



Appeal Decision

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 May 2020

Appeal Ref: APP/N5090/C/19/3224484

Land at 58 Sturgess Avenue, London NW4 3TS

- 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 Mr Namir Moslawy against an enforcement notice issued by the Council of the London Borough of Barnet.
 - The enforcement notice was issued on 6 February 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission the use of the single storey outbuilding aligned along the rear boundary as two dwellinghouses.
 - The requirements of the notice are: 1 Cease the use of the outbuilding as self-contained dwellings. 2 Permanently remove all bathroom facilities from the outbuilding including the removal of all toilets, basins, and showers. 3 Permanently remove all kitchen facilities from the outbuilding including all kitchen units, sinks, cookers and food preparation areas.
 - The period for compliance with the requirements is: 7 Months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (d), (e), (f) and (g) 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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Summary of Decision

1. The enforcement notice is corrected, and subject to this correction the appeal is allowed, and the enforcement notice is quashed.

Application for Costs

2. An application for costs was made by Mr Namir Moslawy against the Council of the London Borough of Barnet. This application is the subject of a separate Decision.

Preliminary Matters

3. Following the appeal being lodged, there was correspondence between the parties about whether the notice was a nullity in light of the requirements of s173 of the Act and having regard to Regulation 5. It was requested that an Inspector review the matter to avoid abortive work in the event it was. My preliminary view was that the notice was not a nullity, and this was provided to the parties in an email from the Planning Inspectorate on 24 February 2020. This view has been accepted by the appellant, and I have seen nothing further to lead me to a different conclusion.

4. The appeal is also proceeding on ground (d) and therefore the lawfulness or otherwise of the developments enforced against are being determined. The parties are however content that the appeals can proceed by the written representation procedure. I have no reason to disagree with the parties and so will proceed to determine the appeal on the basis of the written evidence before me, as I do not consider that injustice would arise.
5. It was proposed by the appellant that a site visit would not be necessary given the grounds of appeal pleaded. The Council raised no objections to this course of action, and I do not consider that injustice to the parties would arise in the particular circumstances of this appeal.

The Enforcement Notice

6. The notice states that it appears to the Council the alleged breach of planning control occurred within the last ten years. The appellant asserts that the correct time limit would be 4 years. Section 171B of the Act relates to the time limits for taking enforcement action and consists of two sub-sections that are potentially applicable, those being s173B(2) and (3). Given the alleged breach does not relate to any operational development, s171B(1) would not be applicable.
7. The allegation is described as the use of the single storey outbuilding as two dwellinghouses. That the Council has alleged 'the use of the single storey outbuilding' in this manner connotes an acceptance that there was already a building, in this case an outbuilding in the rear garden of a property, and which was then subsequently used as two dwellings. That the Council considered it to have been an outbuilding is reaffirmed by the three requirements of the notice, which namely require cessation of the use of the outbuilding as dwellings and the removal of facilities from the outbuilding.
8. What the outbuilding was previously used for, or whether its erection was lawful as an outbuilding, is not relevant in this regard, although I recognise the appellant asserts it was erected in furtherance of permitted development rights and used for storage. I consider that the allegation has been framed in such a way that it is directed at the change of use of an existing building and would therefore fall to be considered against s171B(2) of the Act, with four years being the applicable time limit.
9. If that was not the Council's intention, the allegation should have related to the erection of a building used as two dwellings (erection of two dwellings) or, in the event that only the use could be enforced due to the passage of time, the material change of use of the land, if indeed that were the case. It would therefore not have been clouded by it being an 'outbuilding' and the previous use this connotes. The parties accept that the appeal building was erected more than four years prior to the issue of the notice.
10. The time limit of 10 years, s173B(3), may have therefore been appropriate had the notice been directed at a material change of use of the land only. The Council may then have relied upon the case law it cites¹ to support its position and with it that s171B(3) would be applicable. However, the notice was not framed in such terms. To correct the notice to refer to the change of use of the land would substantially change the nature of the development alleged and

¹ Welwyn Hatfield BC v SSCLG and Beesley [2011] UKSC 15

may well have changed the grounds of appeal brought by the appellant. Injustice would consequently arise.

11. To conclude, I consider the notice is drafted in terms that must be understood as relating to a change of use of an existing building and that four years is the appropriate time period. I have wide powers of correction and the parties have been aware of the possibility that the notice could be corrected in this way, and with opportunity to address it. No injustice to the parties would arise from correcting the notice to refer to four years and so I proceed to determine the appeal on this basis.

The ground (e) appeal

12. This ground of appeal concerns whether the enforcement notice was properly served on everyone with an interest in the land.
13. The case of the appellant is that he lets the two dwellings to a professional landlord, Moving Homes Ltd, who in-turn sublet to the occupiers. Moving Homes Ltd is therefore an owner for the purposes of the Act and were not served upon.
14. A Planning Contravention Notice was however issued by the Council on 19 December 2019 and the details for Moving Homes Ltd were not supplied in response to the question posed in order to identify all those with an interest in the land. There was merely a reference to 'intervening landlord and his tenants'. The Council then sought clarification which culminated in an email from the appellants' agent on 30 January 2019 stating that he had 'no instruction in this matter.'
15. It would therefore appear that efforts to serve the notice were frustrated by the appellant. In any event, a signed certificate of service evidences that copies of the notice were served to the site and addressed to 'the owner' and 'the occupier' of the respective dwellings. I am therefore satisfied that it has been demonstrated on the balance of probabilities that service on Moving Homes Ltd has been effected.
16. I find that the Council made considerable efforts to serve on all relevant parties. Even if I am wrong, I have powers under s176(5) of the Act to disregard non-service provided that neither an appellant nor other relevant persons had been substantially prejudiced by the failure to serve him or her. To this effect, there is very little evidence before me that Moving Homes Ltd has, in the alternative, been substantially prejudiced; for example, that a ground (a) appeal may have otherwise been lodged should it have wanted to protect its rental profit. Moreover, the appellant and his agent were aware of the existence of the notice and there is nothing to suggest that they were unable to communicate this to Moving Homes Ltd, thus enabling them to make a timely appeal should they have so desired.
17. I conclude that consequently the appeal on ground (e) fails.

The ground (c) appeal

18. For the appeal to succeed on ground (c) the onus is on the appellant to demonstrate, on the balance of probabilities, that there has not been a breach of planning control.

19. In this regard the appellant contends that in light of previous enforcement action at the site² there has been under-enforcement and therefore the operation of s173(11) of the Act has granted planning permission for that now enforced against.
20. However, the previous enforcement action related to the conversion of the property into eight self-contained flats. Whilst the building the subject of the current appeal is situated on the same land as that enforcement action, the allegation did not relate to the appeal building.
21. It is therefore not the operation of s173(11) of the Act that any other breaches that may have subsisted at the time of taking previous enforcement action would automatically be granted planning permission. It is accordingly only if it forms part of the alleged breach, and then works are not required to be removed or activity to cease by the notice when it could have done so. Furthermore, that planning permission shall only be treated as having been granted when all the requirements of the notice have been complied with.
22. The Council therefore had the ability to not take enforcement action against the appeal building at the time of the previous enforcement action. It could then proceed at a later date without having consequently under-enforced and being liable to the operation of s173(11) of the Act.
23. The appellant has therefore not demonstrated on the balance of probabilities that there has not been a breach of planning control.
24. I conclude that consequently the appeal on ground (c) fails.

The ground (d) appeal

25. For the ground (d) appeal to succeed the onus is on the appellant to demonstrate, on the balance of probabilities, that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. For the reasons already detailed in my decision, it will be necessary to demonstrate a continuous four-year period of use for each dwelling prior to the issue of the notice on 6 February 2019.
26. The case of the appellant is that he need only provide evidence of a four-year period. He has accordingly demonstrated on the balance of probabilities that the use as two dwellings has subsisted for a relevant period, most notably by virtue of copies of numerous signed assured short-hold tenancy agreements, which were then said to roll over into statutory periodic tenancies. The Council does not appear to dispute this evidence and indeed its records, which are before me, demonstrate that it has been aware of the uses since July 2014.
27. It is however contended that there was a period of at least six months during 2017 when the appeal building was uninhabited, and that this is pertinent to the continuity of occupation.
28. The appellant has provided a 'Statement of Truth' signed on 2 April 2020. It is stated therein that owing to the lockdown arising from Covid-19 the appellant has been unable to see a Solicitor to execute a Statutory Declaration. I therefore afford this statement moderate weight. It is consequently stated that in the summer of 2017 the Environmental Service Department of the Council

² As subsequently considered in appeal decision APP/N5090/C/18/3201593

concluded the dwellings were substandard. The dwellings were then vacated to do the necessary work but a delay with the chosen builders resulted in the dwellings not being occupied until February 2018.

29. The breach of planning control must continue throughout a 4-year period before it can achieve immunity from enforcement action, although some minor interruption will not normally be fatal, provided it is not significant. A short suspension will not usually stop the period running, but it is a matter of fact and degree in each case whether an interruption in activity on the ground has resulted in the cessation of the breach.
30. In my view, the evidence supports that there was a comparatively short suspension, with the appellant properly reacting to the concerns of the Council but being delayed part-way through this process by his chosen builders. This therefore did not result in the cessation of the use such that no enforcement action could have been taken against it during that period. Accordingly, the period where the appeal building was uninhabited is not fatal to the appellant's claim for immunity.
31. The Council has also queried whether the appellant has deliberately concealed the breaches of planning control which could therefore have implications for the claim of immunity. However, there is little evidence to support this view and furthermore the Council's own site inspection notes from 22 July 2014 evidence they have been aware of the use for a considerable period of time.
32. The appellant has therefore demonstrated on the balance of probabilities that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. The evidence is clear and unambiguous and the specific evidence provided by the appellant relating to the occupation of the dwellings is not contested.
33. I conclude that consequently the appeal on ground (d) succeeds.

Overall Conclusion

34. For the reasons given above I conclude that the appeal should succeed on ground (d). Accordingly, the enforcement notice will be corrected and then quashed. A certificate of lawfulness will not however be issued as there is no corresponding appeal before me. In these circumstances the appeal under the remaining grounds set out in section 174(2) to the 1990 Act as amended do not need to be considered.

Formal Decision

35. It is directed that the enforcement notice be corrected by:
- substituting *four years* as the applicable period within section 4 of the notice.
36. Subject to this correction, the appeal is allowed, and the enforcement notice is quashed.

Paul T Hocking

INSPECTOR