



Appeal Decision

Site visit made on 27 July 2020

by Hilary Orr MSc, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 August 2020

Appeal Ref: APP/A5270/C/19/3229199

26 The Green, Acton London W3 7PQ

- 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 Deiffallah Orifij against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice, numbered EN180723CUOB, was issued on 8 April 2019.
- The breach of planning control as alleged in the notice is the material change of use of the outbuilding to the rear of the property to use as a separate self-contained residential dwelling.
- The requirements of the notice are:
 1. Cease the use of the outbuilding as a separate self-contained residential dwelling
 2. Remove the kitchen and drainage connections which facilitate the use of the outbuilding as a separate self-contained residential dwelling
 3. Remove the bathroom and drainage connections which facilitate the use of the outbuilding as a separate self-contained residential dwelling; and
 4. Remove all resultant debris
- The period for compliance with the requirements is 3 months.

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.

Decision

1. The appeal is allowed and the enforcement notice is quashed.

Preliminary matters

2. The appeal site comprises a dwelling house to the west side of The Green. It forms the end of a terrace of three dwellings, with a small front garden and larger irregular shaped rear garden where the building is located. The building has been extended following a Certificate of Lawful Development application (P/2010/2325) (the LDC). Access to the building and the rear garden is to the side of the main dwelling.
3. Part of the Council's case in resisting the appeal, is that they consider that there has been positive deception. As a result of this, and on the basis of the Supreme Court decision in *Welwyn Hatfield BC v SSHCLG* [2011] UKSC 15, and subsequent decisions of the courts, the normal limit for enforcement does not apply. I shall therefore consider the evidence submitted by the parties for the relevant periods, before then considering the question of any deception or concealment.

4. The appeal is proceeding on ground (d) and is a claim that the development enforced against, has become immune and therefore lawful through the passage of time. The relevant time (setting aside for the moment, the matter of deception or deliberate concealment) for this appeal, is 4 years before the enforcement notice was issued. This is one of the legal grounds of appeal against an enforcement notice, where the burden of proof lies with the appellant, the relevant test of the evidence being on the balance of probability.

Reasons

5. Looking first at the four years immediately prior to the issue of the notice, which takes us back to early April 2015. The appellant has provided evidence and asserts that following his youngest son Murad Orifij, vacating the building in March 2015, the building has been let to a number of tenants between 1 April 2015, when Miss Veronika Hokova moved in, and the date the notice was issued on 8 April 2019.
6. In summary, the evidence provided by the appellant in support of his claim, includes a written summary table of the short hold agreements, hand written receipts and a number of both signed and unsigned agreements between the parties. In addition, for the relevant four year period, there are sworn statements from the appellant and from Mrs Kafia Mursal, who is a neighbour.
7. Several matters arise in relation to this evidence. Some of the agreements appear to be incomplete documents, with others unsigned. The purpose of the receipts provided at the appellants document 35 is unclear, as they appear to show the anticipated rent for the duration of each tenancy, rather than the actual rent received. Neither do they provide evidence of the actual occupation dates. In view of this, I give this evidence only limited weight.
8. One striking feature of the appellant's evidence, is that there are no sworn affidavits from previous tenants, with just a letter from Mr Joseph El Hayek. Sworn evidence given on oath carries with it the risk that giving false evidence, could render the individual liable to prosecution. Accordingly, sworn evidence will usually carry greater weight than unsworn evidence. I shall therefore give the sworn evidence provided as part of this appeal significant weight, unless other evidence indicates otherwise.
9. Whilst I acknowledge that it is not always easy to contact tenants once they have left the property, I have not been provided with any evidence to suggest that attempts have been made to contact them, or why this has not been possible. I also note that there is no financial evidence to demonstrate the rent that has been received and the period it covers. Nonetheless, the appellant's sworn statement sets out the history of the outbuilding. It confirms that he started to let out the building from 1 April 2015, applying for a selective letting license in August 2018 and authority to let in August 2018.
10. The evidence from the Council for this period is limited, but highlights that there were three visits to the building in 2018; The first on 7 July, a second on 9 August and again on 24 August. These visits were carried out by different Council officers for different purposes. Notwithstanding this, I have no evidence to suggest that their evidence should not be relied upon. On all three occasions the officers found that the building was unoccupied.

11. The property was therefore not occupied between 7 July and 24 August 2018, a period of at least six weeks. The photographs dated 24 August 2018 and provided by the Council, show some repair work being carried out, including the kitchen floor although various fixtures and fittings can still be seen. The remaining visits refer to the existence of living facilities being present. I note that this overlaps with the tenancies of Miss Tina Francis (14.06.18 – 14.07.18) and Mr Joseph El Hayek (15.08.18 – 14.08.21), set out in the appellant's summary table. In the appellant's final comments, the discrepancy in relation to Miss Francis, is explained following a breach in her contract. The sworn statement of the neighbour provides limited assistance. She states that she observed tenants living in the Annex following the building being vacated by the appellant's younger son. She does not however provide any further detail or dates when the building was occupied.
12. I have had regard to *London Borough of Islington vs SSHCLG* [2019] EWHC 2691 (Admin). This makes it clear that, if at any time throughout the relevant period, the Council would not have been able to take enforcement action then such a period cannot count towards the rolling period of years that gives rise to immunity. As the building was unoccupied during this period, in my judgement, the Council on the basis of the facts available to them, would not have been able to issue a notice against the separate residential use of the building. Consequently, immunity has not been established for this period.
13. This being the case, it is necessary to consider whether immunity has been achieved for a continuous period beyond that considered above. It is clear from the appellant's sworn evidence that the building was capable of independent occupation on 5 October 1999, with an unauthorised shower having been added to the facilities permitted by planning application ref P/1998/2927. The appellant's eldest son then started living in the building until May 2005. Following his marriage, their younger son lived there with his wife and his children from 2005 until 15 March 2015. Following the LDC the building had been extended in 2010.
14. The above facts are not in dispute. However, it is the Council's case that the occupation of the outbuilding by the appellant's respective sons, would have naturally constituted an ancillary, rather than an independent residential use. Whilst I acknowledge that a building may be occupied by a family member on an ancillary basis, this is not necessarily the case, particularly where there is a family unit with children. Each case must be considered in light of the facts. The Council's submissions on this matter rely largely on alleged omissions made by the appellants regarding non-disclosure of tenants or the lack of payment of Council Tax. They provide little in the way of any independent evidence.
15. In June 2003 it appears that a site visit was carried out by the Council relating to an unauthorised outbuilding. The case appears to have been closed because the development appeared to be permitted development with no breach of planning control. The Council carried out a further investigation in 2010, although there is no record that the site was visited on this occasion. The case was closed due to the existence of the 2010 Certificate of Lawfulness. I have not been provided with any site inspection notes, or information from the file for these investigations. As a consequence, it is not clear from the Council's evidence, the nature of the enquiries that led to the investigation and whether

- the building was occupied at the time of any visits, and if it was, how it was being occupied.
16. The appellant's evidence for this period relies on sworn evidence from the appellant, his son Murad Orifij and Mrs Kafia Mursal.
 17. The statement from Murad Orifij and the appellant are consistent in setting out the events that have led up to this appeal. Both make it clear that from at least 2005, when Murad took up occupation, apart from occasional visits to his parents, the building was occupied without reliance on any of the facilities or services from the main dwelling. Access from the highway was to the side of the main dwelling. The garden was shared although the children were the main users. Notwithstanding the unexplained layout of Mrs Mursal's statement, she broadly corroborates the other two statements. She refers to her knowledge of the family and the site and her knowledge of their sons occupation of the outbuilding until 2015. Her statement falls short of a start date for this occupation, but does refer to the appellant's children, with their wives occupying the building. Since Murad Orifij moved in during 2005, it seems reasonable to conclude that her statement, in the plural, relates to the position prior to this.
 18. To my mind, from the evidence provided by the appellant it is clear that, on completion, the building had all of the facilities necessary to provide day to day living for the occupants as early as 1999. Although the garden was shared and access to the building was to the side of the main dwelling. The appellant's sons occupied the building from 1999 to 2015. There was some understandable socialising between the appellant's family and their sons, but it is clear from the evidence that from at least 2005, this occupation did not depend on the main dwelling for day to day facilities. Moreover, I have no evidence before me to refute the appellant's version of events.
 19. Drawing all of the above points together and for the above reasons, I find that the appellant's evidence is sufficiently clear and unambiguous and on the balance of probability, the outbuilding has been used as a separate self-contained residential dwelling for more than four years prior to the issue of the notice.
 20. The final part of the Council's case is that there has been positive deception by the appellant, which means that the normal time limit for enforcement does not apply. They argue that the deception started when the shower, omitted from the 1998 application, was nonetheless added as part of the works.
 21. Deception is positive conduct with the aim to deceive the Council and is a high bar to overcome, with the difference between keeping a low profile on the one hand and deliberate misleading conduct to prevent discovery, on the other. Therefore, for this assertion to succeed, there needs to be clear evidence of a deliberate and positive deception.
 22. The Council have cited a number of occasions where they consider that there is evidence of deception. From the evidence, the approved plans for the 1998 application omitted the shower, although this was subsequently provided. The letter from Home Plans refers to the provision of the shower and the toilet that was shown on the approved plans for the planning application. To my mind this indicates the intention for the appellant's elder son to occupy the building.

However, the true nature of this initial occupation is not clear and therefore I cannot conclude that any deception was involved at this early stage.

23. Similarly, the letter in 2002 from the appellant to the Council, states that the building has been used by some close friends, a few guests attending his daughter's wedding and mainly immediate family members, his son. In the light of the lack of evidence of separate occupation for this period, I do not consider that there is evidence of positive deception in this regard.
24. The plans that accompanied the LDC in 2010 did not show the layout of the building as it existed at that time. The appellant provides no explanation for this in his evidence. Whilst this could be attributed to a desire to avoid the true use of the building, there is no clear evidence before me to support this supposition.
25. It is unclear whether the Council undertook a site visit during the course of the LDC application. Still, the implementation of the LDC, was followed by the second enforcement investigation. However, there is no evidence that the Council undertook a site visit before closing their case. Had the site been inspected on either of these occasions the correct layout would have been readily identified. I do not accept the assertion by the Council, that had they attempted to take enforcement action at this stage, then an ancillary use would have been claimed. Had there been evidence on site of a potential breach at that time then it would have been open to them to serve a planning contravention notice to establish the facts.
26. Overall, in my judgement the appellant's conduct, did not amount to the degree of deception necessary to engage the principles set out in *Welwyn*. The appellant appears to have mostly pursued deliberate inaction, so as to achieve concealment, rather than taking sustained or actively deceptive steps. I conclude therefore on balance, by a narrow margin, that the appellant has not been so actively deceptive as to meet the criteria arising from the *Welwyn* judgement.
27. In all of these circumstances, the appeal on ground (d) against the notice will succeed.
28. I have had regard to the Council's concerns about the appellant's use of Murad Orifij's email account, that the family initially stayed in the main house when his son left the country in 2015 and the lack of recorded rental payments. I consider that there may be a number of reasons for these situations to arise. However, whether taken individually or in combination, I do not consider that they are determinative, nor do they lead me to conclude that the other evidence provided is not credible.
29. As set out above I do not consider that the small break in occupation during July and August 2018 is material and accordingly this does not affect my findings.

Conclusion

30. For the reasons given above, I conclude that the appeal should succeed on ground (d). The enforcement notice will be quashed. In these circumstances, the appeal on grounds (f) and (g) do not fall to be considered.

Hilary Orr

INSPECTOR