

Appeal Decisions

Site visit made on 15 August 2016

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 4 November 2016

Appeal refs: APP/T5150/C/16/3142547 and 3142548

13 A-E Anson Road, London NW2 3UX

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Tomer Kalish and Mr Aba Kalish against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice, numbered E/15/0377, was issued on 9 December 2015.
 - The breach of planning control as alleged in the notice is the erection of a dwelling in the rear garden of the premises.
 - The requirements of the notice are to:
 - (1) Demolish the dwelling in the rear garden and remove all items and debris arising from that demolition, and remove all materials associated with the unauthorised development from the premises, and
 - (2) Demolish the fence separating the dwelling in the rear garden from the rest of the premises.
 - The period for compliance with the requirements is three months.
 - The appeals are proceeding on the grounds set out in section 174(2) (e), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period for both Appeals, the initial appeals on ground (a) and applications for planning permission deemed to have been made under section 177(5) of the Act as amended do not fall to be considered.
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Decisions

1. The appeals are allowed on ground (b), and the enforcement notice is quashed.

Preliminary matter

2. The appeal form did not include ground (b). The case for the appellants in ground (c) firmly falls under that context, however. On 12 September 2016 the parties to these proceedings were invited, within certain timescales, to provide additional comment on this *hidden* ground of appeal. I am grateful for all of these comments, which I shall take into account.

The Appeals on ground (e)

3. The claim is that the Council's correspondence has been sent to an incorrect address and so the notice has not been properly served. This argument does not assist the appellants. This is because, in this ground of appeal, they need to show that, on the balance of probabilities, copies of the notice were not served as required by section 172 of the Act. Clearly all those with an interest in the land have been properly served, including Mr Aba Kalish and Mr Tomer Kalish¹. The latter confirming he received a copy from a tenant. The appellants

¹ Certificate of service, 10 December 2015, attached at appendix VII to Council's statement. HM Land Registry title documents naming individuals with an interest in the land is consistent with the certificate of service.

were aware of the notice because a timely appeal has been made, thus protecting their interest. Therefore, the appeal on ground (e) must fail.

The Appeals on ground (b)

4. It is directed to the consideration of whether the matters alleged in the notice have occurred as a matter of fact. The date of the notice's issue is the relevant date. The onus is firmly upon the appellants to make their own case out, on the balance of probabilities.
5. The Council² state that the appellants have failed to prove that the subject outbuilding is used for some incidental purpose, but this line of argument overlooks the fact that the notice alleges the *erection of a dwelling*. I am therefore faced with an allegation that alleges the erection of a *dwellinghouse*. The latter should be capable of providing viable facilities for day-to-day private domestic existence³. For example, the evidence needs to show the outbuilding possessed independent facilities for cooking, washing or sleeping at the date the notice was issued.
6. Usually, planning enforcement officers make investigations before issuing a notice so that the reality of the breach is properly grasped and analysed. Occasionally, contemporaneous site visit records are produced to counter any potential claim that the stated breach of planning control has not occurred. Unfortunately for the Council, officers could not gain access to the outbuilding. Although correspondence seeking clarification, including a planning contravention notice, had been issued, the appellants say documents were sent to an incorrect address.
7. The critical problem for the Council is that there is no record of the outbuilding's internal layout before the date of the notice as there is no independent verification of the available facilities. In a similar vein, I am afraid that the quantum of evidence from local residents also does not sufficiently show a dwellinghouse had, in fact, been erected in the rear garden. For example, concern has been raised that the outbuilding is connected to domestic drainage system, but surface water run-off from the pitched roof needs to be suitably drained.
8. There are complaints that a close-boarded fence had been erected in the rear garden to subdivide it from a side path leading to the outbuilding. But it is incorrect to assume self-containment on this basis alone. The appellants' counter-argument is that the fence had been erected to protect the garden from damage during building work. It has now been removed which backs up that point.
9. Another claim is that there had been a marked increase in comings and goings. The main building is occupied as self-contained flats and an increase in residential activity might have been associated with its use. Given the absence of precise detail, I cannot be certain that the perceived increase in comings and goings was connected to the use of the outbuilding as a single dwelling.
10. A further claim is that lights have been left on after dark in the outbuilding. The inference drawn is that it must be in use as a dwellinghouse. However, the

² Taken from email 27 September 2016.

³ See the case of *Gravesham BC v SSE and O'Brien*, [1983] JPL 306.

evidence does not show how often and when lights had been left on and whether this was part of a daily routine.

11. My attention has been drawn to a recent planning permission⁴. I agree there are some differences in the external appearance of the outbuilding as built and that shown on the approved plans. As I have indicated elsewhere, I am faced with an allegation that describes the breach as the *erection of a dwelling* and requires its demolition. It does not allege the *erection of a building for non-incidental purposes*, or a failure to build something in accordance with approved plans. I have contemplated the possibility of correcting the allegation to reflect the reality on the ground, but that would fundamentally change the scope of the notice and cause injustice to the appellants and Council.
12. In all probability, the evidence presented does not sufficiently show, to my satisfaction, that the outbuilding was capable of providing viable facilities for day-to-day private domestic existence at the date of the notice. It does not show occupation or use as a single dwellinghouse.
13. My inescapable conclusion is the alleged matters have not occurred as a matter of fact.
14. The Appeals on ground (b) must therefore succeed.

Conclusion for both Appeals

15. Having regard to all other matters, I conclude that the onus has been discharged and both Appeals succeed.
16. Consequently, I take no further action on the Appeals.
17. I have quashed the notice.

A U Ghafoor

Inspector

⁴ Council ref: 12/2744 granted on 6 December 2012 for a single-storey outbuilding in the rear garden of flats.