
Appeal Decision

Inquiry held on 22 August 2017

Site visit made on 22 August 2017

by Andrew R Hammond MSc MA CEng MIET MRTPI

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

Decision date: 29 August 2017

Appeal Ref: APP/N1920/C/16/3164658

113 Hillside Avenue, Borehamwood WD6 1HH

- 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 Mrs Juliet Benson against an enforcement notice issued by Hertsmere Borough Council.
 - The enforcement notice, numbered 15/0174/UCU, was issued on 11 November 2016.
 - The breach of planning control as alleged in the notice is without planning permission the material change of use of the premises into two self-contained residential units.
 - The requirements of the notice are:
 1. Cease the use of the premises as two self-contained residential units;
 2. Return the layout of the property to one dwelling house as set out under Planning Permission TP/06/1238, as shown in green on the attached plan, by removing one of the two kitchens facilitating the unauthorised use;
 3. Remove from the property all but one supply of electricity, gas and water;
 4. Remove from the site all debris arising from compliance with steps 1, 2 and 3.
 - The period for compliance with the requirements is 3 months from the date the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, 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 have lapsed.
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Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Application for costs

2. At the Inquiry an application for costs was made by Hertsmere Borough Council against Mrs Juliet Benson. This application is the subject of a separate Decision.

Procedural Matter

3. All oral evidence at the Inquiry was given under oath.

Reasons

4. Under the ground (d) appeal the appellant pleads that the annex at 113 Hillside Avenue had been let as a separate unit of accommodation since late 2007.

5. The annex consists of a narrow single storey side extension, up to the boundary with the neighbouring property, with a separate front door off the parking area to the front of the dwelling.
6. Prior to the service of the enforcement notice, the appellant's husband responded on 18 December 2015, to a Planning Contravention Notice, stating that the kitchen in the play area (the kitchen within the annex) was set up in the play area in August 2014 following a leak in the roof of the main kitchen; and that the current occupant was a Mr Paul Beattie, with the only previous tenant being Miss Simone Perra who was there from 10 October 2014 to July 2015. Mr Benson submitted an amended response on 23 December 2015 wherein he added "Please note that the kitchen was constructed in 2007 and I believe the inspector who inspected the work was aware, as he made suggested (*sic*) that we should have an extractor in the kitchen, which we did."
7. The Council's representative, under cross examination, confirmed that she had checked the Council's Building Control records and, although there should be a record of such an inspection, she could find none.
8. The appellant confirmed that the kitchen was installed in late 2007 during the construction of the extension but was unable to produce any firm evidence other than receipts for kitchen appliances alleged to be those installed in the annex.
9. Prior to the Inquiry the appellant had provided no evidence as to occupation of the annex prior to Miss Perra's tenancy which began on 10 October 2014. The appellant was also unable to explain why Mr Benson had stated that Miss Perra was the first tenant, suggesting that 'it was a mistake'. Mr Benson did not appear as a witness to explain why he could have made such a mistake and none was otherwise given.
10. At the Inquiry the appellant produced a bundle of evidence consisting of copies of a number of tenancy agreements dating back to 25 November 2007; a short letter from Barons Estates; and a letter from Mr and Mrs Benson, dated 2 March 2016, which the appellant states was hand delivered to the Council. Although Mrs Benson felt certain that the letter was delivered she could not be sure whether it was delivered by her husband, by her daughter or by herself. The Council have no record of receipt of the letter.
11. The letter from Barons Estates, dated 4 February 2016 and addressed 'to whom it may concern' reads "We can confirm from our records that we initially rented the property for Mr & Mrs Benson in July 2008. We have assisted them since that time, to date, with a number of tenants. Please note there have been intermittent gaps whereby we believe Mr & Mrs Benson have had family/friends stay/maintenance issues."
12. The tenancy agreements, which the appellant explained had been drawn up by the estate agents were as follows:-
 - a) Miss Moore 12 months from 25:11:2007 to 24:11:2008 (unsigned)
 - b) Mr Daniel Simson 12 Months from 05:07:2008 to 04:07:2009
 - c) Mr Paul Ruvin 12 months from 2:01:2010 to 01:01:2011
 - d) Miss K Nitka 12 months from 1:02:2013 to 31:01:2014
 - e) Miss S Perra 12 months from 20:10:2014 to 19:10:2015
 - f) Mr Paul Beattie 12 months from 18:09:2015 to 17:09:2016

Although the latter 5 agreements are signed none are witnessed.

13. The letter of 2 March clarifies that the kitchen was installed in 2007 and was used temporarily by the appellants in 2014, and explains that the side annex had "always been in use since its completion, sometimes by our guest, family members and sometimes tenanted." The letter continues with a list of persons occupying the annex 'according to our estate agent' as follows:-
 - a) January 2007 – Miss Moore
 - b) July 2008 to December 2010 Daniel Simson
 - c) January 2010 to January 2011 Mr Paul Ruvin
 - d) February 2013 to February 2014 Miss Nitka
 - e) March 2014 Ms N Riley
 - f) July 2014 Mr S Alavi about 6 months or less
 - g) October 2014 Simone Perra
 - h) 2015 to date Paul Beattie.
14. The letter continues by stating that 'for all dates not accounted for the space was used by us, family members and guest', further explaining no timetable was kept of such use.
15. Although the dates in the letter were allegedly provided by the estate agent, under cross examination the appellant corrected a number of inconsistencies by reference to banking records of rent payments. The records were not produced as evidence.
16. It was suggested that the first tenancy (Miss Moore) had indeed commenced in November 2007 and not January 2007, and that Miss Moore had left early, hence the overlap with Mr Simson's tenancy agreement. Although Mr Simson's tenancy was originally to July 2009, the appellant explained that this was extended by agreement. Mr Ruvin, it was stated, also extended his tenancy. No evidence was produced as to actual occupation during these periods of tenancy extension.
17. No evidence as to any identity checks or other investigations by the estate agent were provided nor were any statements by any tenants produced as evidence.
18. When questioned in cross-examination, the appellant accepted that, without corroboration, the existence of a tenancy agreement was no proof of actual occupation. Furthermore, the appellant acknowledged that there were unrecorded periods of between a week and two months when relatives or other guests were occupying the annex and sharing the facilities of the main dwelling. They were not occupying the annex as a self-contained unit of accommodation.
19. A gap of two months between lettings during which time 113 Hillside Avenue reverted to a single dwellinghouse, such that the Council could not have taken enforcement action, would be significant. Any such gap, as opposed to one for example when repairs were being carried out or a new tenant was sought could not be considered de minimis and would constitute a break in the breach of planning control, the result being that a resumption of letting the annex as a separate unit would constitute a new breach of planning control and the 4 year period would recommence.

20. The totality of evidence as produced before and at the inquiry is, therefore, inconclusive as to whether the annex was actually occupied as a self-contained dwelling for a continuous period of 4 years prior to the issue of the enforcement notice. In addition no explanation has been provided as to inconsistencies between the responses to the Planning Contravention Notice and the late evidence produced at the Inquiry.
21. The burden of proof is on the appellant to show that on the date the enforcement notice was issued it was too late to take enforcement action, namely that the use had continued for a continuous period of 4 years prior to that date with no more than de minimis gaps. On the balance of probability it has not been demonstrated that the use of 113 Hillside Avenue has continued for a period of 4 years prior to the issue of the enforcement notice such that the alleged breach is immune from enforcement action.

Other Matter

22. Within the Council's proof of evidence it was suggested that by claiming that the kitchen was installed in 2007 the appellant was suggesting its removal should not be required by the enforcement notice. Such a suggestion would have constituted a 'hidden ground (f) appeal'. That matter was raised during the opening of the Inquiry but was not pursued by the appellant who, in any event, confirmed that the kitchen was installed at the time the annex was constructed so that it could be self-contained. The kitchen therefore facilitated the breach of planning control and the notice can require its removal.

Overall Conclusion

23. For the reasons given above I consider that the appeal should not succeed.

Andrew Hammond

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Ashitey Ollennu of Counsel

He called

Mrs Juliet Benson

FOR THE LOCAL PLANNING AUTHORITY:

Miss Isabella Crowdy of Counsel

She called

Mrs Marsha Kange

DOCUMENTS

- 1 Letter of notification of arrangements for the Inquiry, provided by the Council.
- 2 Bundle of late evidence comprising letter from Barons Estates; a number of tenancy agreements; and copy of a letter to the Council from Mr & Mrs Benson, provided by the appellant.