
Appeal Decision

Site visit made on 13 September 2016

by Nigel Burrows BA MRTPI

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

Decision date: 12 October 2016

Appeal Ref: APP/N5090/C/16/3142539

Land at 64 Sutton Crescent, Barnet, EN5 2SS

- 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 Dr Harvey Leigh against an enforcement notice issued by the Council of the London Borough of Barnet.
- The enforcement notice, ref: ENF/00833/15 was issued on 9 December 2015.
- The breach of planning control as alleged in the notice is 'the construction of an outbuilding for use as a separate residential unit within the last 10 years.'
- The requirements of the notice are:-
 1. Demolish the brick outbuilding to the front of the property
 2. Permanently remove all constituent materials resulting from the works in 1. above from the property.
- The period for compliance with the requirements is four months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The enforcement notice is quashed

Procedural Matters

1. The alleged breach of planning control is described in the enforcement notice as 'the construction of an outbuilding for use as a separate residential unit within the last 10 years'. The Planning Inspectorate wrote to the main parties on 29 January 2016 and indicated that such breaches are normally described as a material change of use under section 171B(2) of the Act (either development without planning permission or a failure to comply with conditions) and the time limit of 4 years applies. The responses received by the Planning Inspectorate were subsequently cross-copied to the parties.
2. The Council's stance is the building was constructed for use as a dwelling and was put to this use immediately on its completion. The Council argues the 4-year 'rule' does not apply, citing the *Welwyn Hatfield* case.¹ The judgement in *Welwyn* concluded that if a dwellinghouse is erected unlawfully and used as a dwellinghouse from the outset, the unlawful use can still properly be the subject of enforcement action within 10 years, even if the building itself as a structure becomes immune from enforcement action after 4 years.²
3. However, if the allegation in the Council's enforcement notice is read on its face, it appears to be directed at operational development. This is confirmed by the Council's submissions on ground (f), which state unequivocally "*The Council contends that the breach is operational development and the purpose of the notice is to remedy the breach of planning control by requiring the land to be restored to the condition in which it was prior to the breach of planning control taking place*". As the enforcement notice appears to be directed at operational development, this is subject to the 4-year immunity period

¹ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15 (J.1188)

² The judgement of the Supreme Court in *Welwyn* was applied more recently in *Lawson Builders Ltd & Lawson & Lawson v SSCLG & Wakefield MDC* [2013] EWHC 3368 (Admin), [2015] EWCA Civ 122

- by virtue of section 171B(1) of the 1990 Act, as amended. Consequently, the circumstances in this particular case do not appear to be directly comparable to *Welwyn*.
4. The appellant's stance is that the existing structure 'as built' has planning permission and the notice should only relate to its use. This appears to be a reference to planning permission B/00422/11, which was apparently granted on 23 March 2011 for development described as "*Conversion of existing rear detached garage into a habitable space, including single storey extension and alterations to roof and all elevations.*"
 5. The Council emphasises that a condition imposed upon the planning permission for the structure required its use to remain ancillary to the main building and prevented its occupation as a separate unit. Be that as it may, the allegation in the enforcement notice is not directed at a breach of a condition. It is also necessary to bear in mind that if the development was not undertaken in accordance with the terms of the permission, then the condition is of no effect. In any event, the time limit is normally 4 years for taking enforcement action against a breach of a condition which has the effect of preventing the use of a building as a separate dwellinghouse (by virtue of section 171B(2) of the Act).³
 6. I have not been provided with details of the date when the building operations were substantially completed (or when the use as a self-contained dwelling commenced). Whilst the appeal is travelling on ground (d), this ground appears to have been introduced as a consequence of the Planning Inspectorate's letter. In any event, the appellant has not provided any substantive evidence under ground (d) to show that at the time the notice was issued it was too late to take enforcement action against the matters stated in the notice. I could not discount the possibility that this might be a consequence of the Council's insistence that the relevant immunity period is 10 years. However, as I have previously indicated, the period would be 4 years in the case of operational development.
 7. I have wide powers to correct the notice. However, in this case it would not be possible to correct the immunity period using my powers under section 176 of the Act without the risk of causing injustice to the appellant. There is a lack of firm evidence before me to indicate when the breach of planning control alleged in the notice occurred. If I were to correct the notice to refer to the 4-year immunity period, there is a clear risk that such a correction might deprive the appellant of the opportunity to revisit his arguments on ground (d), i.e. at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. Similar difficulties would arise if I were to correct the notice to refer to a material change of use, as legal arguments might arise concerning the relevance of *Welwyn* to this appeal.
 8. I therefore conclude the notice is defective and it is not capable of correction without potentially causing injustice to the appellant. Consequently, the notice will be quashed. In the circumstances, grounds (a), (d), (f) and (g) of the appeal do not fall to be considered.
 9. I have taken into account all the other matters raised in the written representations but I find they do not outweigh the main considerations that have led to my decision.

Formal Decision

10. The enforcement notice is quashed.

Nigel Burrows

INSPECTOR

³ *FSS v Arun DC & Brown* [2006] EWCA Civ 1172