



Appeal Decision

Site visit made on 12 June 2017

by **Pete Drew BSc (Hons) DipTP (Dist) MRTPI**

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

Decision date: 20 June 2017

Appeal Ref APP/T5150/C/16/3158357

Land to the rear of 120 Brondesbury Park, [also known as 2C Staverton Road] Brondesbury, London NW2 5JR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
- The appeal is made by Miss Sonal Halai against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice was issued on 2 August 2016.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the domestic garage and land associated with Ground Floor Flat (Flat B) and land to the rear of 120 Brondesbury Park to separate storage/commercial use ("the unauthorised change of use").
- The requirements of the notice are: (1) cease the use of the domestic garage and associated land as separate storage/commercial use (Use Class B8) and make alterations to ensure that the premises are returned to the condition before the unauthorised development took place by returning the use of the garage and associated land back to domestic use associated with the residential units at 120 Brondesbury Park; (2) Remove all debris, items and materials associated with the unauthorised separate storage/commercial use from the premises.
- The period for compliance with these requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (d), (f) and (g) of the Act. As the requisite fees have not been paid the deemed planning application does not fall to be considered.

Formal Decision

1. I direct that the enforcement notice be corrected by:
 - i. the substitution of The Plan attached to this decision for the plan attached to the enforcement notice;
 - ii. the deletion of the words "*Ground Floor Flat (Flat B) and land*" in Schedule 1 of the enforcement notice and their replacement with the word "*Land*";
 - iii. the deletion of the words ("*the premises*" – *shown outlined bold in BLACK on the attached plan*)" in Schedule 1 of the enforcement notice and their replacement with the words ("*the premises*" – *shown edged in red on The Plan attached to the appeal decision*)"; and,
 - iv. the deletion of Schedule 2 of the enforcement notice and its replacement with the words "*Without planning permission, the material change of use of the premises to separate storage/commercial use ("the unauthorised change of use")*".
2. I direct that the corrected enforcement notice be varied by the deletion of the words in STEP 1 in Schedule 4 of the enforcement notice and their replacement with the words "*cease the use of the premises for separate storage/commercial use and ensure that the premises are returned to its condition before the*

unauthorised change of use took place". Subject to these corrections and this variation the appeal is dismissed and the enforcement notice is upheld.

Procedural matters

3. On the appeal form it is said that the notice: "...has no meaning", which might suggest it is being claimed that the notice is a nullity, even if that word is not expressly used. If the notice were to be found to be a nullity there is, in effect, no notice at all and therefore nothing that can be corrected or, indeed, form the basis of an appeal. For this reason I shall deal with this argument first.
4. A notice is a nullity if it is missing some vital element, such as a requirement or a period for compliance, so as to render it defective on its face. However this does not apply to this notice, which is similar to the example notice in the Planning Practice Guidance [the Guidance]¹. In the absence of any substantive rationale I conclude that the notice is not a nullity and that its meaning is clear.
5. Notwithstanding the above, I consider that there are issues with the notice and for this reason, ahead of the site visit, The Planning Inspectorate [PINS] wrote to the main parties to invite comments thereon. The most significant is that the premises, as defined in the notice, includes residences, but the allegation makes no reference to that lawful use. In order to address this matter the Council put forward a revised plan, which excludes those residences and would focus the alleged breach onto a smaller area. The first plan that it put forward was found, at the site inspection, not to reflect the area within which it is said that the alleged breach has taken place. Following the site visit, when it was agreed that the street frontage of the site measured approximately 7.5 m², a revised plan was put forward, which I shall adopt. In these circumstances I am satisfied that there would be no injustice from correcting the notice to substitute the revised plan, including consequential corrections to the text, which includes changes to Schedules 1 and 2 of the enforcement notice.
6. The second issue is that the first reason for issue of the notice refers to 4-years but having regard to the provisions of section 171B(3) of the Act the relevant period would appear to be 10-years. In the context of the claim in the grounds of appeal that the use started in 1994, no reasons have been given as to why there would be prejudice from approaching ground (d) on that basis. In any event, given that Schedule 3 of the notice is spent after appeal stage, there is no reason to formally correct the notice to refer to 10 rather than 4-years.
7. The address that I have used at the head of this decision has been largely taken from the face of the enforcement notice. Since that refers, in the alternative, to 2C Staverton Road, which is the address given on the appeal form, there can be no ambiguity as to the address to which the enforcement notice, and now this appeal, relates. However, for the reasons set out above, since the corrected notice plan no longer includes the ground floor flat [Flat B] it is appropriate to delete this address from the notice. Nevertheless, as a matter of fact, the land lies to the rear of 120 Brondesbury Park [No 120] and so this part of the notice address is appropriate. This correction, which partly reflects the Appellant's position³, would not cause injustice to either party and is a consequence of the reduction in area of the premises, as defined.

¹ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/548727/17b-061-20140120_example-enforcement-notice-operational-development.pdf

² The parties agreed the external measurement was 7.72 m and that the internal measurement was 7.38 m.

³ Appellant's email to PINS at 15:36 hours on 15 June 2017.

8. The appeal form states that Mr Premji Patel is an additional Appellant and a second appeal reference is given of APP/T5150/C/16/3158358. However it would appear that this was done in error and that Mr Patel is acting as Agent on behalf of Miss Halai who is the sole Appellant. Noting that the identical grounds of appeal were lodged, I propose to deal with this appeal on this basis.

Ground (b)

9. Under this ground of appeal the Appellant needs to show that: “...*the breach of control alleged in the enforcement notice has not occurred as a matter of fact*” [as per section E. (b) of the appeal form]. The Guidance says⁴ in enforcement appeals the onus of proof in respect of matters of fact is on an Appellant.
10. The grounds of appeal admit that: “*This land is used as storage*”, albeit with the qualification that: “*95% of the land is empty*”. This reiterates what has been said in earlier correspondence, such as the email sent to the Council on 20 April 2016. In the context of those admissions I conclude that the ground (b) appeal must fail because the onus of proof to show that the alleged breach has not occurred, noting tense, as a matter of fact has not been discharged.
11. In reaching this view I appreciate the limited amount of storage that is shown in the photograph that accompanies the Appellant’s statement but, since it is undated and is not accompanied by a statutory declaration, or similar, to corroborate the date on which it was taken, I am only able to attach limited weight to the claim that it was taken at: “...*the time of the enforcement notice*”. Moreover that statement does not say whether that was the position on the date of issue of the notice or following service, when the Appellant might have had an opportunity to remove stored items from the land. Although not a point to which I attach significant weight I note that, in contrast to the grounds of appeal, the statement says the land was 97 % empty on 15 February 2017, which suggests that some additional storage had been removed from the land since the appeal was first lodged on 10 September 2016. The photographs provided by the Council show the level of storage that has taken place at an earlier stage, which show that the breach has occurred as a matter of fact.
12. I record that at the time of my inspection there was limited, if any, evidence of commercial use and that the storage appeared to be primarily domestic items, which were almost entirely stored within the garage. However the allegation includes “*separate*” storage use and I consider below whether domestic storage by persons who are not resident at the adjacent dwelling[s] might represent a breach of planning control and hence be caught within the ambit of the notice. Nevertheless it is not what existed at the time of my inspection that is material for the purpose of ground (b) but what has occurred as a matter of fact, including what was taking place on or prior to the date of issue of the notice.

Ground (c)

13. Under this ground of appeal the Appellant needs to show that: “...*there has not been a breach of planning control*” [as per section E. (c) of the appeal form]. The grounds of appeal merely assert: “*The use of the land do not constitute a breach*”. However no further reasons are given in the Appellant’s statement or final comments, beyond the question of duration which I deal with under (d).

⁴ See for example paragraph: 053, Reference ID: 16-053-20140306.

14. The Council's contention that: "*It is clear that the unauthorised change of use requires planning permission*", has not been challenged. The photographs at Appendix 5 to the Council's statement reveal a level of commercial storage that cannot be regarded to be de minimis. Section 55 of the Act defines development to include the making of a material change in the use of any buildings or other land. No explanation is offered as to why the level of commercial storage evident in those photographs would not be material.
15. In these circumstances the question arises as to whether a separate storage/commercial use would be ancillary to a lawful use. The Council asserts that the lawful use of the premises, as defined, is as a domestic garage associated with the ground floor flat of No 120. Although there is what I shall call a courtyard between the garage and Staverton Road there is no reason to think that the lawful use of this area is also anything other than ancillary to the ground floor flat of No 120. The fact that the premises, as defined, might have been registered under a separate land registry title to the ground floor flat of No 120 has no bearing on its lawful use for planning purposes.
16. I consider that the alleged breach of planning control, which I have previously established to have taken place as a matter of fact, is materially different from what appears to be the lawful use of the land. The Appellant has not shown, by reference to a grant of planning permission or otherwise, what other use of the premises might be lawful for planning purposes. Indeed if the premises are not ancillary to the ground floor flat of No 120 the alternative conclusion might be that they have a nil use, i.e. no lawful use. Accordingly the use identified by the Council would appear to facilitate the beneficial use of the premises, albeit this would not include storage by persons who were not ordinarily resident at No 120. Perhaps the one exception might be if it were shown to be storage by the landlord that was reasonably and necessarily related to the ground floor flat of No 120. This might need to be assessed on a fact and degree basis, but it has not been shown that what has occurred clearly fits in this category. Thus the "*separate*" domestic storage within the garage that I observed during my inspection would appear to be part of a continuing breach of planning control.
17. I conclude that the ground (c) appeal should fail because the separate storage/commercial use is more than de minimis and is unrelated to the lawful use of the land. It therefore represents the making of a material change in the use of the premises, as defined, which is development for which planning permission is required. In the absence of any grant of planning permission I conclude that it has not been shown that there has not been a breach of planning control.

Ground (d): Approach

18. The Guidance states that the Applicant is responsible for providing sufficient information to support an application for a Lawful Development Certificate [LDC], which is the equivalent of ground (d) in an enforcement appeal. It says: "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability*"⁵. This test applies equally to an Inspector at appeal stage.

⁵ Source of quote: paragraph ID: 17c-006-20140306.

19. The notice is dated 2 August 2016 and, for the reason given previously, the material date for the purpose of ground (d) is 10-years prior to the date of issue, namely 2 August 2006. On this basis the onus of proof falls on the Appellant to demonstrate that the use alleged in the notice began prior to the material date and has continued, such that: *"...at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice"* [as per section E. (d) of the appeal form].

Ground (d): Reasons

20. The grounds of appeal claim: *"The land has been use as it is since 1994"* [sic], but at that stage no elaboration was offered. The Appellant's statement adds nothing in this respect, but at final comments stage the Appellant's Agent said: *"It is a fact that piece of land had never been abandoned; it has always been used as landlord's storage of commercial material. I have the personal history and knowledge of the site since 1990..."*. However, on the limited information before me, it is unclear why the Appellant's Agent has personal knowledge of the premises over the requisite period. The Appellant has not explained her relationship with her Agent⁶ and therefore I attach very little weight to this and other personal statements that are made by the Appellant's Agent.
21. Although the Appellant's Agent proceeded to say that the full evidence can be tested on the witness stand, by the stage that this comment was made PINS had decided⁷ that the appeal should proceed by way of written representations. I find is no basis to change the procedure now.
22. The Appellant's Agent's email of 17 November 2016 also said: *"The open ground has been used as storage of building materials since 1990 (approx.)..."*. It is unclear whether the Appellant is making a distinction between the land, the site and the open ground⁸ but I consider that to be unlikely and the more probable explanation is imprecision in the use of terminology. The net result is that the Appellant's evidence is ambiguous as to whether it is claimed that the commercial use commenced in 1990 or 1994. Moreover none of this evidence has been sworn and so I am only able to attach very limited weight to these dates, which have not been corroborated by photographs or written evidence.
23. Not only is there no positive evidence to show the use commenced prior to the material date, as defined, there is evidence to contradict the Appellant's version of events. A contemporary document produced by the Council, which comprises an email dated 17 January 2006, describes the use of the premises as *"abandoned for over 4 years"* prior to November 2005. I appreciate that the Appellant's final comments are an attempt to rebut that claim. However in the absence of sworn evidence or an explanation as to why the Appellant's Agent would have personal knowledge of the premises over the requisite period, I consider that greater weight should be given to this contemporary evidence.
24. In addition there is evidence to suggest that the premises have been used for a materially different use since the material date. On 5 July 2012 a person called Ravi Halai, who made a declaration that they were the owner of the premises,

⁶ I note paragraph 2.6 of the Council's statement suggests the Appellant's father is Mr Premji Patel, but the Appellant does not say this and since I would have to assume this named gentleman is her Agent I attach this claim very limited weight.

⁷ This was in line with the Appellant's Agent's email dated 17 November 2016, which said he was "happy to go either way" as to the procedure by which the appeal was to be heard.

⁸ Compare first quote and second quote in paragraph 20 above with this quote in paragraph 22.

as defined, on that date, made an application for an LDC for an existing use that was said to comprise a “*residential unit*”. It was claimed that this use commenced on 1 May 2007, that there had been no interruption of that use and no material change of use since that date⁹. The warning that is contained in section 12 of that application form indicates that it is an offence to provide false or misleading information in connection with such an application. On that basis it is appropriate to attach greater weight to the contents of that LDC form than the unsworn claim made by the Appellant’s Agent that the premises have: “...always been used as landlord’s storage of commercial material”.

25. The Council goes further to suggest the Appellant’s claims are untrue, but I do not need to make a finding on this point in the circumstances of this appeal. I do however note that the Appellant’s Agent’s email of 17 November 2016 said: “...*we built over the open ground 2006 (approx). Due to enforcement Notice we had to bring this down (2 years back). Since then the open land is used as storage of building materials etc...*”. This is wholly inconsistent with the Appellant’s Agent’s final comments [see above quote], tends to reinforce my view as to the weight to be given to his evidence and corroborate my view that greater weight should be given to the contents of the LDC application. In my view it strongly suggests that any commercial use of the premises began “2 years back” which, given the date of the email, would be November 2014.
26. For all of the above reasons I conclude that the Appellant has not shown the use alleged in the notice began prior to the material date and has continued.

Ground (f)

27. Section 173(3) of the Act says an enforcement notice shall specify steps in order to achieve, wholly or partly, any of the purposes set out in section 173(4) of the Act. These include remedying the breach by discontinuing any use of the land or by restoring the land to its condition before the breach took place. Paragraph 3.4.1 of the Council’s statement says the requirements of the notice are aimed at remedying the breach, within section 173(4)(a) of the Act. In this context, the first requirement of the notice appears to reflect section 173(4)(a) and the second requirement is a necessary consequence of the first.
28. The grounds of appeal merely assert: “*No injury to amenity has been caused*”, but given the purpose of the steps in the notice this is not a case which falls within section 173(4)(b) of the Act. In the absence of the deemed application fee having been paid the planning merits of the development do not fall to be considered and so whilst the Council has referred to the policy context that is not a matter relevant to the ground (f) appeal. In any event, as the Council observe, no alternative, or lesser, steps have been put forward to address any injury to amenity, for example from noise and disturbance caused by vehicles coming back and forth to the land in connection with the commercial use. So, even if I am wrong and this is a case within section 173(4)(b) of the Act, in the absence of any lesser steps the requirements of the notice are not excessive.
29. In reaching this view I have noted the terms of the Appellant’s final comments, which say that the site is clear, such that there is nothing left to clear. If that is the position then the requirements of the notice have been complied with, but that does not mean that the requirements are excessive. Indeed, to the

⁹ See answers to question 10 of the application form.

contrary, if the Appellant were to have complied with the requirements of the notice then it would suggest that those requirements are not excessive.

30. I conclude that no reason is advanced as to why the requirements of the notice exceed what is necessary to remedy the breach, which appears to be the limited scope of the ground (f) appeal. However even if I am wrong, in the absence of a lesser step having been advanced, the requirements of the notice are not excessive. I do however propose to vary the first step of the notice to align it with the allegation, which makes no reference to "*Use Class B8*", and merely discontinue the unauthorised use rather than require the premises to be positively used for a particular purpose, which exceeds the powers in the Act. I am satisfied there would be no injustice to either party from such a variation.

Ground (g)

31. The grounds of appeal say: "*The limited time given needs to be stretched to infinity...*". However infinity is not a quantifiable period and given that section 173(9) of the Act requires a period to be specified, I consider that the effect of varying the stated period to an infinite, and hence unknown, timescale would have the effect of rendering the varied enforcement notice to be a nullity. In any event, given the terms of the Appellant's final comments, if the site is clear and there is nothing to clear then the 3 month period for compliance appears to be positively generous. In the absence of a sound reason why the period for compliance is too short I conclude that the ground (g) appeal should fail.

Other matters

32. I have taken account of the contents of the Council Enforcement Officer's email dated 13 May 2016, and the exchange prior to that date, but the question of expediency is a matter for the Council. The fact the status of the investigation changed to "*further action suspended*" at that time, pending a conversation or meeting, does not mean that the Council subsequently used excess power to issue the notice subject of this appeal. Indeed the concession in the final comments that: "*We were not notified on or after 10th June 2016 that the premises was allegedly used as stored of boiler parts*" [sic], tends to reinforce that such use did occur after May 2016, as suggested in paragraph 2.7 of the Council's statement, regardless of whether it was sanctioned by the Appellant.
33. The Appellant's statement draws attention to what is said to be "*...building storage for commercial use*" at the rear garage of No 118 Brondesbury Road. However there is no evidence before me that any such use "*...is allowable by the planners*". It might be that the situation was temporal, for example if it was related to building works at that property, or alternatively it might represent a separate breach of planning control. However even if the latter there is no evidence to support the inference that the Council tolerates any breach such that the Appellant has been unfairly singled out for attention. In the absence of the deemed application fee having been paid the existence of the alleged activity at No 118 does not assist the appeal grounds that are pled.

Conclusion

34. For the reasons given, having regard to all other matters raised, I conclude the appeal should be dismissed and I shall uphold the corrected and varied notice.

Pete Drew

INSPECTOR

The Plan

This is the plan referred to in my decision dated:20 June 2017

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

**Land to the rear of 120 Brondesbury Park, [also known as 2C Staverton Road]
Brondesbury, London NW2 5JR**

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Scale: Do not scale as original plan has been scanned which might cause variations.

