



Appeal Decision

Site visit made on 24 July 2017

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 18 August 2017

Appeal Ref: APP/A5270/X/16/3152360

1 Craven Avenue, Southall UB1 2DJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991['the Act'] against a refusal to grant a certificate of lawful use or development ['LDC'].
 - The appeal is made by Mr and Mrs M Khalil against the decision of the Council of the London Borough of Ealing.
 - The application ref 161823CPE, dated 5 April 2016, was refused by notice dated 31 May 2016.
 - The application was made under section 191(1)(b) of the Act¹.
 - The development for which an LDC is sought is described in the application form as follows: '*(a) the lawful retention of the building at the rear and (b) its lawful use as a self-contained dwelling (Class C3)*'.
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Decision

1. The appeal is dismissed.

Preliminary matters

2. The outbuilding is the subject of an enforcement notice issued by the Council on 20 October 2015. Mr and Mrs Khalil appealed against the notice under s174(2)(d)² of the Act. However that appeal was dismissed on 10 August 2016³. The notice declares the following as the breach of planning control:

Without planning permission, the material change of use of part of the outbuilding to the rear of the premises (in the position marked 'X' on the substituted site plan) to use as a self-contained residential dwelling.

The steps required by the notice are: (1) cease the use of the outbuilding as a self-contained residential dwelling (2) Do not use the outbuilding for any other purposes other than a use incidental to the main dwelling (3) Remove the kitchen and drainage connections which facilitate the use of the outbuilding as a self-contained residential dwelling, and (4) remove all resultant debris.

3. The applicant must describe the existing development for which an LDC is sought⁴. Mr and Mrs Khalil made an application for the LDC on 5 April 2016 for existing development described in my bullet-point five. However the description given in the LDC application form is imprecise. The decision notice issued by the local planning

¹ If any person wishes to ascertain whether any operations which have been carried out on land are lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the operations.

² Section 174(2)(d) states that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.

³ APP/A5270/C/15/3138440 and 3138441.

⁴ Section 191(4) of the Act permits the Council, by extension the Secretary of State, to modify the terms of an application so as to accord with the facts and evidence.

authority refers to the existing use in the following terms: '*Continued use of the outbuilding as a self-contained residential unit*'. It refused to grant an LDC on the grounds that insufficient and inadequate evidence has been submitted to establish lawfulness. After the s174(2)(d) appeal was determined on 10 August 2016, the planning agent sought to amend the description of the existing development by not seeking an LDC for the outbuilding's self-contained residential use. After my site visit I invited the appeal parties to comment on certain matters including the description of the existing development for which a declaration is sought. On 4 August 2017 the planning agent confirmed the following description:

'The carrying out of operational development in erecting an outbuilding for incidental residential purposes with internal kitchen and bathroom'.

I will proceed on that basis.

Inspector's reasons

4. In this appeal the onus of proof is firmly upon Mr and Mrs Khalil. In *Gabbitas*⁵ the Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The applicant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make Mr and Mrs Khalil version less than probable, there is no good reason to dismiss the appeal, *provided their evidence alone is sufficiently precise and unambiguous* [my emphasis]. I must examine the submitted factual evidence, the history and planning status of the building in question and apply relevant law or judicial authority to the circumstances of this case.
5. The main issue is whether the carrying out of operational development in erecting an outbuilding for incidental residential purposes with internal kitchen and bathroom are lawful on the date of the application.

For background information, operations are lawful at any time if no enforcement action may then be taken in respect of them because the time for enforcement action has expired or for any other reason and they do not constitute a contravention of any of the requirements of any enforcement notice then in force. An enforcement notice is not in force where an enforcement appeal is outstanding or an appeal has been upheld and the decision has been remitted to the Secretary of State for redetermination, but that redetermination is still outstanding⁶.

Section 171B(1) of the Act indicates where there has been a breach of planning control consisting in the carrying out without planning permission of building operations on land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed. For the purposes of this appeal, the relevant date is 5 April 2012 [emphasis added].

6. The detached outbuilding is situated in the rear garden and has two parts; a small room on the right-hand side in domestic storage use. On the left-hand side there is an open plan room with a separate shower, toilet and a kitchen. The building is a permanent structure substantial in size. I consider that the work comprised in its

⁵ *Gabbitas v Secretary of State for the Environment* [1985] JPL 630 reviewed in *Ravensdale Limited v Secretary of State for Communities and Local Government* [2016] EWHC 2374 (Admin).

⁶ The Department's Planning Practice Guidance describes 'lawfulness' at paragraph: 003 Reference ID: 17c-003-20140306.

construction amount to building operations falling within the scope of s55(1) and (1A) of the Act. Express planning permission was required for the development but it had not been obtained.

7. The overwhelming evidence is that work comprised in the erection of the outbuilding commenced without planning permission in 2008. All of the building operations were substantially completed by December of that year. There is undisputed aerial imagery of the appeal plot showing the outbuilding in existence before the material date. A building regulation certificate, issued by the Council on 12 January 2009, also describes the work as the formation of a WC and shower room within the detached outbuilding. Proof has been submitted that shows the internal layout in December 2008 comprised a storeroom, open plan room with separate shower/WC; a kitchen did not exist. This is consistent with the previous Inspector's conclusions.
8. Mr and Mrs Khalil submit that a cooker hob, extractor, sink, washing machine, floor and wall units were actually fitted within the outbuilding in January 2009. They argue that operational development comprised in the erection of an outbuilding with internal kitchen and bathroom was substantially completed in January 2009. They contend that, before the outbuilding's unauthorised use as a single dwelling-house, the kitchen had been installed. The submission is that, since an outbuilding with internal kitchen and bathroom had been substantially completed before 5 April 2012, building operations are now lawful.

For the following reasons, I do not accept those submissions.

9. As Mr and Mrs Khalil contend that the outbuilding was completed in 2009 with a kitchen and bathroom, it is reasonable to consider whether a kitchen in the form described above existed. That assertion is in direct conflict with the evidence presented at the previous Inquiry which was given on oath. In January 2009 officers visited the site and photographs show the internal layout of the outbuilding at the time. These images show kitchen units in existence but there is no electric hob or gas cooker. Contemporaneous account of the visits also confirms the absence of any cooking facility, which led officers to the conclusion the outbuilding was used for some ancillary purpose. This documentary evidence casts considerable doubt over the claim that a fully functioning kitchen with electric hob or cooker existed at this point in time. The previous Inspector came to the same conclusion. There is nothing before me to suggest that is incorrect.
10. I have reviewed all of the evidence presented but it does not sufficiently show that the outbuilding was substantially completed with an internal kitchen in the form described above on or before 5 April 2012. There is conflicting and contradictory factual evidence as to when an electric hob or gas cooker had actually been installed. There is no corroboratory proof showing how and when the outbuilding with facilities described above had been completed for example, evidence about timing and sequence of work is unclear.
11. In fact, the evidence presented indicates that a cooker hob and extractor had been installed around April 2010 to facilitate a different use of the outbuilding. Once separate cooking facilities had been provided, the outbuilding was occupied and used by individuals unconnected to occupiers of the main dwelling-house at least until 2016. It has been shown that the outbuilding was used as a single dwelling-house forming a separate planning unit during the period leading up to the issuing of the enforcement notice. This primary use was different in character to its ancillary use as the functional link was significantly severed.

12. Pulling all of the above points together, I find that the carrying out of operational development in erecting an outbuilding for incidental residential purposes with internal kitchen and bathroom are not lawful on the date of the application. That is not the end of the matter.
13. The enforcement notice does not require demolition of the outbuilding however it requires the removal of the kitchen and drainage connection, as these facilitated its use as a self-contained dwelling-house. It also stipulates that it must be used for incidental purposes in connection with the main dwelling. There is a legal impediment because s191(2)(b) declares that, for the purposes of the Act, uses and operations are lawful at any time if they do not constitute a contravention of any of the requirements of any enforcement notice then in force. Clearly, the extant notice is in force and stands. So, the granting of an LDC for existing operations, as described and clarified by the planning agent, would contravene the requirements of this notice. Without more, in my opinion, this is plainly a sound and valid basis upon which to refuse this LDC application even if an alternative view prevails on the matters above.
14. In passing, I should address one secondary submission. Much is made of the provision found in s55(2)(d) of the Act, but the argument is misplaced. This is because it permits the use of any building(s) or other land within the curtilage of a dwelling-house for any incidental purpose. It does not exempt from development control purposes the erection of a totally new building for a claimed incidental use. In this case, a new building had been constructed in breach of planning controls.
15. Mr and Mrs Khalil, on the material facts and circumstances of this case and the available evidence, whichever way one scrutinises the representations made, I consider that an LDC cannot be granted because the operational development described by Mr and Mrs Khalil via the planning agent is unlawful for planning purposes.

Conclusion

16. For all of the reasons given above and all other matters raised, in my judgement the carrying out of operational development in erecting an outbuilding for incidental residential purposes with internal kitchen and bathroom is not lawful at the date of the LDC application.
17. I conclude that the appeal should be dismissed in accordance with the powers transferred to me in section 195(3) of the Act.

A U Ghafoor

Inspector