

Appeal Decision

Site visit made on 12 January 2017

by Andrew Dale BA (Hons) MA MRTPI

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

Decision date: 9 February 2017

Appeal Ref: APP/U5930/C/16/3152847
3 Cheltenham Road, Leyton, London E10 6EU

- 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 Bobby Lipman against an enforcement notice issued by the Council of the London Borough of Waltham Forest.
 - The enforcement notice was issued on 19 May 2016 under ref. 053880.
 - The breach of planning control as alleged in the notice is set out as follows:
 1. *Without planning permission, the unauthorised operational development/building works to build an outbuilding into two x one bedroom self-contained residential units (hatched in blue on the attached site location plan). The certificate of lawful proposed development (ref: 2014/1279) granted the construction of an outbuilding as a garage or store room and not for the construction of two x one (sic) self-contained residential units.*
 2. *The unauthorised use of the outbuilding for residential accommodation, on account of its small floor space, limited outlook, lack of privacy, external noise and lack of private amenity space, constitutes poor quality accommodation with current and future residents' amenities of both the outbuilding and main building significantly impaired, contrary to the requirements of Core Strategy Policy CS13 and Adopted Development Plan Policies DM4, DM7 & DM33.*
 3. *The unauthorised use of the outbuilding as residential accommodation, by reason of the increased noise and activity arising from this use within in (sic) a rear garden location, constitutes inappropriate development to the rear of the existing site, causing noise disturbance to the detriment of the occupants of neighbouring properties contrary to the requirements of Core Strategy Policies (sic) CS13 and Adopted Development Plan Policies DM4 & DM33.*
 - The requirements of the notice are set out as follows:
 - 1) *Cease the use of outbuilding as residential accommodation*
 - 2) *Demolish the purpose built (sic) outbuilding*
 - 3) *Remove general debris resulting from steps 1 to 3 (sic).*
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (e) and (f) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be corrected and varied by:
 - i. Deleting in their entirety the second and third matters which appear to constitute the breach of planning control in paragraph 3;
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- ii. Deleting in its entirety the first matter which appears to constitute the breach of planning control in paragraph 3 and substituting therefor the following:
"Without planning permission, the construction of a building containing two self-contained residential units on the land shown hatched in blue on the attached site location plan.";
 - iii. Altering the word "*breaches*" and "*have*" in paragraph 4 to "*breach*" and "*has*" respectively; and
 - iv. Deleting in their entirety all three of the requirements in paragraph 5 and substituting therefor the following: "*(1) Cease the use of both the residential units; (2) Demolish the building containing the two self-contained residential units; and (3) Remove from the site all debris arising from compliance with step (2) above.*"
2. Subject to the above corrections and variations, the appeal is dismissed and the enforcement notice is upheld.

Background and matters of clarification

3. No. 3 Cheltenham Road is an end of terrace house that has been enlarged and appears to be used as a house in multiple occupation. It stands next to the junction between Cheltenham Road and Ely Road. The detached building, the subject of this appeal and the enforcement notice, has been erected in the rear garden of the property. It is a single-storey, flat-roofed structure.
4. On 30 July 2014 the Council granted a certificate of lawful use or development under ref. 2014/1279/CLP. This certified that a proposed single-storey rear outbuilding would be lawful. The application read with the plans confirmed that the outbuilding would be used as a garage and for storage. Access to the garage was to be from Ely Road. One internal dividing wall was shown.
5. The building was constructed at some point after 30 July 2014. Officers from the Council gained access to it on 2 April 2015. They discovered that it had been laid out internally as two separate self-contained residential flats. On 15 April 2015 the appellant confirmed in an email to the Council that he would look to remove the kitchen and bathroom facilities. As I saw at my site inspection all those facilities have been removed except the bathroom in the half of the building that is closest to the main property. No access has been created to Ely Road. The garage door has been blocked up behind in order to create one of the internal rooms.
6. There is no appeal on ground (a). Therefore, the planning merits of the construction, which would include assessing whether the building complies with relevant development plan policies, do not fall to be considered.

The enforcement notice

7. Before turning to the grounds of appeal, it is necessary to consider whether the enforcement notice is in good order. I have power to correct or vary a notice provided that this can be done without causing injustice to the parties.

8. The second and third matters in paragraph 3 of the enforcement notice read as reasons for issuing the notice rather than as descriptions of possible breaches of planning control. They have clearly been included in this paragraph by mistake. There is no need for me to transfer them to paragraph 4 as the reasons there cover the same concerns and development plan policies. I have therefore deleted the second and third matters in paragraph 3 in their entirety.
9. As confirmed in the Council's questionnaire, the enforcement notice concerns a breach of planning control relating to building operations. The first matter remaining in paragraph 3 of the notice can be described more concisely as *"Without planning permission, the construction of a building containing two self-contained residential units on the land shown hatched in blue on the attached site location plan."* I realise that application ref. 2014/1279/CLP did not approve the construction of two self-contained residential units but there is no need for this application to be referred to in the breach of planning control alleged.
10. There is only one alleged breach of planning control so corrections to paragraph 4 of the enforcement notice are made accordingly.
11. In general terms, the steps required by an enforcement notice should match the matters alleged to be the breach of planning control unless under-enforcement is intended. In seeking to cease the use as residential accommodation and to demolish the building, it is clear that under-enforcement is not the Council's aim. I have rewritten the requirements to match the corrected breach of planning control and would point out that any debris to be removed can only arise from step 2. The requirements as varied are no more onerous than those faced by the appellant in the original draft of the enforcement notice.
12. Taking into account the submissions from both main parties, I consider that no injustice would arise from these corrections and variations.

The appeal on ground (e)

13. Ground (e) arises where an appellant wishes to argue that copies of the enforcement notice were not served as required by section 172 of the 1990 Act as amended.
14. The key issue in this case is whether the notice was served properly on the owner and on the occupier of the land to which it relates and on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice. If it was not served properly, the test is whether anyone with an interest in the land has been substantially prejudiced by the failure to serve a copy of the notice on them.
15. Section 176(5) of the 1990 Act as amended gives the Secretary of State or the appointed Inspector power to disregard any failure to serve the notice on anyone as required, if neither the appellant nor the person concerned has been substantially prejudiced by the failure to serve him or her.
16. The appellant says that the enforcement notice was left at the site address even though the Council's enforcement officer was fully aware that the appellant did not reside there and that as a result he did not become aware of

the notice until two weeks before lodging the appeal. The interests of other parties are not referred to.

17. Whilst the Council's officer may have been aware that the appellant did not reside at the site address, there is no evidence to show that the officer knew his usual residential address. The case of *London Borough of Newham v Miah* [2016] EWHC 1043 (Admin) is authority for the view that an address at the Land Registry is a proper address for service of an enforcement notice if a local planning authority has not been given another address. The local planning authority does not need to check with other Council departments to see if they have a record of the last known address. The statutory framework points to the knowledge of the local planning authority as being relevant for the service of an enforcement notice.
18. From the information provided by the Council, including the certificates of service, it seems to me that copies of the notice were served correctly in accordance with section 172 of the 1990 Act as amended. Moreover, the appellant was able to lodge an appeal against the notice and to make written representations well before the date the notice was first due to take effect. So, even if there had been a failure of service in accordance with section 172, I would have been satisfied that this had not caused substantial prejudice to him and would have exercised my powers to disregard it.
19. In the light of the above, the appeal on ground (e) fails.

The appeal on ground (b)

20. An appeal on ground (b) is directed to the consideration of whether the matters alleged in an enforcement notice have occurred, as a matter of fact. The relevant date for assessing whether the alleged breach of planning control set out in a notice has taken place is the date of issue of the notice. The burden of proof in such matters is on the appellant and the relevant standard is on the balance of probabilities.
21. The appellant explains that due to bad advice from his builders, he agreed to their suggestion of putting kitchen and bathroom units in the outbuilding. The appellant's case is that after the exchange of emails with the Council on 15 April 2015, he rectified the breach immediately by removing all the kitchen facilities and bathrooms, except one bathroom which the appellant says he uses after weekly yoga practice there. He says that the outbuilding has since been used for storage and as a space for him to practice his weekly yoga and that the building has never been used as separate residential accommodation.
22. When the Council undertook a site visit on 2 April 2015, which would have been shortly after the building was substantially completed, two separate, one-bedroom, self-contained flats were found, each containing a fully fledged kitchen, a shower room and toilet and a bedroom. Each residential unit therefore contained all the facilities necessary for day-to-day living, with well planned partitioning works inside the building, as I saw, allowing for three distinct rooms in each of those residential units.
23. From what I have seen and read, I have no doubt that the Council is correct to take the view that the building was purpose-built for residential use in the form of two self-contained, one-bedroom residential units. What had been built did

not correspond with the drawings for a proposed single-storey outbuilding to be used as a garage and for storage upon which the decision for the certificate was based. That certificate did not extend to confirming lawfulness for the erection of two residential units.

24. Even though two kitchens and one bathroom have been removed from the building, the construction of two residential units occurred as a matter of fact. Whether or not the residential units were actually ever occupied is not entirely clear but even if they were not occupied, they were apt for such residential use. Indeed, on 2 April 2015, when asking what use the building has or of what use it is, I consider that any reasonable observer could only conclude that its use was as two separate residential units.
25. Having regard to all the written representations before me and to the findings of my site visit and notwithstanding the removal of two kitchens and one bathroom, I consider on the balance of probabilities that the alleged breach of planning control has occurred as a matter of fact. The appeal on ground (b) must therefore fail.

The appeal on ground (f)

26. Section 173 of the 1990 Act as amended indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These purposes are to remedy the breach of planning control as specified in section 173(4) (a) or to remedy any injury to amenity which has been caused by the breach as specified in section 173(4) (b).
27. In the enforcement notice the subject of this appeal, the Council seeks the removal of the unauthorised development. This would restore the land to its condition before the breach took place, one of three ways set out in section 173(4) (a) in which a breach can be remedied. The purpose of the requirements is within section 173(4) (a); the requirements are seeking to remedy the breach of planning control which has occurred.
28. Where no appeal has been brought on ground (a) and consequently there is no deemed application for planning permission, ground (f) cannot be interpreted as allowing arguments about the planning merits of the development or an alternative modified development. Similarly, where the purpose of the requirements is to be found wholly within section 173(4) (a), the Act cannot sensibly be interpreted as allowing any appeal submission under the second head of ground (f) arguing that the requirements exceed what is necessary to remedy any injury to amenity.
29. The key issue under this ground (f) appeal is therefore whether the requirements of the notice exceed what is necessary to achieve the purpose of remedying the breach of planning control. In the case of operational development put up without planning permission, as here, an appropriate requirement in these circumstances would be to secure its removal. That is what this enforcement notice seeks to do. The requirements cannot be said to be excessive or unreasonable.
30. The appellant considers that a requirement to demolish the building is excessive when it can usefully be used for storage and as a space for him to practice his weekly yoga. The enforcement regime is not meant to be punitive.

Where there is a valid fallback, for example, by way of the future exercise of permitted development rights, it is necessary to consider whether the complete removal of an unlawful structure would ultimately achieve anything.

31. However, the exercise of permitted development rights for the erection of buildings in the curtilage of a dwellinghouse is not straightforward. As well as satisfying various physical dimensions, the appellant would need to demonstrate that permitted development rights still apply to the house in multiple occupation at no. 3 Cheltenham Road and that if they did, the building was required for a purpose incidental to the enjoyment of that dwellinghouse as such. If the appellant does not reside at the appeal property, as confirmed on the appeal form, it is difficult to understand how the weekly yoga use could be a purpose incidental to the enjoyment of no. 3 Cheltenham Road. Furthermore, no evidence has been submitted to illustrate how the building and the space within it would relate to the storage needs of the occupiers of that property.
32. The appellant would, of course, have open to him the possibility of submitting a planning application or an application for a certificate of lawful use or development in respect of proposed development should he desire a building to meet the incidental domestic needs of the site. The prospect of the retention of the unauthorised building or any parts of it to achieve such a purpose is a matter that might helpfully be explored through further discussions with the Council. On the basis of the evidence put before me, it would not be appropriate to achieve this through a variation to the requirements of the notice. I should point out that the Council has powers to waive or relax any requirement of the notice or to extend the compliance period, should it consider that this would be appropriate, under section 173A (1) (b) of the 1990 Act as amended.
33. As things stand, the steps specified in the notice do no more than is necessary to achieve the purpose of remedying the breach of planning control. The steps are not excessive for that purpose. The appeal on ground (f) fails.

Andrew Dale

INSPECTOR