
Appeal Decisions

Inquiry held on 6 June 2017

Site visit made on the same date

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 19 June 2017

Appeal Ref: APP/A5270/C/16/3156816 and 3156817
39 Leonard Road, Southall, Ealing, UB2 5HZ

- 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 Mrs Gurpal Kaur Sidhu and Mr Bilhar Singh Sidhu against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice, numbered EN160116CUOB(4), was issued on 21 July 2016.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land to the rear of the premises to separate residential use.
- The requirements of the notice are :
 - a) Cease the use of the land for separate residential use;
 - b) Remove from the outbuilding currently on the land the kitchen and all associated drainage connections which facilitate the use of the land for separate residential use;
 - c) Remove from the outbuilding currently on the land the bathroom and all associated drainage connections which facilitate the use of the land for separate residential use;
 - d) Demolish and remove from the land the outbuilding currently on the land;
 - e) Remove from the land all resultant debris; and
 - f) Restore the land to the condition it was in before the breach took place.
- The period for compliance with the requirements is three months.
- The appeal made by Mrs Sidhu (3156816) is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended.
- The appeal made by Mr Sidhu (3156817) is proceeding on the grounds set out in section 174(2)(c), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period for this Appeal, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended in relation to that appeal have lapsed.

Summary of Decision: The appeals are dismissed and the enforcement notice upheld.

Application for costs

1. At the Inquiry applications for costs were made by the Appellants against the Council and by the Council against the Appellants. These applications are the subjects of separate Decisions.
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Procedural matters

2. All oral evidence was given to the Inquiry after the witnesses had either taken the oath or made an affirmation.

The appeals on ground (c)

3. An appeal on ground (c) is on the basis that the development alleged in the notice is not a breach of planning control. The Appellants' case is that the development that has taken place is a change of use of a building from a storeroom and playroom ancillary to the main dwelling to a residential dwelling. This is not the allegation as stated on the notice which is 'the material change of use of the land to the rear of the premises to separate residential use'.
4. There is no dispute that the change of use alleged in the notice has taken place and there are no ground (b) appeals.
5. The Appellants also refer to the withdrawal of the first notice (see below) but the withdrawal of an enforcement notice does not affect the power of the local planning authority to issue a further enforcement notice¹.
6. The Appellants have not addressed the allegation other than in terms of their description of the breach and in the terms of what is, in effect, their ground (d) appeals. The change of use of land, as alleged on the notice, is development as provided for by s.55 of the 1990 Act and planning permission is required under s.57. No planning permission has been granted for the change of use and no permitted development rights² apply because the main property comprised two at the time of the outbuilding's construction.
7. The change of use of the land to the rear of the premises to separate residential use was a breach of planning control and the appeals on ground (c) fail.

The appeals on ground (d)

8. In appeals on ground (d) the Appellants have to prove on the balance of probability that at the time the notice was issued it was too late to take enforcement action against the matters stated in the notice.
9. The allegation stated on the notice is 'the material change of use of the land to the rear of the premises to separate residential use' and in the reasons for issuing the notice the Council says that the alleged breach occurred within the last 10 years³. The Appellants rely on the 4 year time limit for operational development⁴ and the change of use of a building to a self-contained residential dwelling⁵.
10. The Council issued an enforcement notice on 20 April 2016 alleging 'the construction of a single storey detached dwelling to the rear of the premises'⁶ (the first notice). An appeal was made by Mrs Sidhu and on the appeal form it was stated that 'the outbuilding has existed and has been used as a residential

¹ S.173A(4) of the 1990 Act

² Pursuant to the then applicable Town and Country Planning (General Permitted Development) Order 1995 as amended

³ S.171B(3) of the 1990 Act

⁴ S.171B(1) of the 1990 Act – paragraph 2 of Document A

⁵ S.171B(2) of the 1990 Act

⁶ Appendix 5 to Mr Whittaker's proof

unit continuously since 19 August 2011 which is more than four years and is lawful and immune from enforcement⁷.

11. Mrs Sidhu made a statutory declaration in that appeal dated 31 May 2016⁸ in which, among other things, she stated that 'In or around early 2011 I instructed builders known as Khalsa builders to build an outhouse comprising of one bedroom self-contained unit to include a kitchen, toilet/shower room, heating and boiler'. An invoice from the builders detailing the work done was produced. In support of Mrs Sidhu's case, the tenant of the ground floor flat at the main dwelling, Ms Ahmed, made a statutory declaration dated 31 May 2016⁹ in which she stated, among other things, that 'in or around 2011 I recall builders commenced building works at the rear garden of the property, in particular an erection of an outbuilding, which was complete within a few months. Upon completion I visited the outbuilding at the rear of 39 Leonard Road which comprised of a one bedroom self-contained unit'.
12. In view of this evidence the Council withdrew the notice on 21 July 2016. Costs were awarded to Mrs Sidhu but it is important to note that there was no consideration of the merits of her appeal and no determination of it.
13. The notice that is the subject of this appeal was issued on 21 July 2016 (the second notice). Appeals were made by Mr and Mrs Sidhu and the appeal form, dated 18 August 2016, states in respect of ground (c) 'by reason of s.171B(1) and/or (2) as the outbuilding was an extension of the original storage shed ancillary to the dwelling house and permitted development and not an entirely a new building protected by statute. Hence the additional 15m² or thereabouts was merely ancillary to the dwelling house'. In respect of the ground (d) appeal it is stated, among other things, that 'the construction of the outbuilding is not entirely a new building but an extension of the existing building'.
14. These grounds of appeal were amended on 18 November 2016 to 'by reasons of s.171B(1) and/or (2) as the outbuilding was a change of use of a storeroom and playroom ancillary to the main dwelling and so protected by statute against enforcement after four years had elapsed' in ground (c) and the references to an extension and 'not an entirely new building' were removed from the ground (d) appeal. It is, however, notable that in his opening remarks pursuant to ground (d) Mr Phillips commented 'additionally, the construction of the annex was not entirely a new building but an extension of the existing building'¹⁰.
15. Mrs Sidhu provided a witness statement in this appeal dated 4 May 2017. When giving her oral evidence she confirmed that the contents were true. In this document she refers to her previous statutory declaration and says that the contents were limited to the breach alleged in the first notice. With regard to the second notice she said, in essence, that the builders were instructed to build an outbuilding for storage and a playroom ancillary to the main dwelling and that it had been completed as such by mid-April 2011. In February there had been a leak from the first floor of No 39 into the ground floor and the tenant of the ground floor used the outbuilding for storage and as a playroom for her children while the water damage in the living room of her flat was being repaired and for other works of redecorating to be undertaken.

⁷ APP/A5270/C/16/3149277

⁸ Appendix 7 to Mr Whittaker's proof

⁹ Exhibit FA2 to a statutory declaration dated 28 April 2017 which is exhibit GKS10 to Mrs Sidhu's witness statement

¹⁰ Page 2 of Document A

16. The works to the ground floor flat were completed at the end of June 2011 and at that point, as Ms Ahmed could not afford to pay rent for the outbuilding, a decision was made by Mr and Mrs Sidhu to insert a kitchen, bathroom, central heating and a boiler so that the outbuilding could be used as a self-contained residential unit. The letter from the builders is exhibited to this statement with asterisks inserted by Mrs Sidhu identifying the later works¹¹. Mrs Sidhu's reasons for creating the self-contained unit included her assertion that 'everyone else was doing it' and that it would increase the value of her property. The first tenant had an agreement dated from 19 August 2011 and the outbuilding has been residentially occupied since then.
17. Ms Ahmed made a second statutory declaration dated 28 April 2017¹² in which she also refers to the first notice and being asked to include in this declaration supplementary evidence. She refers to the damage caused to her living room in early 2011; the outbuilding being in-situ by mid-April 2011; her moving into it for use as a playroom and area to relax and store her furniture; at that time the outbuilding was plastered, painted internally and had an electricity supply; the attached plan shows no internal partitions save for a storage area. She used the outbuilding until the end of June 2011 and then builders commenced works which were completed by the end of July 2011. When she then visited the outbuilding it was the one bedroom unit described in her first statutory declaration.
18. Mr Sidhu provided a witness statement dated 4 May 2017 which he confirmed in oral evidence was true. He said that when the property was purchased in 2004 there was a shed in poor condition at the bottom of the garden; this shed was demolished and it was not until 2011 that builders were instructed to build a replacement outbuilding. The replacement is slightly larger than the previous building but it was largely built on the foundations of the previous one which had not been removed. His evidence then mainly followed that of Mrs Sidhu's witness statement and oral evidence in this appeal.
19. Mrs Sidhu produced an extract from a works log book for No 39¹³. The log records '39 outbuilding Leonard Road. Instructed builders to build an outbuilding in the back garden. 5.1.2011. Total cost £9,000' and five payments are noted. The builders' invoice is dated 29 July 2011 and sets out the works completed which include all the works required to build a self-contained residential unit; there is no differentiation between these works to suggest that they were completed at different times and as separate pieces of work.
20. Mr Sidhu's evidence was that the kitchen, bathroom, central heating and boiler fittings were additional works after Ms Ahmed stopped using the outbuilding. But he was unable to explain why the total cost in January of £9,000 was the same as that for the works in total, that is, if the internal fittings had been extra and thought about and added at a later date why was the amount paid the same as that originally noted? It is notable that the extract from the log book was not produced in relation to the first notice although the builders' invoice was produced at that time as evidence that the outbuilding was erected from the outset as a self-contained residential unit.

¹¹ Exhibit GK4

¹² Exhibit GKS10 to Mrs Sidhu's statement

¹³ GKS3

21. Both Mr and Mrs Sidhu said that they had supplied all the materials for the outbuilding and its internal fittings but no receipts or invoices for these items were provided. The explanation was that they had been sent to the accountant but it was not explained why they could not have been obtained in the same way in which the builders' invoices (the one for the outbuilding together with that relating to the works to the ground floor flat¹⁴) had been obtained.
22. I accept that evidence has to be produced that answers the allegation in the notice but at various times during the enforcement proceedings brought by the Council in respect of the outbuilding at No 39 there have been three different explanations concerning the erection and use of the outbuilding depending on the allegations made by the Council as to the breach of planning control. These different explanations are: first, that the building was erected in 2011 as a self-contained residential unit; second, that the outbuilding was erected as a store/playroom and after some 10 weeks its use was changed to a self-contained residential unit; and third, that an original outbuilding was extended and used as a self-contained residential unit. Only one of these explanations can be true and correct.
23. The Appellants contend that s.171B(1) and/or (2) set out the applicable time limits. However, the allegation is the change of use of land whereas s.171B(1) relates to operational development and s.171B(2) relates to a change of use of a building to use as a single dwelling house and therefore neither of these four year time limits apply. A change of use of land carries a ten year immunity period pursuant to s.171B(3) and as the change of use of the land, which on the Appellants' own evidence, took place in July/August 2011 when the outbuilding was completed and occupied for residential use that ten year period cannot be satisfied.
24. I have taken into account the submissions made by Mr Phillips and the authorities he referred to which included the planning unit, use of land being construed in a practical way and when the use of a building becomes lawful so does the use of land. But in reaching my finding that ten years is the appropriate period I adopt what has been established most recently in the courts, that is, if a dwellinghouse is erected unlawfully and used as a dwellinghouse from the outset there would have been no change of use, to which s.171B(2) could apply and therefore the unlawful use can be the subject of enforcement action within ten years, even if the building as a structure becomes immune from enforcement action as operational development after four years¹⁵.
25. The onus is on the Appellants to demonstrate their case, on the balance of probability. However, for the reasons I have set out above I find that the evidence given by and on behalf of the Appellants was contradictory, inconsistent and unreliable. Taking all matters into account including the log book and the invoice together with Mr Sidhu's inability to explain their contents, it seems to me more likely than not that the outbuilding was constructed as a self-contained residential unit from the outset.
26. As the use of the land as a self-contained dwelling did not entail a change of use, the four year timescale set out in s.171B(2) of the Act is not applicable to

¹⁴ Dated 3 July 2011 and Exhibit GKS 6 to Mrs Sidhu's statement

¹⁵ *Lawson Builders Ltd, Paul Lawson and Jennifer Lawson v SSLG and Wakefield MDC* [2013] EWHC 3388 (Admin) applying *Welwyn Hatfield DC v SSCLG and Beesley* [2011] UKSC 15

this case. There has not been a breach of planning control for ten years, as required by s.171B(3) of the Act. Accordingly, the appeals on ground (d) must fail. In the circumstances there is no need for me to go on to consider the evidence relating to the four year period.

The appeal on ground (a) and the deemed planning application

27. The ground (a) appeal is on the basis that the Appellant is saying that planning permission ought to be granted for the change of use stated in the notice and the deemed planning application is in similar terms. From the reasons for issuing the notice I consider that the main issues are the effect of the use of the land on the character and appearance of the area and the host dwelling; the effect of the use of the land on neighbours' (including the occupants of the main dwelling) living conditions with regard to outlook, privacy and noise and disturbance; and whether the use of the land results in the provision of substandard living conditions.

Character and appearance

28. The appeal site comprises a two storey terraced house that has been extended at the rear on the ground floor and which has been divided into two flats. The outbuilding is in the rear, modest sized garden; it has an area of some 30sq m; and is accessed from an alley way that runs from the side of No 43 to the rear of the property. The outbuilding has been constructed of brick with window frames and doors of white uPVC and it has a flat roof. It has a large box-like shape and is utilitarian in design.
29. The use of this part of the garden as separate residential land is an alien form of backland development which does not reflect the established pattern of residential development in the area which fronts onto the street, primarily in the form of two storey terraced housing.
30. The houses in Leonard Road are modest in size as are their gardens. The introduction of a large unattractive building at the rear, which takes up a significant amount of garden space, for residential use increases the density of both built development and residential use to an unacceptable degree.
31. For the reasons given above I conclude that the use of the land for separate residential use has a harmful effect on the character and appearance of the area and the host dwelling and that it is contrary to Policy 7.4 of the Council's Development Management DPD which seeks to ensure that development in existing built areas complements street sequence and building pattern.

Neighbours' living conditions

32. The day to day activity of occupiers of the outbuilding, including coming to and fro, putting out washing, having the television/radio on, having lights on and using the garden area would have an unacceptable impact on the occupants of No 39 in terms of noise and disturbance and loss of privacy given the location of the outbuilding and its proximity to the main dwelling.
33. Disturbance and loss of privacy could also be caused to the occupiers of neighbouring properties given the tight-knit nature of the dwellings and the location of habitable room windows and the alleyway that leads to the outbuilding.

34. The outbuilding is clearly visible in the back garden of No 39 from both the rear of No 39 and adjoining properties and as such has an adverse impact on the outlook from those properties given its proximity and unattractive appearance.
35. I therefore conclude that the use of the land for residential purposes has a harmful effect on neighbours' (including the occupants of the main dwelling) living conditions with regard to outlook, privacy and noise and disturbance and that it is contrary to Policy 7B of the Council's Development Management DPD which seeks to ensure that new development achieves a high standard of amenity for users and adjacent users by ensuring good levels of privacy and a positive visual impact.

Living standards

36. The outbuilding has a bedroom some 2.7m by 1.9m; an 'L' shaped living area; a small open plan kitchen; and a small bathroom. There is a canopy on the side facing the main house which contains some storage and there was a washing line under the canopy at the time of my visit. The modest back garden is shared between the occupiers of the outbuilding and the occupiers of No 39.
37. The floor area of the outbuilding falls far short of the 50sq m standard for a one bedroom flat and it also falls short of the 37sq m standard for a single person dwelling¹⁶. Whilst I accept that less than 37sq m could be permitted this would be only in the case of 'exemplary design' which this outbuilding is not.
38. The accommodation in the outbuilding is extremely cramped and I noted that with the bed, a wardrobe and some stored articles in the bedroom there was virtually no floor space remaining. The living area is extremely small and its shape renders much of it un-useable. The kitchen area is similarly very cramped with little storage or cupboard space.
39. The internal living room relies on natural light from the window in the kitchen and the glass door; these glazed elements face the canopy and the garden and provide extremely limited light to the living area which was gloomy at the time of my visit¹⁷. Foliage in the park at the back of the outbuilding also resulted in limited natural light to the bedroom.
40. The limited area of garden that remains at No 39 has to be shared with a number of other occupiers and it cannot therefore be described as private. Any use of it would be overlooked by the occupiers of No 39 and the occupiers of other houses in Leonard Road.
41. I therefore conclude that the use of the land for residential purposes results in the provision of substandard living conditions and that it is contrary to Policy 3.5 of the London Plan and Policies 3.5 and 7B of the Council's Development Management DPD.

Other matters

42. I appreciate that there are a number of similar structures in the immediate area but I am not aware of their planning status. I was informed by Mr Whittaker that the Council has investigated many outbuildings in the area and enforcement action has been taken in respect of some. No backland

¹⁶ Table 3.3 of Policy 3.5 of the London Plan and Policy 3.5 of the Ealing Development Management DPD

¹⁷ 17.30 on a relatively sunny afternoon

development such as this has been granted planning permission although some have obtained lawful development certificates. Each development has to be considered on its own merits and the presence of other similar development, whether authorised or not, does not justify the grant of planning permission for a development that causes the harm I have identified.

43. Given the meaning of 'affordable housing' in planning terms the accommodation provided by the outbuilding is not affordable as claimed by the Appellants. It is low cost but that reflects the poor quality of the accommodation.
44. I accept that housing benefit is currently being paid in respect of the outbuilding. It is my understanding that housing benefit is applied for by the tenant and the Council undertakes a paper-exercise to establish whether housing benefit is payable or not. The fact that housing benefit is paid does not confer any acceptance by the Council that the standard of accommodation is acceptable or not and, in any event, this is not a planning consideration.
45. I also note that the occupier was homeless prior to taking up her occupation in May 2016; that the accommodation suits her needs; and that if the notice is upheld she will lose her home. Whilst I have some sympathy for the current occupier her occupancy cannot be guaranteed and any planning permission would run with the land which means that it could be let to any tenant. In this respect I note that when a warrant was executed to gain entry to the outbuilding in February 2016 it was occupied by two adults and two children¹⁸. A condition limiting the occupation to one person, as suggested by the Appellants, would be unenforceable and would not make the change of use acceptable for the reasons I have given above.
46. With regard to security, there is a tall palisade fence along the boundary with the park at the rear of properties in Leonard Road. It appeared to me that the fence would be difficult to climb given its height and design. The outbuilding has a door immediately adjacent to the alleyway and a further door into the rear garden. In these circumstances it seems to me that security for No 39 would be more enhanced by a wall along the rear boundary with no access into the garden of No 39 rather than the outbuilding. Similarly I do not consider that the outbuilding is necessary to protect the garden of No 39 from wind.

Conclusions

47. For the reasons given above, and taking all other matters into account, I conclude that the appeal on ground (a) fails and the deemed planning application is refused.

The appeals on ground (f)

48. In appeals on ground (f) the Appellants have to show that the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control.
49. The Appellants' amended grounds of appeal refer to enforcing against the outbuilding and thus rendering it useless being contrary to principles and good governance; in their statement they say that the outbuilding should not be demolished because it has been in existence for more than four years; and

¹⁸ Appendix 4 to Mr Whittaker's proof

Mr Phillips submitted that any step beyond ceasing the use of the land for separate residential use would be disproportionate and unnecessary because there was a shed on the land in 2004, there have been no complaints about the use, the structure affords the occupants of No 39 security from the park and the law affords the Council suitable and appropriate remedies in the event of a breach.

50. The only lesser step proposed therefore by the Appellants is the deletion of all the requirements other than that which requires the use of the land for separate residential use to cease. This comprises the only obvious alternative which would result in under-enforcement. However, the outbuilding itself is not permitted development given the division of No 39 into two flats and even if it were, given the Appellants' evidence that they predominantly have tenants in No 39 who are in receipt of housing benefit and that housing benefit would not be paid for the tenants to use the outbuilding, it seems that there is unlikely to be any future use for it as an ancillary building.
51. The purpose of the requirements of a notice such as this is to remedy the breach of planning control¹⁹ and it has been established that a notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement²⁰. There is no question in this appeal that the change of use of the land for separate residential use is facilitated by the outbuilding and its contents.
52. I therefore find that the requirements do not exceed what is necessary to remedy the breach of planning control and the appeals on ground (f) fail.

Conclusions

53. For the reasons given above I conclude that the appeals should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Decision

54. The appeals are 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.

Gloria McFarlane
Inspector

¹⁹ S.173(4) of the 1990 Act

²⁰ *Murfitt v SSE* [1980] JPL 598 and *Somak Travel Ltd v SSE* [1987] JPL 630

APPEARANCES

FOR THE APPELLANT

Mr J Phillips Counsel

He called

Mrs Sidhu Appellant

Mr Sidhu Appellant

FOR THE LOCAL PLANNING AUTHORITY

Mr R Morton Solicitor

He called

Mr N Whittaker Enforcement Officer
BSc(Hons) MA MRTPI

DOCUMENT SUBMITTED AT THE INQUIRY

Document 1 - The Council's letter of notification of the Inquiry

DOCUMENTS SUBMITTED BY THE ADVOCATES AT THE INQUIRY

Document A - The Submissions of the Appellants (including authorities)

Document B - The Council's opening statement

Document C - The Council's closing statement and bundle of authorities