
Appeal Decision

Site visit made on 23 August 2016

by Alan Woolnough BA(Hons) DMS MRTPI

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

Decision date: 21 September 2016

Appeal Ref: APP/Z3635/C/15/3140643

72 Charles Road, Staines TW18 1JX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Ms S Fossey against an enforcement notice issued by Spelthorne Borough Council.
- The Council's reference is 15/00127/ENF.
- The notice was issued on 10 November 2015.
- The breach of planning control as alleged in the notice is: 'Unauthorised use of an outbuilding in the rear garden of the dwellinghouse for primary living accommodation'.
- The requirements of the notice are:
 1. Cease the unauthorised use of the outbuilding as primary living accommodation.
 2. Convert the outbuilding back to a gym/hobbies room.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the 1990 Act as amended.

Summary of Decision: The notice is found to be a nullity.

Procedural matter

1. An application for costs was made by Ms S Fossey against Spelthorne Borough Council. This application is the subject of a separate decision.

The notice

2. The enforcement notice is incorrectly framed in several respects. Recital (2), on the first page, refers to an apparent breach of planning control consisting of 'the carrying out of building, engineering, mining or other operations ... without the grant of planning permission required for that development', falling within paragraph (a) of section 171A(1) of the 1990 Act as amended. Recital (1) records that this appears to have taken place within the last four years.
 3. However, Schedule 2 to the notice goes on to describe the alleged breach as 'unauthorised use of an outbuilding in the rear garden of the dwellinghouse for primary living accommodation'. The notice targets only the use of the outbuilding, not its construction. The reference to 'the carrying out of ... operations' made in recital (2) is therefore erroneous.
 4. Although 'use' of a building is not in itself 'development' as defined by section 55 of the 1990 Act as amended that definition does include, in addition to the operations referred to in recital (2), the making of any 'material change of use' of any building. Nonetheless, what is described in the enforcement notice,
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namely use of the outbuilding for primary living accommodation, does not in itself amount to a material change of use.

5. Indeed, the Council does not suggest otherwise, in either the notice or subsequent submissions on the appeal. No reference is made to the provision of self-contained accommodation that has functioned as a separate dwellinghouse or to the creation by other means of a second planning unit separate from that containing the host dwelling. Accordingly, there is no indication that any unauthorised 'development', as defined by section 55 and referred to in recital (2), has taken place.
6. Rather, it is apparent from the Council's submissions on the appeal that if a breach of planning control has occurred in this case, it is perceived to have taken the form of non-compliance with condition 3 attached to planning permission ref no 14/01091/HOU, granted by the Council on 8 September 2014. The development thus approved is described in the decision notice as: 'Erection of single storey side extension and single storey rear extension. Retrospective permission for the erection of an outbuilding for use incidental to the dwellinghouse'.
7. Condition 3 reads: 'That the outbuilding hereby approved be used ancillary to the domestic enjoyment of the main house and shall not contain any form of habitable accommodation. It should not be used as a separate unit of residential accommodation'. There is no dispute between the parties that the outbuilding targeted by the enforcement notice is that which is subject to the said planning permission.
8. The Council perceives the outbuilding to have accommodated, amongst other things, a bedroom. The term 'habitable accommodation' is not defined for planning purposes in statute, guidance or case law. However, there can be no question that in general parlance it encompasses bedroom accommodation. It follows that if the outbuilding provided a bedroom then non-compliance with condition 3 must have occurred.
9. Provided condition 3 is held to be valid so as to have effect, non-compliance therewith would have amounted to a breach of planning control within paragraph (b) of section 171A(1) of the 1990 Act as amended, irrespective of whether the matter in question was 'development'. It follows that the Council referred to the wrong statutory provision in recital (2) of the subject notice and that the period of time referred to in recital (1) should have been ten years rather than four.
10. The powers which I may use to correct or vary an enforcement notice on appeal, as conveyed by section 176(1) of the 1990 Act as amended, are extensive. However, they are applicable only at my discretion and, moreover, are subject to the caveat that I must be satisfied that any correction or variation I may make will not cause injustice to the Appellant or the local planning authority.
11. Specification of the wrong paragraph of section 171A(1) and the resultant misdrafting of an enforcement notice are not likely to render the notice a nullity *provided* it is clear from within its four corners whether it alleges development without planning permission or a breach of condition. However, in this case the notice makes no mention whatsoever of condition 3 of planning permission ref no 14/01091/HOU.

12. The correction of the consequent reference to four years rather than ten would not of itself give rise to injustice, the Appellant not having pursued an appeal on ground (d) on the basis that the alleged breach occurred more than four years before the notice was issued. Indeed, the relevant permission was not in place until just over a year before enforcement action was taken. I also note that the Appellant has referred to the effect of condition 3 in her submissions, so was not denied the opportunity to take it into account when making the appeal, and that the Council has focussed on the condition in its appeal statement.
13. Nonetheless, I am concerned that the absence of any mention of the relevant permission within the notice at the point of issue may have rendered condition 3 less central to the Appellant's argument than it would have been had the notice been drafted correctly. Indeed, although she has addressed the question of whether the condition was effective in law, her submissions on the appeal also range across a number of other matters that have nothing to do with whether or not the condition had been complied with, such as whether a material change of use had occurred.
14. Moreover, the terminology used in the notice makes it difficult to understand exactly what is required in order to comply with it. Crucially, I am mindful that if I were to reframe the notice as targeting non-compliance with condition 3, I would have to change some of the terminology used by the Council in a way that could be fundamental to the Appellant in deciding what her approach should be. In this regard, condition 3 prohibits the inclusion within the outbuilding of 'any form of habitable accommodation'. Accordingly, this phrase belongs in the notice.
15. However, the notice refers instead to use of the building as 'primary living accommodation' and requires cessation of its use as such. What is meant by primary living accommodation, and whether it is wholly encompassed by or overlaps in part with the term 'habitable accommodation' in this context remains unclear. For example which, if either, of these concepts might include the shower room with basin and wc and is the notice intended to secure cessation of the use of those facilities?
16. Correcting the notice by switching from one term to another, as I would have to do if minded to uphold it, might well deny the Appellant the opportunity to construct her argument on appeal in a materially different way. This would be unjust. I therefore find that, although not always the case, the use of the wrong section 171A(1) paragraph has in this particular instance rendered the notice a nullity. In other words, it is not merely beyond correction but is so flawed that, in effect, there is no notice and thus no valid appeals on ground (c) or (f) against it.
17. For the sake of completeness I will add that requirement 2 in Schedule 4, which specifies the conversion of the outbuilding 'back to a gym/hobbies room', exceeds the lawful scope of the purported notice, of whether the said use is denoted on an approved plan. An enforcement notice cannot require the introduction or resumption of an alternative use, lawful or otherwise. Rather, it may only secure the cessation of an unauthorised one.
18. This error, although not beyond correction in itself, is so fundamental to the validity of the notice that I do not require a valid ground (f) appeal in order to

address it. Nonetheless, its correction is inconsequential in circumstances where the notice has been declared a nullity for other reasons.

Conclusion

19. I have concluded that the enforcement notice is a nullity. Consequently, there is in effect no notice against which to appeal and, in these circumstances, the appeals on grounds (c) and (f) do not fall to be considered. Should the Council wish to continue to pursue enforcement action, it may consider doing so by means of a replacement notice framed in the proper terms, having regard to the 'second bite' provisions of section 171B(4)(b).

Formal decision

20. The notice is found to be a nullity. Therefore, no further action will be taken in connection with this appeal. In the light of this finding the local planning authority should consider reviewing the register kept under section 188 of the 1990 act as amended.

Alan Woolnough

INSPECTOR