
Appeal Decision

Inquiry opened on 13 September 2016

Site visit made on 12 September 2016

by Thomas Shields MA DipURP MRTPI

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

Decision date: 11 November 2016

Appeal Ref: APP/N5090/C/16/3142109
2A Vaughan Avenue, London, NW4 4HU

- 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 Daniel David against an enforcement notice issued by the Council of the London Borough of Barnet.
 - The notice was issued on 2 December 2015.
 - The breach of planning control as alleged in the notice is without planning permission, the change of use of the outbuilding to the side of the property to a separate dwelling.
 - The requirements of the notice are:
 1. Cease the use of the outbuilding to the side of the property as a self-contained residence
 2. Permanently remove all kitchen units, sinks, cookers and food preparation areas from the outbuilding
 3. Permanently remove the toilet and shower from the outbuilding.
 - The period for compliance with the requirements is four months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (d) of the Town and Country Planning Act 1990 as amended. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act also falls to be considered.
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Decision

1. 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.

Preliminary Matters

2. During the opening of the Inquiry the appellant sought to introduce new documentary evidence and a new supporting witness in respect of the ground (d) appeal. The evidence was argued to be important to the appellant's case but given that the Council had not had any prior opportunity to review it, I concluded that the Inquiry could not continue as it would have been prejudicial to the Council's case.
 3. As such, it was agreed with the parties that the appeal should proceed by way of written representations allowing for the submission and exchange of further evidence and comments from both parties. The appeal has therefore been determined following that method and I have taken all submitted written material from the parties into account in reaching my decision.
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The appeal on ground (d)

4. The ground of appeal is that at the date the enforcement notice was issued no enforcement action could be taken.
5. In order to succeed on this ground of appeal the onus is on the appellant to prove on the balance of probability that the use of the outbuilding changed to use as a separate dwelling on or before 2 December 2011¹ and that this use then continued for at least four years after the date of change without any substantial interruption.
6. Reference was made to case law² regarding whether the four year rule for immunity applies equally to a breach of planning control involving the sub-division of a dwelling house into two or more separate dwelling houses, as it does to the unpermitted use of a building to use as a separate dwelling house. Clearly the Court found that the four year rule applies in both sets of circumstances. The judgment does not lead me to reach any different conclusion.
7. The PPG³ echoes the judgment in *Gabbittas v SSE & Newham LBC* [1985] JPL 630. It makes it clear that if a Council has no evidence itself, nor any from others, to contradict or otherwise make the Appellant's version of events less than probable, there is no good reason to dismiss an appeal on ground (d), provided that the appellant's evidence alone is sufficiently precise and unambiguous.
8. The outbuilding is a large rectangular single storey building to the rear of 2A Vaughan Avenue, fenced off and separated from the communal garden area of the flats within No. 2A, and accessed through its own side gate.
9. The appellant's case is that the outbuilding has existed since at least 2006 having previously been used as a garage, then extended and converted in 2007 to a separate residential dwelling and used continuously as such thereafter. Statutory declarations (SD) and other documents in support of the appellant's case have been submitted.
10. In support of the appeal Mr Abraham says in his SD that he purchased the appeal site on 6 July 2007. However, he does not say when conversion works to convert the outbuilding to a separate dwelling commenced, when those works were substantially completed, or when residential occupation first started. The appeal statement⁴ submitted in support of the appeal, and Mr Abraham's SD, state that a Lawful Development Certificate (LDC) was granted on 29 December 2008 for retention of the outbuilding.
11. However, that is not an accurate description. The LDC application, and the certificate granted, was described as '*Retention of detached **garage** in rear garden*' (my emphasis). There can be no doubt that the LDC was granted on the basis the outbuilding was lawful as a garage, as described in the application to the Council. This directly conflicts with the appellant's case that it had already been converted and was in use as a separate residential dwelling by mid-2007.

¹ ie 4 years before the enforcement notice was issued

² *Doncaster MBC v SSE and Van Dyke v SSE*

³ The Planning Practice Guidance ID:17c-006-20140306

⁴ Appeal Statement, Porta Planning, paragraph 2.7

12. Mr Abraham states Mr Nissim took possession of the property on 1 February 2008. If by 'possession' he means Mr Nissim occupied the outbuilding as a separate dwelling, that again conflicts with the LDC being granted for retention of the *garage* in December 2008.
13. A copy of a draft sale agreement dated October 2009 for the outbuilding between Mr Nissim and Mr Abraham has been submitted. However, I can find nothing in its content that indicates the outbuilding was already in residential use, or was proposed to be in residential use.
14. An email⁵ from Mr Nissim states that when leaving in 2010 he left behind a desk, wardrobe and bed and there was a bathroom and kitchen. The email is rather short on detail and does not provide any evidence of continuous residential use of the outbuilding.
15. The appellant also submitted copies of assured shorthold tenancy agreements (AST) as evidence of occupancy when he sublet the outbuilding.
16. The first is for Mr Steinbrook for a twelve month period from 8 May 2010 to 8 May 2011. There is then a 19 month gap between the end of the AST period and the commencement of the following AST (for Bakor and Eszlatyi) commencing on 12 December 2012. It is argued that Mr Steinbrook remained in occupation during that time benefitting from a rolling lease arrangement. However, there is no other evidence to corroborate the appellant's assertion that he did remain in residential occupation for the whole of that period. In any event, the document is not signed by the appellant or anyone on his behalf, or by any witness. As a document therefore the AST for Mr Steinbrook does not provide reliable evidence of continuous residential occupation during that period. Accordingly, I attach no weight to it.
17. Further ASTs are provided for the following periods:
 - 12 December 2012 to 11 December 2013 (Bakor and Eszlatyi)
 - 11 July 2013 to 12 July 2014 (Olteanu and Lupu)
 - 13 June 2014 to 13 June 2015 (Pinto and Jesus)
18. The AST for Bakor and Eszlatyi commences after the material date; that is 2 December 2011. The AST for Olteanu and Lupu commences five months before the end of the AST for Bakor and Eszlatyi. If Bakor and Eszlatyi vacated the property early there is no evidence of when they actually left, or how long a gap there may have been between occupancies.
19. Taken as a whole the ASTs do not provide credible evidence of continuous residential use of the outbuilding for more than four years prior to the issue date of the notice.
20. The above notwithstanding, the Council's evidence is that inspections of the outbuilding by its officers on 29 April 2010, and on 3 and 6 September 2012 revealed that that outbuilding was not in use as a residential dwelling.
21. With regard to the 2010 inspection (four months after the LDC was granted) Mr Abraham states that the outbuilding had already been converted to residential use providing a bed, kitchen and shower room, and that the Council

⁵ Email from Mr Nissim dated 18:54 31 October 2016

officer took photographs of the internal domain. The Council's site inspection notes conflict with that assertion stating that there was a desk and chair and that it appeared that the outbuilding was being used incidentally as an office by one of the flat's residents. No photographs have been submitted of that inspection. However, even if there was a bed, kitchen, and shower room such that it afforded the basic facilities for residential occupation as a dwelling house; that is not evidence of any *use* of the outbuilding as a separate residential dwelling at that time.

22. Moreover, shortly following that inspection Mr Abraham clearly states in his email⁶ to the Council that the building is not being used (amongst other uses) as a *home or anything else*, and the subsequent exchange of emails point towards the use of the outbuilding being used incidentally by occupiers of the flats. No mention is made by the Council's officer, or indeed by Mr Abraham, of use as a separate dwelling. I consider these factors further diminish the credibility of the appellant's evidence that the outbuilding was in use as a separate dwelling.
23. With regard to the 2012 site inspection the appellant accepts that for a period of six to eight weeks, the outbuilding was in use as offices by his company Micro Lend UK. This was a temporary arrangement to facilitate the relocation of the business from former offices in Golders Green Road to Colindale. The officer's undisputed record of that visit is that there were four terminals and up to 4 people working there. There was therefore a clear material change of use from the outbuilding's previous use to office use.
24. It is argued that this period of non-residential use was a *de minimis* interruption of residential use. For reasons I have previously set out I am not convinced on the balance of probability that four years residential use had been achieved by the time of the 2012 office use.
25. However, even if there had been four years continuous residential use, such that it would have been lawful prior to the period of office use in 2012, I disagree with the view that the office use would have been *de minimis*. It was a new use and a clear and prolonged break from the (argued) residential use, such that resumption of residential use afterwards would again have been a new material change of use commencing within four years of the issue of the notice. That is consistent with long established case law in *Panton and Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461.
26. For all the above reasons I consider overall, having regard to the advice in the PPG, and to *Gabbitts*, that the appellant's evidence is very far from being precise and unambiguous. The Council's evidence adds further significant weight against the appeal.
27. As such, the appellant has failed to discharge the burden of proof, on the balance of probability, that the use of the outbuilding changed to use as a separate dwelling on or before 2 December 2011 and that this use then continued after the date of change for at least four years without any substantial interruption.
28. The appeal on ground (d) therefore fails.

⁶ Council's Written Evidence, Appendix 1, email at 11:55 14 April 2010

The appeal on ground (a)

Reasons

29. The main issues in this ground of appeal are the effect on the character and appearance of the area and upon the living conditions of occupiers of the outbuilding with particular regard to the provision of internal and external space.

Character and appearance

30. No. 2A was a large dwelling house in a prominent corner position with a generous garden, now converted into flats. Like other properties in the area the appeal building appears as an incidental building in the street scene to the main building.
31. The appellant argues that the outbuilding does not adversely affect the character and appearance of the area and points to other similar outbuildings in the area.
32. However, I consider that the prevailing and predominant character of housing in the area comprises mostly two storey, and occasional single storey, dwelling houses designed and constructed in a traditional form, with some having been converted internally into flats.
33. In contrast, the converted garage to a dwelling, having a garage door style finish as its end elevation facing the street, together with the relatively small plot in which it is located, does not respect the traditional appearance and pattern of surrounding dwelling houses and the spaces between them. In addition, compared to an incidental outbuilding, its more intensive use as a dwelling with frequency of comings and goings by occupiers and visitors would draw attention to its uncharacteristic design and appearance as a dwelling.
34. For these reasons I conclude that it significantly harms the prevailing character and appearance of the area in conflict with the Council's Development Plan policies.

Living conditions

35. Notwithstanding the Council's adopted standards for internal and external space I consider that the internal and external space would provide adequate amenity space for at least one occupant. Such a restriction could be secured by a planning condition.
36. However, although, subject to such a condition, I have found that there would be no harm in respect of living conditions, and acknowledging that the development would provide an additional dwelling in an area where there is an acute demand for housing; these factors do not overcome or outweigh the significant harm to the character and appearance of the area I have previously identified.
37. The appeal on ground (a) therefore fails.

Thomas Shields

INSPECTOR