever lived on the site.

25. The appellant states that the outbuilding was not subject to separate utility or Council Tax bills. I could not allow the appeal on the basis of that claim alone, because it is not unusual for people to fail to register for Council Tax, and utility bills can be factored into rent (while both may be factored into salary). However, the evidence certainly does not harm the appellant's case – and the Council has not contended that the alleged residential unit was in fact billed separately, although their report shows that an officer 'checked C/Tax records'.

26. I also accept the appellant's point that the outbuilding has no separate access, although this again cannot be decisive because occupiers of separate dwellings can and do sometimes share a drive. The outbuilding can be reached without walking through the main house at no. 74; there is a path alongside the eastern site boundary which connects the outbuilding to the plot frontage and Parkstone Avenue. However, the path also serves the back garden to the main house; that space is not and does not appear to have ever been subdivided. There is no evidence of the outbuilding having any separate curtilage.

27. I find from the evidence before me that the residential use of the outbuilding was 'part and parcel' of the lawful residential use of 74 Parkstone Avenue on the balance of probabilities. I conclude that there has not been a breach of planning control as alleged and Appeal A succeeds on ground (c). Notice A shall be quashed and grounds (d), (a), (f) and (g) do not fall to be considered.

APPEAL B – THE SWIMMING POOL ENCLOSURE APPEAL

Appeal B on Ground (d)

28. An appeal on ground (d) is that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control constituted by the matters alleged.

29. Under s171B(1) of the TCPA90, no enforcement action may be taken against a breach of planning control consisting in the carrying out of building operations after the end of the period of four years beginning with the date on which the operations were substantially completed. The appellant must show that the 'building comprising a swimming pool enclosure…' was substantially completed by 27 March 2015 on the balance of probabilities, four years before Notice B was issued.

30. Before I turn to the evidence, it is worth explaining what is meant by 'substantially completed'. The question is not whether operations have progressed so far that outstanding works, on their own, would not require planning permission. Where a building is proposed, permission should be sought and granted for the operation *as a whole*. If a building is not erected in accordance with a permission, it is unlawful as a whole and can be enforced against as a whole, unless and until it is immune from enforcement action. To be substantially completed, therefore, a building must be fully detailed and of a certain character.

31. Mr Bhangu submitted Google Earth photographs dated 19 July 2013, 10 February 2015 and 3 May 2015 as Exhibit B to HB1. I accept from the position of cars in the street and at the property that these images are identical. The enclosure is absent from the pictures – but Mr Jaffrey's evidence is that the works did not begin until 2014. I shall assume that the photographs were taken in 2013 and do not undermine the appellant's or the Council's case.

32. Mr Bhangu submitted another aerial photograph at Exhibit A which was confirmed by 'Get Mapping' as having been taken on 24 August 2014. It shows that the walls of the structure had been built and the pool itself laid out – but there was no roof, as Mr Bhangu admitted in HB2. The enclosure was not substantially completed by 24 August 2014, although that was again well before the material date.

33. Mr Jaffery said in SJ1 that '*…towards the end of 2014 (September/October 2014) I observed the works progress on the Swimming Pool to substantial completion…the whole of the property including the swimming pool area was occupied and used for residential purposes'*. That evidence is not sufficiently detailed to make the appellant's case on its own.

34. Mr Hare said in JH1 that '*…I attended the property at 74 Parkstone Avenue on the 12th December 2014…the swimming pool complex [was] completed. I recall that the pool was full of water and that the pool building had a large glass roof and it appeared…to be used by the tenants*'. He added in JH2 that '*…I recall seeing children's swimming armbands and floats…there were no building materials or…similar…on site'*. Mr Panesar agreed in SP2 that '*the pool annex was very nicely laid out with a seating area immediately before the pool and then the glass windows…which looked out onto the main garden*'.

35. Mr Hare stated that PG allowed him to take photographs of the outside of the site, although not inside the enclosure. The pictures are dated '12/12/2014' and indeed show trees in winter. They also show that the enclosure then had walls, windows, some kind of roof and rooflight – but they are not clear beyond that, because they are faded, taken from a distance and only show parts of the enclosure.

36. Mr Bhangu, Mr Jaffery and the Council also submitted a Google Earth photograph dated "6/4/2015". I will assume that it was taken on 6 April rather than 4 June 2015, because the Council thought so and this assists the appellant. The image again suggests that the shell was in place with a roof and rooflight. However, the roof was clearly not finished or felted as shown in the more recent pictures in the appellant's statement of case.

37. The Council has submitted photographs taken on 28 June 2017 which show missing flooring around the pool, but they do not say why they thought the enclosure was then in the state that it was. The onus is not on the Council to make their case but, with no other narrative available, the appellant may be right that post-completion works could have taken place in 2017 to remedy some problem such as damp. Mr Hare is clear that the floor was not lifted in December 2014.

38. Even so, the appellant's evidence of the building being substantially completed by December 2014 or March 2015 is contradicted by the '6/4/2015' photograph. Google date stamps are not reliable, and the appellant was told by Get Mapping that no aerial images were taken in 2015. However, the photograph cannot have been taken much earlier than 6 April of that year because it shows that works on the enclosure had progressed since 24 August 2014 *and* trees in full leaf.

39. I find the appellant's evidence insufficiently precise and unambiguous for me to allow this ground (d) appeal. I have noted the references to water in the pool and children's toys, but Messrs Jaffery, Hare and Panesar did not describe or show the enclosure being a fully detailed building or in actual use for its intended purpose. The appellant has not explained the discrepancy between the appearance of the enclosure in the April 2015 aerial photograph and their own later pictures.

40. Adding a little weight to that finding, the high court judgment against PG in respect of debt owed to AHL was made in July 2014 when, on any account, the swimming pool enclosure was not substantially complete. The appellant has not explained how PG could have finished the enclosure, given his dire financial situation, before or even after December 2014 when Messrs Hare and Panesar visited for the express purpose of finalising the charging of the property as security for payment.

41. It has not been shown that the alleged enclosure was substantially completed by 27 March 2015 on the balance of probabilities. I conclude that it was not too late for the Council to take enforcement action and Appeal B fails on ground (d).

Appeal B on Ground (a) and the Deemed Planning Application

Main Issues

42. The main issues are the effect of the enclosure on the living conditions of nearby occupiers and on the character and appearance of the surrounding area.

Reasons

Living Conditions

43. The enclosure is wide and long for a single storey rear extension even to a house of the size of no. 74. It is also some 3.35m to the eaves and therefore 50% higher than any wall or fence which could be erected without express permission on the site boundaries. In many cases, an extension of this scale could be expected to harmfully overbear neighbouring properties and I note that the Council's SPD4 expects single storey rear extensions to be no higher than 3m generally[5].

44. However, the reason given for that guidance is to ensure there is no unacceptable loss of amenity to neighbouring properties. It is more important, in my view, for development to meet the aims than 'general' size limits set out in SPD4. Indeed that document also states that the acceptable depth of any rear extension will depend on site-specific considerations and I would take the same approach when considering the height of the swimming pool enclosure.

[5] SPD4: Residential Extensions and Alterations

45. The enclosure is adjacent to and the same length as an outbuilding at no. 72 which delineates the mutual boundary. The outbuilding is lower to the eaves but higher to the ridge than the nearest part of the enclosure. It will effectively conceal the enclosure from near parts of the garden at no. 72.

46. On its other side, the enclosure stands some 2.5m from the boundary to no. 76 – which is marked not only by a fence but also mature trees and shrubs. Again, the enclosure will be substantially screened from near parts of the garden at no. 76. I consider that the '*bulk and massing immediately adjacent to the boundaries'*, as described by Notice B, are not such that the enclosure will loom over or appear unacceptably dominant from close quarters in either garden next door.

47. The enclosure should not appear unacceptably obtrusive from the backs of the gardens at nos. 72 and 76 because it would be seen as a lightweight, largely glazed structure that is partly screened by boundary fences and softened by landscaping in the retained site garden[6]. The enclosure will be visible from rear-facing first floor windows in the adjoining houses, but at an angle and from a distance. It is some 6.5m from the main part of the appeal dwelling, with the gap being filled by the pre-existing extension and a courtyard.

48. The occupier of no. 72 has asked that the enclosure is re-roofed in artificial grass in order to improve his outlook, as apparently promised by PG. However, he has not indicated that the enclosure appears unacceptable as it is. The Council has not objected to the existing roofing and that is unsurprising because flat-roofed house extensions are often covered in felt. Although the appellant is prepared to re-roof the enclosure, it would be unnecessary and unreasonable to require such works as a condition of a planning permission. The enclosure as is causes no unacceptable loss of outlook from or enjoyment within adjacent gardens or homes.

49. I conclude that the enclosure causes no unacceptable harm to the living conditions of nearby occupiers. It does not conflict with Policy DC61 of the Havering Core Strategy and Development Control Policies Development Plan Document (DPD) or Policies 7.4 or 7.6 of the London Plan (LP), which require that development complements the amenity and character of the area through its appearance, materials, layout and integration with surrounding buildings and that buildings are human in scale, ensure people feel comfortable with their surroundings and do not cause unacceptable harm to the amenity of surrounding land and buildings.

50. The enclosure does not conflict with the National Planning Policy Framework (the Framework), which expects development to create places with a high standard of amenity for existing and future users. It causes no unacceptable loss of amenity to the neighbouring properties in conflict with SPD4 or SPD9[7].

Character and Appearance

51. The Council's reason for issuing Notice B focusses on the effect of the enclosure on adjoining gardens – but it does refer to their character. The Council's statement also raises a concern that the enclosure is unsympathetic to and detracts from the character and appearance of the site and the wider Emerson Park area. The appellant has addressed this matter and I shall too.

52. I agree with the appellant that swimming pools are seen in many gardens in this neighbourhood but the vast majority, as shown by the aerial photographs, are outdoor pools. The appellant has not shown that the enclosure is similar in scale or design to any nearby extensions or garden buildings. However, it does not follow

[6] Some glazed panels were missing and boarded up on the day of my visit but I am told that was through damage.
[7] SPD9: Residential Design

that the enclosure is unacceptably large in relation to, or otherwise out of keeping with the appeal or nearby properties.

53. The enclosure is subservient to the main part of the house by reason of its height, largely glazed design and position some 6.5m away. The windows in the enclosure allow views of the main part of the dwelling from the rear, and overall I find that it does not detract unacceptably from the architecture or character of the original building. Meanwhile, the back garden on the site remains expansive enough for the house as extended to have a commensurate green and open setting.

54. To protect the spacious character and appearance of the Emerson Park area, SPD5 states that no part of any new building or extension will be permitted within a minimum of 1m from an adjoining common party boundary at ground floor. The enclosure is less than 1m from 72 Parkstone Road – and that cannot be justified simply by the fact that the outbuilding at no. 72 does not maintain a 1m gap either. The outbuilding appears to pre-date SPD5 and could in any event make it more important that space is preserved on the appeal side of the boundary.

55. However, supplementary guidance does not have statutory force, and SPD5 is clear that each case must be treated on its merits. I find that, despite its proximity to the outbuilding at no. 72, the swimming pool enclosure does not give the site an unacceptably cramped appearance or reduced rear garden length. Its massing and architectural design, and the retained space on the site would be compatible with and maintain the distinctive and varied character of the Emerson Park area.

56. I conclude that the swimming pool enclosure causes no unacceptable harm to the character and appearance of the surrounding area. It does not conflict with DPD Policy DC61, or with LP Policies 7.4 and 7.6, which require development to respect the scale, massing and height of surrounding physical context; have regard to the pattern and grain of existing spaces and streets in scale, proportion and mass; and comprise details and materials that complement local architectural character.

57. The enclosure does not conflict with the Framework, which seeks to ensure that developments are sympathetic to local character. I have found that it maintains the varied character of the Emerson Park area as required by SPD5. It does not dominate or detract from the character of the appeal or surrounding houses in conflict with SPD4; it does relate well to its surroundings as required by SPD9.

Other Matters and Conclusion

58. The appellant suggests that a grant of permission is justified by the fact that the enclosure could be replaced by a similar building as permitted by Article 3 and Schedule 2, Part 1, Class E of the *Town and Country Planning (General Permitted Development) (England) Order 2015*. I attach little weight to this point because such 'permitted development' would need to be detached from the pre-existing extension and lower in height than the enclosure. However, this finding makes no difference because I have found the enclosure acceptable on its merits.

59. The Council has recommended no planning conditions to be imposed on any grant of permission for the enclosure; I consider that none are necessary. For the reasons given and with regard to all other matters raised, I conclude that Appeal B should succeed on ground (a) and planning permission should be granted for the alleged enclosure. Notice B shall be quashed and so Appeal B does not fall to be considered on ground (g).

Jean Russell

INSPECTOR