
Appeal Decision

Site visit made on 25 February 2020

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 March 2020

Appeal Ref: APP/G5180/C/19/3239446

10 Copers Cope Road, Beckenham BR3 1NB

- 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 1990 Act).
- The appeal is made by Mr Durmus Ergen against an enforcement notice issued by the London Borough of Bromley.
- The enforcement notice was issued on 19 September 2019.
- The breach of planning control as alleged in the notice is set out in the Appendix to this decision.
- The requirements of the notice are set out in the Appendix to this decision.
- The period for compliance with the requirements is set out in the Appendix to this decision.
- The appeal is proceeding on the grounds set out in section 174(2) (f) 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 have lapsed.

Summary decision: The appeal succeeds in part and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

Reasons

1. The appeal on this ground is that the steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections. The notice has been issued in order to remedy the breach of planning control and is derived from the lack of compliance with condition 2 and 9 of planning permission ref: APP/G5180/W/17/3186361¹. The notice alleges a breach of condition. In particular, condition 2 has not been complied with since no external alterations have been carried out to the building and no soft landscaping works have been implemented to form an effective screen to neighbouring properties, as required by condition 2. Furthermore, the Council state that the building is being used for residential purposes, contrary to condition 9.
2. Section 173(4) of the 1990 Act enables the LPA to specify different categories of remedial requirement in an enforcement notice which includes: (a) Remedy the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land; discontinuing any use of the land, or; restoring the land to its condition before the breach took place OR (b) Remedy any injury to amenity which has been caused by the breach.

¹ Approved on 1 June 2018.

3. The steps stated in the notice require that 1) the use of the building for residential purposes to cease; 2) to remove from the land the unauthorised development; and 3) restore the land to its former condition and use as amenity ground ancillary to the hotel. However, caselaw has established that enforcement should be remedial rather than punitive and the above requirement seeking the removal of the building and restoring the land to its condition before the breach took place is excessive and over-enforcement. Furthermore, the third requirement of the notice goes too far in requiring a use to take place. Whilst it is generally acceptable for a notice to require that the land is returned to its condition prior to the breach, it should not require a previous use to be reinstated, which goes beyond remedying the breach.
4. The breach of conditions could be addressed through compliance with conditions 2 and 9 in accordance with S173(4)a) and the implementation of the details shown on the approved plans and the implementation of a landscaping scheme. This would achieve the purpose of the notice which is to remedy the breach. As such, it is excessive to require demolition of the building and the restoration of the land to its former condition and use as amenity ground ancillary to the hotel as stated on the face of the issued notice.
5. In terms of the landscaping scheme, plan 1 submitted shows that a row of *Amelanchier lamarkii* trees would be planted along the rear boundary of the site, which would provide a suitable screen along the rear boundary and with neighbouring properties to the rear of the site and would protect the living conditions of these neighbouring occupiers. Furthermore, a mixture of *Cotinus coggygria* and *Choisya tenate* would also be planted along the rear boundary of the site and to the front of the building, and areas of hardstanding surrounding the building, would be replaced with lawn which would improve the appearance of the site.
6. With regards to the external alterations to the building also required by condition 2, the Council have confirmed that the scheme of works pursuant to condition 2², was approved on 4 October 2018. Whilst I appreciate no such works have been implemented, no persuasive argument has been made by the Council to explain why it would not be possible to implement the approved scheme. Furthermore, the Council have not argued that this consent is not extant.
7. The Council have referred to two case laws in relation to the current appeal which I shall consider. The *Ahmed* case³ held that that if there is an obvious alternative, the Inspector is under a duty to consider it. As outlined above, I consider that the steps required by the notice exceed what is necessary to remedy the breach of planning control. Whilst the Council consider that the appellant has already been giving the opportunity to carry out lesser steps to comply with the notice in the earlier appeal decision, I do not agree for the following reasons.
8. The earlier appeal did not relate to an appeal against an enforcement notice, but for a s78 appeal, against a failure to give notice within the prescribed period of a decision on an application for planning permission. Furthermore, the previous Inspector⁴ stated that "*Nor would it be proportionate to nullify the*

² Appeal ref: APP/G5180/W/17/3186361 approved on 1 June 2018.

³ *Ahmed v SSCLG and Hackney LBC* [2014] EWCA Civ 566.

⁴ Paragraphs 26 and 27 of appeal decision ref: APP/G5180/W/17/3186361 approved on 1 June 2018.

permission in the event that the works are not carried out within a 3 month timescale, as initially suggested by the Council. As the harm principally arises from the use of the building, I consider that it would be more appropriate to prevent the use of the building in the event that works carried out to implement this permission are not carried out within a strict timetable [2]”.

9. The Council have also referred to the *Copeland* case⁵, where it was held that where a building is constructed with material differences from approved plans, and a condition was not imposed requiring that the development is carried out in accordance with the plans, the enforcement notice should allege the construction of a building without planning permission. However, the circumstances of that case are different to the current appeal before me since the earlier approved scheme does contain conditions requiring the development to be carried out in accordance with the plans. In light of this, it would be reasonable and proportionate to vary the notice to ensure compliance with the approved planning permission including its conditions. Therefore, the circumstances of the legal authorities mentioned above are not directly comparable to the current appeal.
10. It is apparent to me that the breach of planning control relates to breach of condition 2 and 9 only. As such requirements 2) and 3) on the issued notice clearly go beyond what is necessary to remedy the breach of planning control. Additionally, whilst the first requirement of the notice specifies to “*cease the use of the building for residential purposes*”, it would be more precise, given the alleged breach of planning control relates to a breach of condition, to require that the building should only be occupied in accordance with condition 9. I will therefore delete requirements 1), 2) and 3) and insert a new requirement to make the development comply with the extant planning permission which would remedy the breach of planning control, in line with s173(4)(a) of the Act. Varying the notice on this basis would cause no injustice to either party, as it would not make it more onerous.
11. As such, the appeal on ground (f) succeeds and I will vary the notice to remove those excessive requirements.

Conclusion

12. I conclude that the requirements of the notice are excessive to remedy the breach and it is reasonable to require the development to comply with the extant planning permission. I shall vary the enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that extent.

Formal Decision

13. It is directed that the enforcement notice be varied by:

Deletion of steps 1), 2) and 3) section 5 - What you are required to do, and substituted therefor by the following steps:

- 1) Carry out the approved schedule of works and landscaping scheme, approved by the Council for condition 2 of the planning permission ref: APP/G5180/W/17/3186361 approved on 1 June 2018;

⁵ *Copeland BC v SSE & Ross & Ross* [1976] JPL 304, where a house was built with the wrong roof tiles and the whole house was held to be unauthorised.

- 2) Cease the occupation of the building other than in accordance with condition 9 of the planning permission ref: APP/G5180/W/17/3186361 approved on 1 June 2018, so as to comply with the terms of this permission, including its conditions and limitations; and
 - 3) Remove all constituent materials from the land resulting from the compliance with steps 1 and 2 above.
14. Subject to these variations, the enforcement notice is upheld.

R. Satheesan

INSPECTOR

Appendix to Appeal Decision ref: APP/G5180/C/19/3239446

The matters which appear to constitute the breach of planning control

On 1 June 2018 the planning inspectorate granted planning permission for the erection of a single storey building with basement level, including two light wells, for use as ancillary facilities to the hotel, together with associated planting and landscaping around the building and within the rear garden, subject to conditions. Condition 2 and 9 of the planning permission provides:

Condition 2:

"Within 3 months of the date of this decision a scheme of works shall be submitted to the local planning authority covering the following points:

- i) A schedule of works demonstrating how the alterations to the building necessary to comply with the approved plans, including the removal of windows, hardstanding, and other structures shown on the approved plans as being removed (to the extent that they fall within the application site area), will be implemented.*
- ii) A soft landscaping scheme, including details of new planting on the site and the creation of a planting screen to reduce the buildings impact on neighbouring residents. This must also include a timetable for its implementation.*

Unless within 3 months of the date of this decision a scheme of the works incorporating the points set out above is submitted in writing to the local planning authority for approval, and unless the approved scheme is completed in full within 6 months (or as otherwise provided for in accordance with the details approved under the terms of this condition) of the local planning authority's approval, the use of the building for ancillary facilities to the hotel shall cease and all equipment and materials brought into the building for the purposes of this use shall be removed until such time as a scheme of works pursuant to the requirements of this condition is approved and completed.

If no scheme in accordance with this condition is approved within 11 months of the date of this decision, the use of the building as ancillary facilities connected with the hotel shall cease and all equipment and materials brought into the building for the purposes of this use shall be removed until such time as a scheme of works pursuant to the requirements of this condition is submitted in writing and approved by the local planning authority, and subsequently completed.

Upon completion of the approved schedule of works and landscaping scheme required by this condition, those works shall thereafter be retained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge had been finally determined".

Condition 9:

"The development hereby permitted shall only be used as facilities for hotel residents and operational facilities for hotel staff ancillary to the hotel use at 10 Copers Cope Road and shall not be used as guest bedrooms or residential accommodation".

It appears to the Council that Condition 2 and 9 have not been complied with, because the schedule of works has not been completed within the specified time and the building appears to be used for residential purposes".

What you are required to do

- 1) Cease the use of the building for residential purposes.

- 2) Remove from the Land the unauthorised building as constructed as shown on the attached plan B and referred to in paragraph 3 above, and
- 3) Restore the Land to its former condition and use as amenity ground ancillary to the hotel built on the Land.

Time for compliance

Within 2 Months after this Notice takes effect.

End.