



Appeal Decisions

Site visit made on 2 June 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 6 July 2020

Appeal A. Ref: APP/H1515/X/19/3228393

156 Brentwood Road, Herongate, Essex CM13 3PD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Dr Aruna Lalani Delicia Wickramasekere against the decision of Brentwood Borough Council.
 - The application Ref 18/01676/S191, dated 24 October 2018, was refused by notice dated 28 January 2019.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as residential use (C3).
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Appeal B. Ref: APP/H1515/W/19/3234215

156 Brentwood Road, Herongate, Essex CM13 3PD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Ms Lalani Wickramasekere against the decision of Brentwood Borough Council.
 - The application Ref 18/01879/FUL, dated 28 November 2018, was refused by notice dated 1 February 2019.
 - The development proposed is described as *'single storey side extension incorporating rooms within the main property to form a self-contained flat'*.
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Decisions

Appeal A:

1. The appeal is dismissed.

Appeal B:

2. The appeal is dismissed.

Appeal A

Preliminary Matters

3. In such instances S171B (2) of the 1990 Act says that where there has been a breach of planning control involving the change of use of any building to use as a single dwelling, such as is the case here, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. Here, given that the application for the certificate of lawful use (LDC)

was made on 24 October 2018, the Appellant must successfully demonstrate, on the balance of probability, that the breach of control commenced four years before, ie prior to 24 October 2014 (hereinafter referred to as "*the material date*") and has continued since.

4. In an appeal under s195 of the 1990 Act against the refusal to issue a LDC the burden of proof is upon the appellant. The test of the evidence is one of balance of probability. As such, the planning merits of that applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law.

Main Issue

5. The main issue in this appeal is whether, on the balance of probability, the use was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990, and whether the Council's decision to refuse to grant a LDC was well founded.

Reasons

6. The appellant has provided a statutory declaration (SD) which gives an account of the occupation of the pantry flat from its acquisition in September 2008 until the current appeal was lodged in May 2019. It is claimed that, from 11 September 2008 to 2 April 2014, the 'flat' was occupied by the appellant's daughter and son, subsequent to which it was let out privately to a series of tenants. In paragraph 5 of her SD it is claimed that, from 11.09.2008 until 24.10.2018 (the date of the SD), the Pantry Flat floor space was used for residential use (Class C3).
7. Statements have been produced by both Thelmalka and Eranga Wickramasekere, the appellant's daughter and son respectively, to corroborate the appellant's claims. Mention is made of a study area, a laundry area, a space to entertain friends and sleeping quarters. Thelmalka says that, during the period, September 2008 to April 2014, "the pantry flat was used as the second home by myself and my brother." She goes on to state:

"I have used this pantry flat to study, to sleep, to entertain my friends as my second home. Our washing machine was also fixed in this room."
8. In turn, Eranga states

"The pantry flat served as a secondary home for me as I spent my time and sleep in this room".
9. All three persons make reference to drawing no HG3, submitted with the application. This drawing is said to represent the ground floor layout and, with hatched shading, shows a small flat demarcated into four distinct rooms. However, the words "in this room", used by both Thelmalka and Eranga is not a term that one would expect to be applied to a self-contained residential unit, and would not reasonably apply to the area shown as hatched. Reference to a single room, with the appellant herself referring to a 'Class C3' residential use, does not serve to strengthen the evidence.
10. In October 2016 two planning related applications (refs.16/01432/FUL and 16/01433/ADV), both in respect of No 156 Brentwood Road, were submitted to the Council. Although they both involved works to the shop premises to the

front of the building the floorplan submitted with both applications, dated 15 December 2015, identified the internal accommodation within the building's ground floor in its entirety. This drawing shows the floorspace corresponding to the hatched area on drawing no HG3 as instead being comprised of a few separate, small rooms which do not connect with each other. With cross reference to drawing no HG3, the floor area takes in that annotated as 'Room 1', accessed only via the central hallway, a small section of 'Room 2', accessed only from the post-office area, an unlabelled room, accessed only via a doorway off the side yard, and a WC, accessed directly from the hallway.

11. In planning terms a dwelling or dwellinghouse is defined as a self-contained building or part of a building used as a residential accommodation, and usually housing a single household. In the case of *Gravesham BC v SSE & O'Brien* [1982] 47 P & CR 142; [1983] JPL 307 it was held the distinctive characteristic of a dwellinghouse was its ability, to afford to those who used it, the facilities required for day to day private domestic existence. A "room", as referred to by the appellant's daughter and son, does not suggest a term that is reasonably interchangeable with a residential 'flat'.
12. Short letters are provided by a number of persons claiming to be former occupiers at No 156. Taken together, these would suggest that from 2 April 2014 until 3 November 2017, and beyond, the "pantry flat" was occupied on a continuous basis with a succession of tenants. I have noted, though, that all these letters refer to, not only the "pantry flat" but also drawing HG3. This would seem to suggest something of a prompt, otherwise reference to a layout plan would not have been a consideration for the former tenants as the likelihood is they would not realistically have been aware of any such plan, and certainly not the particular drawing reference number.
13. Notwithstanding the above, more surprising is the content of a letter dated 16 October 2018, from David Redhead of 151 Brentwood Road, sent to the appellant. The letter mentions that, since February 2014, Mr Redhead has rented out the domestic garages at the rear of No 156, and it would appear that the letter was in response to the appellant requesting confirmation of such. Mr Redhead indicates that he previously used to warn tenants when those persons renting the garages required access to and from the premises. In referring to a flat in the letter he says to the appellant that, "for ease of reference", he is attaching drawing HG3. On the face of it, and taking into account the picture I have built up on the basis of the evidence provided, I fail to understand the relevance of the drawing to Mr Redhead and how, bearing in mind that he had begun renting the garages in 2014, he was aware of the drawing or its direct relevance to him.
14. In the above connection I am mindful of the ground floor plan, dated December 2015, accompanying the applications submitted to the Council the following year. The appellant disregards this floorplan saying that it was based on the original sale documents when the appellant took control in 2008, and the architect did not update them. This might be the case, but I am not fully convinced by such a brief explanation, and I also note that drawing HG3 is undated.
15. The material date fell during the asserted occupation of Hasitha Wegiriya which it is said ran from April 2014 to July 2015. In the circumstances, though, I am less than certain which was the actual floorspace rented and, moreover, what

was the internal arrangement at the time. Although at my site visit it do not prove possible to enter this part of the building as it was apparent that the current occupier found the general site visit as intrusive I was satisfied with the appellant's assertion that it reflected that of the adjoining "garden flat" which I was able to view. It appeared, though, that the appellant would have been happy for me to see inside this part of the building. That said, given that the LDC application was made in October 2018, internal alterations could have easily been undertaken since this time.

16. I find that the over-reliance on drawing HG3 rather than previous occupiers providing instead a comprehensive description of the hatched area at issue, and its various components, tends to dilute the drawing's relevance. In particular, Mr Redhead apparently providing a copy of the said drawing only casts doubt on the credibility of the overall evidence put forward to support and corroborate the appellant's claim.
17. Taking all the factors together I find that the appellant's evidence is somewhat unclear in parts, particularly in respect of the actual floor layout of the hatched area, and also when, and how, it changed from that shown on the December 2015 plan. Further, the appellant has not satisfactorily demonstrated that the accommodation fulfilled the characteristics and requirements associated with a self-contained residential unit. Whilst the non-payment of Council tax for the "pantry flat" is not so material in itself as to disqualify the appellant's claims it is another factor to reinforce my findings that the evidence is not sufficiently compelling and, as such, is neither precise nor unambiguous to the extent that it satisfactorily discharges the appellant's onus of proof.

Conclusion

18. The onus is on the appellant to prove her case and, having had regard to the substance of the case, I consider that insufficient precision and unambiguity has been shown to demonstrate, on the balance of probabilities, the claim that the use of the "pantry flat" as a self-contained and independent residential unit had built up the necessary immunity since the material date.
19. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in this instance was well-founded, and that the appeal should fail. I will exercise, accordingly, the powers transferred to me in section 195(3) of the 1990 Act, as amended.

Appeal B

20. It is proposed that a small, existing self-contained residential unit, known as the "garden flat", and currently without planning permission, be permitted and extended with the addition of a single-storey side extension, thereby creating a larger one-bed flat.

Main Issues

The main issues in this appeal are:

- 1) whether the residential flat provides a satisfactory standard of living accommodation for its occupiers, with particular regard to the internal floorspace area available, external amenity space, and also any noise disturbance arising by way of the proximity to the air conditioning units installed at the site; and

- 2) the effect of the development on highway safety, with particular regard to any increased demand for on-street parking.

Reasons

Living accommodation

21. The Brentwood Replacement Local Plan (LP) was adopted in 2005. LP policy CP1 sets out a series of general development criteria requiring, amongst other things, that proposals should be of a high standard of design and layout and, in applying the said policy to the development at issue, that it would not have an unacceptable detrimental impact on the flat's occupiers by way of overlooking, lack of privacy or general disturbance.
22. LP Appendix 5 provides 'Miscellaneous Residential Design Guidance' (MRDG) for new development, and indicates that for both new build flats and conversions each unit, excluding circulation areas, should have a total floor area of not less than 40 sqm in the case of one-bed units. More contemporarily the government's publication: 'Technical Housing Standards – Nationally Described Space Standards' (NDSS), issued in 2015, requires, that for a one-bed, two-person flat, a minimum gross internal floor area of 50 sqm with 'built-in' storage space of 1.5 sqm is provided.
23. At my site visit I inspected the 'garden flat', and observed that it is very limited in size, comprising only basic internal accommodation, with a bedroom/living area, a narrow kitchen off-shoot and a bathroom. Drawing no HGF4, which shows the proposed ground floor layout, indicates that the flat currently measures only approximately 19.7 sqm, but that the proposed single-storey extension would increase the floor area to some 41 sqm. The appellant's appeal statement indicates that the proposed unit would measure 42.15 sqm, but the Council disputes these measurements estimating, instead, that the unit would total only 38 sqm, with no built-in storage.
24. The LP document is now some fifteen years old and, earlier this year, the Council submitted a new draft development plan to the Secretary of State for independent examination. The draft document indicates an intention to adopt the NDSS although until the LP itself is adopted the MRDG remains, for which it is indicated that proposals for residential development should have regard.
25. In terms of external amenity space I noted that there is a grassed area to the rear. The proposed extension would protrude into this space, although drawing HGF4 refers to the area remaining (totalling some 50 sqm) as "communal garden", given the other living accommodation within No 156. Although the Council, in its reasons for refusal, has not specifically cited matters of privacy and overlooking the decision notice correctly refers to LP policy CP1 and the National Planning Policy Framework (the Framework) requiring that a good standard of amenity for all existing and future occupiers should be secured.
26. Drawing HGF4 labels the proposed extension as a living room and shows that the flat would be accessed externally through this room via doorways on both its sides, and that the room would be lit by windows installed within its rear wall. If the communal garden was directly outside the living room then, given the proposed layout, it would suffer from potential overlooking, and with only a limited depth of garden between the rear wall and No 156's rear boundary. As a consequence the appellant proposes that fencing could be erected to

- sub-divide the garden area providing some 20 sqm for the occupiers of the garden flat and approximately 30 sqm communal area. Although LP Appendix 1, which provides extracts from the Essex Design Guide, advises that one bed dwellings should provide at least 50 sqm of garden amenity space, given here the particular circumstances such a standard is neither achievable nor realistically necessary for the size of the flat proposed. That said, I have concerns as to the acceptability of the proposal in the context of the appeal site as a whole, and the implications for the garden flat's future occupiers.
27. The fact that the flat would be externally accessed directly into the living room does not represent a good standard of layout. The absence of any threshold to the unit or any internal hallway, and the potential privacy issue which the appellant would seek to ameliorate by fencing, is indicative of the attempt to accommodate two separate flats at the rear of the building. As a consequence the garden flat's proposed layout is somewhat contrived, with the bedroom shown as being lit by only a single small window opening in the corner of the room, and a narrow kitchen area that would also receive little natural light.
 28. The intended layout is constrained by the limited floor area, falling significantly short of the NDSS minimum standard for a one-bed, two-person flat, and only just satisfying the MRDG minimum standard for such, although the Council would dispute the latter. The proposal is standards led, rather than the emphasis being on design.
 29. The appellant has suggested a condition to restrict the level of occupation to only one person as the NDSS, for one-bed, one-person units, has a lesser minimum floorspace standard. However, this would place an undue restriction on any occupier and, moreover, in amounting to an intrusion of privacy, would realistically be unreasonable and unenforceable.
 30. Accordingly, the proposal would not result in a comfortable standard of accommodation, and the fact that there are three large air conditioning units in position close to one of the proposed external doors to the living room and also in proximity to the kitchen window only compounds matters. No noise assessment has been produced to indicate any intended mitigation measures in this regard. In the absence of any technical details to suggest otherwise I must consider that the flat would likely be subject to undue noise and disturbance, to the detriment of its future occupiers. Given that there are three conditioning units the materiality is such that the matter should have been assessed at the application stage rather than being left to the appellant to attempt to discharge the requirements of a planning condition.
 31. The appellant indicates that the proposal represents a sustainable form of development, but does not demonstrate how exactly this would be achieved. Moreover, in light of my findings I must disagree with the appellant on this point. Also, although the appellant mentions that the accommodation would constitute low-cost housing, the shortcomings of the proposed layout weigh heavily against this factor.
 32. On this main issue I thereby conclude that the proposal would not provide for a satisfactory standard of living accommodation for its occupiers, and this would materially conflict with the aims and requirements of LP policy CP1 and also relevant advice within paragraph 127 of the Framework.

Highway safety

33. I note that the Council's parking standards, set out in the LP's Appendix 2, require one off-street parking space for the proposed one-bed flat. Although I understand that the garages at the site are rented to persons which have no connection with No 156, there is a yard of reasonable width behind the gated entrance to the side of the building. The Council comments that, to ensure vehicles can access and egress the site safely, a clear 6m deep space is required in front of the garages, and the plan submitted does not demonstrate this.
34. I have had regard to both the main parties' points on this issue but, given that I have found against the proposal on a different and more substantive issue, I do not intend to explore the matter of on-site parking, and the scope for such, further.

Conclusion

35. For the reasons given above I have concluded that the proposal would not be conducive to a convivial standard of living conditions for the flat's future occupiers. Having had full regard to the appellant's representations, and all matters raised, the appeal does not succeed.

Timothy C King

INSPECTOR