
Appeal Decision

Site visit made on 30 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 October 2016

Appeal Ref: APP/C5690/C/16/3144229

5 Belmont Hill, London SE13 5AU

- 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 Mr Süleyman Bilgin against an enforcement notice issued by the Council of the London Borough of Lewisham.
- The Council's reference is EN/13/00140.
- The notice was issued on 30 December 2015.
- The breach of planning control as alleged in the notice is: 'Without planning permission, the carrying out of the following unauthorised developments at the above premises:
 1. the construction of a mansard roof extension as shown on Photograph 1 attached
 2. the construction of an external staircase providing access to the rear flat roof at first floor level as shown on Photograph 2, attached
 3. the installation of railings around the flat roof at the rear at first floor level to create a roof terrace as shown on Photograph 2 attached
 4. the material change of use of the premises from a hot food takeaway; Use Class A5 of the Town & Country Planning (Use Classes Order) 1987 (as amended) to a hot food takeaway; Use Class A5 at ground floor level and residential use at first floor level'.
- The requirements of the notice are:
 1. Remove the mansard roof extension and;
 2. Reinstate the roof to its form existing prior to the unauthorised development by reinstating the butterfly roof in accordance with the Roof Plan shown on Plan BH022013-01 and on BH02013-02, attached
 3. Remove the external staircase to the rear
 4. Remove the railings around the flat roof at the rear at first floor level
 5. Cease the use of the first floor of the premises for residential purposes and;
 6. a. Remove the upvc residential entrance door at the rear first floor level which provides access to the residential unit as shown on Photograph 1 attached and;
 6. b. Install second hand stock bricks to the resultant gap in the wall to match the adjoining rear wall at first floor level and;
 7. Remove the entrance porch which is situated in front of the upvc residential entrance door at the rear first floor level as shown on Photograph 1 attached
 8. Reinstate the internal stairs between the ground floor and the first floor of the premises as shown shaded blue on the Ground floor Plan and First floor Plan on Plan BH022013-01, attached
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (e) and (f) of the 1990 Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections.

Procedural matter

1. The Appellant refers to the upper floors of the subject building having been used 'historically' for storage and staff accommodation ancillary to the ground floor takeaway. However, he provides no cogent evidence to substantiate this. Nor has he explained how residential accommodation of this kind might legitimately be regarded as ancillary to the takeaway use so as to function as a lawful fallback position or demonstrated that any form of residential use is lawful in this case, including by reason of the passage of time. These assertions have not therefore informed my decision on any of the grounds of appeal.

The notice

2. The enforcement notice targets not only operational development, as set out in items 1 to 3 of the breach of planning control alleged at section 3, but also a material change of use of the first floor to residential accommodation in item 4. The heading in bold upper case type at the top of page 1 of the notice, which suggests that the document relates to operational development alone, is therefore incomplete. This is best resolved by deleting the words 'OPERATIONAL DEVELOPMENT' from the heading altogether.
3. Item 4 of the allegation is framed so as to allege a material change of use of the ground and first floors of the premises to a hot food takeaway with residential use above, but does not make mention of the residential use of the second floor (albeit that this is referred to in the reasons for issuing the notice set out at section 4). The second floor is contained within the roof extension subject to item 1 of the allegation. However, the notice is framed in such a way that were I to find the extension acceptable in visual terms so as to justify its retention I could not then move on to consider its adequacy as residential accommodation.
4. In such circumstances the use of the second floor/extension would fall outside the scope of the deemed planning application associated with the appeal, which could not be broadened without causing injustice to the Appellant. This flaw is not in itself sufficient to invalidate the notice and, in the event, has been of little consequence in the light of my finding on the planning merits of the extension. Nonetheless, it is worthy of mention.
5. Additionally, at the time of my visit it was apparent that, in all likelihood, the first and second floors of the property were being used for residential purposes in a manner functionally independent of the ground floor takeaway. Even though I am given to understand that those sleeping on the second floor are employees of the takeaway, nothing before me suggests that anyone resident on the upper floors is dependent on ground floor facilities for residential purposes, as cooking, washing and wc facilities are all available on the first floor. Nor have I seen anything to suggest that the situation was otherwise on the date that the notice was issued.
6. Therefore, having regard to the tests arising from *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207, I am minded to regard the ground floor takeaway as it existed on that date as a separate planning unit, the use of which for purposes within Class A5 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended is lawful. Accordingly, I will remove reference to it from item 4 such that the latter will refer only to a

material change of use of the first floor to residential use. I have considered whether there is scope to be more precise about the nature of the residential use, such as describing it as a self-contained dwelling unit. However, I am not in a position to do so in circumstances where, for the reasons set out above, I cannot include the second floor.

7. This leaves unanswered the question of whether the material change of use alleged should be subject to the statutory four year time bar on enforcement action (as cited in the reasons for issuing the notice) or the ten year rule (which would apply to any material change to a residential use other than a single dwellinghouse). However, as the Appellant has not pursued a ground (d) appeal based on the shorter period and, in his response to the Council's Planning Contravention Notice (PCN) gives a commencement date of 2 August 2013, the matter is immaterial. I will therefore leave the time bar reference in section 4 unchanged.
8. Requirements 6a and 7 of the notice stipulate the removal of the residential entrance door at rear first floor level and the entrance porch in front of it. Neither is mentioned in the allegation but it is clear from the Appellant's submissions that he was fully aware that they too were targeted by the notice. Moreover, it is readily apparent that they have helped to facilitate the material change of use of the first floor. I will therefore add reference to them to the allegation to ensure consistency within the notice.
9. The Appellant further challenges the validity of the notice under the heading of ground (e) with reference to the expediency of issuing it. In fact, this is not a ground (e) matter but, instead, falls to be considered outside the parameters of the various grounds of appeal set out in section 174(2) of the 1990 Act as amended. I will therefore deal with it here.
10. The starting point in this regard is section 172(1)(b) of the 1990 Act as amended, which specifies that a notice may be issued when it appears to the local planning authority that it is expedient to do so, having regard to the provisions of the development plan and any other material considerations. Nonetheless, I give little credence to the notion that this has implications for validity in this particular case.
11. Firstly, the Appellant's argument in this regard is based solely on the notion that he should have been given the opportunity to make a planning application for some or all of the unauthorised works before enforcement action was pursued. However, even though this is often good practice it is not a statutory requirement and thus has no bearing on the legal standing of the enforcement notice. I note that he has not appealed against the notice on ground (g) so as to seek an extended compliance period in which to pursue a new planning application. In any event, it remains within the Council's power to further extend that period under section 173A(1)(b) of the 1990 Act as amended if circumstances suggest that this would be appropriate.
12. Secondly, the High Court found in *R (Ardagh Glass Ltd) v Chester CC* [2009] EnvLR 34 that, as a test, 'expedient' suggests the balancing of the advantages and disadvantages of a course of action, the basis for which should be the assessment of planning considerations. The phrase 'where it appears to them' in section 172(1) is a clear indication that whether to issue an enforcement notice on this basis is a matter for the local planning authority's discretion.

The appeal on ground (a) provides the proper opportunity to review whether the right balance has been struck.

13. In any event, in the case of *Britannia Assets v SSCLG & Medway Council* [2011] EWHC 1908 (Admin) it was held that there was no jurisdiction for an Inspector to determine whether or not the local planning authority had complied with its obligation under section 172 in this regard. Any legal implications of whether it was 'expedient' for the authority to issue an enforcement notice are therefore matters to be dealt with by way of judicial review. Accordingly, I will not address the question further other than in the context of ground (a).

The appeal on ground (e)

14. In appealing against the enforcement notice on ground (e) the onus of proof is firmly on the Appellant to demonstrate on the balance of probabilities that copies of the notice were not served as required by section 172 of the 1990 Act as amended. Section 172 requires that copies shall be served on the owner and occupier of the land and any other person having an interest in it which, in the opinion of the local planning authority, is materially affected by the notice. It goes on to specify the window of time within which the copies should be served.
15. However, nothing before me suggests that these requirements have not been met in full in this case. Rather, the Appellant has attempted erroneously to build a case on ground (e) on matters of expediency (seemingly misled in that regard by a flawed interpretation of the relationship between sections 174(2)(e) and 172(1)(b)) and whether one of the requirements of the notice is excessive. The first of these is potentially a matter that goes to the fundamental validity of the notice but is more properly dealt with by means of an appeal on ground (a), as explained above. The second is a matter for ground (f).
16. It follows that the Appellant has presented no valid case pursuant to ground (e). I therefore conclude that the appeal on that ground should fail.

The appeal on ground (a)

Main issues

17. The Appellant's case on ground (a) focuses solely on the roof extension and presents no argument for granting planning permission for the other elements of the development targeted by the notice (the external staircase, railings, material change of use of the first floor and associated entrance door and porch). Nonetheless, fees having been paid on the appeal the planning merits of the development as a whole are before me and I will address them all.
18. This being so, the main issues in determining the appeal on ground (a) are:
- the effect of the development on the character and appearance of the host property and surrounding area, including its effect on the setting of the Belmont Conservation Area (CA);
 - its effect on the living and working conditions of neighbouring residents, with particular regard to privacy; and
 - the adequacy of living conditions within the subject residential accommodation, with particular regard to internal floor space.

Planning policy

19. The development plan includes the London Plan 2015 (LP) and the Lewisham Local Development Framework Core Strategy Development Plan Document 2011 (CS) and Development Management Local Plan 2014 (DM). Paragraph 215 of the National Planning Policy Framework (the Framework) records that due weight should be given to relevant policies in existing plans according to their degree of consistency with it.
20. I find no significant conflict between the Framework and the development plan policies cited in this case. Accordingly, I will give them full weight insofar as they are relevant to the appeal scheme. Reference is also made to the Council's Residential Standards Supplementary Planning Document (SPD) updated in May 2012, the London Plan Housing Supplementary Planning Guidance (SPG) updated in March 2016, and the DCLG document *Technical housing standards – nationally described space standard* (NDSS), published in March 2015.

Reasoning

21. The residential accommodation targeted by the enforcement notice cannot be accessed internally from the takeaway at ground floor level. Rather, access is direct from the street via an alleyway leading from a pedestrian door in the front elevation of the premises, which in turn leads to an external stairway. This gives access to a flat roof at the rear of the premises, used as a sitting out area, from which a door provides access to the first floor accommodation. Second floor accommodation within the roof extension is reached by means of an internal staircase leading from the first floor.

Character and appearance

22. The appeal premises lie to the immediate west of the south-western corner of the Belmont CA, in a prominent frontage position close to a busy road junction. I found the closest part of the CA to be characterised primarily by, on one side of Belmont Hill, two and three storey office premises in prestigious early-mid 19th century villas set well back from the road and, on the other side, smaller semi-detached dwellings dating from the first half of the last century.
23. The external stairway, roof terrace, door and porch subject to the enforcement notice are tucked away next to a rear service yard, across which they are merely glimpsed in public views from the relatively secluded cul-de-sac of Myron Place and effectively subsumed in visual terms by disparate surroundings typical of those often found at the rear of commercial premises. However, the steep topography of the area is such that the addition to the main roof of No 5 draws the eye as an incongruous and unsightly feature in views from within the CA to the north and Lee High Road to the east and south.
24. In particular, the addition is too bulky and disproportionate in relation to the slender host building below, an impression exacerbated by the use of materials that contrast with the brick façade of the terrace. Although the Appellant considers the roof extension typical of Lewisham in particular and London in general, he provides nothing to substantiate that claim. I am unaware of anything in the immediate vicinity of the appeal premises that resembles the subject development.

25. He also asserts that the Council's Residential Standards SPD¹ 'allows for extensions in the mansard form'. However, the form of the addition as built is not that of a traditional mansard roof, despite the Council's use of the term. In any event, amongst other things the SPD militates specifically against roof extensions where any part would be above the height of the ridge of the main roof and specifies that larger roof extensions should be located on rear elevations to protect the front and side elevations from substantial alteration.
26. The Appellant suggests that modifications secured by condition would remedy to a satisfactory degree any visual harm caused by the extension. However, those put forward in drawing form would do little to reduce the addition's size or prominence, alter its proportions or bring the scheme into line with prevailing local policies and guidance. Although the Appellant cites guidance produced by the London Borough of Hackney in support of his case, nothing before me suggests that what has been prescribed for a substantially different part of London has a reasonable bearing on what may be acceptable here.
27. I conclude that the roof extension causes unacceptable harm to the character and appearance of the host property and the surrounding area and to the setting of the Belmont CA and that, on the evidence before me, this could not be mitigated satisfactorily by means of conditions attached to a grant of planning permission. It is therefore contrary to LP Policy 7.8, CS Policy 15, DM Policies 30, 31 and 32, the Council's Residential Standards SPD and the relevant provisions of the Framework.

Living/working conditions of neighbours

28. The Council's principal concern in the context of this issue is that the roof terrace facilitated by the railings around the edge of the property's single storey rear projection and the external staircase leading thereto provide direct views towards the upper floor rear windows of neighbouring properties used for a mix of office and residential space. The views thus obtainable are more invasive than those that would otherwise be available from No5 and are thus likely to have eroded the privacy of the rooms in question.
29. I have seen nothing to counter effectively the Council's advice that at least some of these rooms are in domestic use such that the living conditions of neighbouring residents will have been adversely affected. I must therefore take a precautionary approach and assume that this is likely to have been the case. In any event, even those occupying an office are also entitled to a reasonable degree of privacy during the working day, which is compromised by the roof terrace and external staircase.
30. Although the entrance door, porch and railings do not in themselves infringe on privacy, they are likely to have facilitated use of the rear flat roof as a sitting out area in a manner, and at an intensity and frequency, that would not otherwise subsist. It follows that their removal is also justified in order to guard against invasive overlooking. I therefore conclude that these elements of the appeal development cause harm to the living/working conditions of neighbouring occupiers and are contrary to DM

¹ The Appellant in fact names the document as *Residential Extensions SPD* from May 2012 but provides instead a copy of the *Residential Standards SPD* bearing the same date. I am not aware of any published document bearing the former name and have therefore assumed the latter to be the intended reference.

Policies 31 and 32, the Council's Residential Standards SPD and the relevant objectives of the Framework.

Living conditions of occupiers

31. The Council has expressed concern that the residential accommodation created at first and second floor levels does not meet national and local floorspace standards. The London Plan Housing SPG, at Standard 24, specifies that all the new dwellings should meet the NDSS.
32. On the Council's figures (which are based on the Appellant's own measurements), the total floorspace for both upper floors amounts to only 41 square metres, far less than the minimum gross internal floorspace of 58 square metres prescribed for a two storey dwelling by the NDSS. The latter prescribes a minimum of 37 square metres for a one person, one bedroom single storey unit, so even if the first floor is considered in isolation its area of 23.8 square metres is far from adequate.
33. The Council points out that the subject accommodation also falls well below similar local internal standards prescribed by DM Policy 32, in terms of both floor area and internal room height. The Appellant does not challenge the figures relied upon by the Council and, having inspected the property internally, I find no reason to question them. Nor does he present any argument on this issue to counter the Council's view that, as a consequence of failure to meet the relevant minimum standards, the quality of the residential accommodation at the appeal property is unacceptably poor.
34. It matters not whether those occupying the accommodation are employed in or otherwise associated with the takeaway, there being no reason why status in this regard should have a meaningful bearing on living standards. I conclude that the appeal development does not provide adequate living conditions for those that occupy it residentially. It is therefore contrary to DM Policy 32, the London Plan Housing SPG, the NDSS and the relevant provisions of the Framework.

Other matters

35. I have considered all the other matters raised. The enforcement notice has not denied the Appellant the chance to seek planning permission for the development as built. Indeed, this is what he has done, at least in part by means of the deemed planning application associated with his ground (a) appeal. I have noted comments to the effect that he has not had the opportunity to negotiate an alternative solution with the Council. However, there is nothing before me to suggest that an acceptable way forward is in the pipeline. In any event, any concerns in this regard are not matters for me but fall instead to be pursued by means outside the parameters of the planning appeal process.
36. The Appellant suggests that there is a need to use the upper floors for purposes ancillary to the takeaway. I do not question that the latter provides a service to the local community. Nonetheless, it has not been explained why that service might be under threat if the appeal fails, given that the floorspace in question is not used for ancillary purposes at present. I do not therefore find that that community need takes precedence over harm to the setting of the CA in this case so as to accord with paragraph 134 of the Framework.

37. I have also noted the Appellant's comments to the effect that the unauthorised works were carried out following a fire. However, neither these nor any other matters are of such significance as to outweigh the considerations that have led to my conclusions on the main issues. Accordingly, the appeal on ground (a) does not succeed.

The appeal on ground (f)

38. In appealing on ground (f) the Appellant must show that one or more of the requirements of the enforcement notice exceed what is necessary to remedy the breach of planning control (the statutory purpose of the notice under paragraph (a) of section 173(4)) or, as the case may be, any harm to amenity arising from that breach (the statutory purpose under paragraph (b)). It is clear to me from the wording of the subject notice as issued that it is framed with the intention of fulfilling the purpose under paragraph (a).
39. Moreover, the ground (a) appeal has already enabled me to assess the merits of steps suggested by the Appellant to overcome amenity concerns by means of conditions. I will therefore confine my reasoning under ground (f) to whether what is specified exceeds what is necessary to remedy the breach, whilst also bearing in mind that the Appellant has indicated that, in the event of failure on grounds (e) and (a), he will comply with requirements 3 to 7 as set out in section 5 of the notice. He does, however, take issue with requirements 1, 2 and 8.
40. Requirements 1 and 2 seek, respectively, the removal of the mansard roof extension and reinstatement of the roof to its pre-existing form. However, the only argument put forward for these being relaxed focuses on the opportunity to make a retrospective planning application to secure the lawful retention of the addition in either existing or modified form. This opportunity has already been proffered by way of the deemed planning application associated with the appeal against the enforcement notice on ground (a).
41. This being so, there is no logic in the Appellant's argument to the effect that, even if ground (a) fails, these should not remain requirements of the enforcement notice. Ground (f) must be pursued on the premise that it falls to be considered by the Inspector only when an appeal on ground (a) seeking planning permission for items subject to disputed requirements has failed (as in this case) or the Appellant has chosen not to dispute the Council's perception of their planning merits in the first place.
42. Turning to requirement 8, this specifies the reinstatement of internal stairs between the ground and first floors of the premises in a particular location shown on Plan BH022013-01. The starting point in considering whether this is excessive is the provision in section 173(4)(a) of the 1990 Act as amended that the notice may fulfil the purpose of 'restoring the land to its previous condition before the breach took place'. In this context the term 'land' is interchangeable in law with the term 'building', as is readily apparent from section 174(5). It matters not that some of the works required to achieve this are internal and, therefore, not in themselves 'development' as defined by section 55.
43. The Appellant asserts that the stairs in question were lost in the fire referred to earlier, the implication being that they had already gone by the time the subject breach of planning control occurred. However, the Appellant's evidence

in relation thereto is not sufficiently precise and unambiguous to meet the relevant tests arising from *Gabbittas v SSE & Newham LBC* [1985] JPL 630 and thus substantiate that claim. Nothing before me suggests that Plan BH022013-01 does not accurately represent the building in its previous form. I therefore regard the reinstatement of the stairs as part and parcel of what is necessary to restore the land to its previous condition.

44. It is also apparent that omission of requirement 8 but the retention of requirement 3 (which is unchallenged) would potentially leave the premises without ready pedestrian access to the first floor. In this regard I take on board the Appellant's point that, irrespective of the logic or desirability of providing a stairway, it may not be his preference to do so and to subsequently make use of the first floor for its lawful purpose.
45. More pertinent perhaps, albeit not expressed explicitly by the Appellant, is the notion that he may wish to access the first floor by means other than specified in the notice (for example, by installing a staircase in a different position). In this regard, although passing reference is made to the pre-existence of a different external stair and rear access door (and the Appellant's intention to reinstate these) there is nothing before me to substantiate this claim and demonstrate that such an installation could for the basis for an alternative requirement or otherwise be lawful.
46. I thus find that neither scenario overrides the purpose of the notice as set out in section 173(4)(a), the complete fulfilment of which depends in part on reinstatement of the staircase as specified. Accordingly, the latter cannot be held to be excessive under the terms of the Act. In such circumstances, requirement 8 must remain in place and, if the Appellant has an alternative to the specified staircase in mind, this would best be discussed with the Council with a view to exploring whether there is scope for 'under-enforcing' in relation to that particular matter.
47. I conclude that none of the requirements disputed by the Appellant exceeds what is necessary to remedy the breach of planning control. The appeal on ground (f) therefore fails.

Conclusion

48. For the reasons given above I conclude that the appeal should not succeed. I will uphold the enforcement notice with corrections and refuse to grant planning permission on the deemed application.

Formal decision

49. It is directed that the enforcement notice be corrected by:
 - (i) in the heading at the top of the first page, the deletion of the words 'OPERATIONAL DEVELOPMENT';
 - (ii) in section 3, the deletion of the wording of item 4 in its entirety and the substitution therefor of the words 'the material change of use of the first floor of the premises to residential use'; and
 - (iii) at the end of section 3, the insertion of an additional item 5 which reads: 'the installation of a upvc residential entrance door at rear first floor level with entrance porch over as shown on Photograph 1 attached.'

50. Subject to these corrections, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Alan Woolnough

INSPECTOR