



Appeal Decision

Site visit made on 30 June 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 24 August 2020

Appeal Refs: APP/G5180/C/19/3231907 & APP/G5180/C/19/3231908 8 Austin Avenue, Bromley BR2 8AJ

- 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 appeals are made by Mr Leslie Baker and Mrs Janet Baker against an enforcement notice issued by the Council of the London Borough of Bromley.
 - The enforcement notice was issued on 31 May 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, the construction of a link extension (shown hatched blue on the attached Plan B) between two outbuildings at the rear of the Land (shown hatched green and yellow on the attached Plan B) and the material change of use of the extended and combined current outbuilding into a self-contained unit of habitable accommodation.
 - The requirements of the notice are to:
 - (1) Remove the link extension from the current outbuilding on the Land.
 - (2) Reinstate the two former outbuildings to their condition prior to the unauthorised link extension development.
 - (3) Cease the use of the outbuilding(s) as a self-contained unit of habitable accommodation and revert it or them to the lawful use ancillary to the main dwelling on the Land.
 - (4) Remove all materials associated with paragraphs 5(1) and 5(2).
 - (5) Leave the Land in a clean and tidy condition.
 - The period for compliance with the requirements is within 56 Days after this Notice takes effect.
 - The appeal is proceeding on the ground set out in section 174(2)(a), (c), and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under section 177(5) of the Act as amended, and falls to be considered.
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Formal Decision

1. The enforcement notice is corrected as follows:

Delete Requirement (5)

2. Subject to the above correction, the appeals are dismissed, planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act, as amended, and the enforcement notice is upheld.

Application for costs

3. An application for costs was made by Mr Leslie Baker and Mrs Janet Baker against the Council of the London Borough of Bromley. This application is the subject of a separate decision.

Procedural Matter

4. Appeal APP/G5180/C/19/3231907 is the lead appeal in this instance, with the requisite fee paid for the deemed planning application under the ground (a) appeal here lodged. Appeal APP/G5180/C/19/3231908 relates only to the ground (c) and (f) appeals lodged, whereby I am treating the representations made by the respective appellants as identical.

Background

5. The appeal relates to a building erected as a link between two separate outbuildings sited within the rear garden of the appeal property, a single-family dwellinghouse. An application (ref DC/17/03134/FULL6) was made, retrospectively, described by the applicant as "*Outbuilding to rear garden used as ancillary accommodation to the main house.*" The Council subsequently refused planning permission, and the decision was upheld on appeal in March 2018 under PINS ref APP/G5180/D/17/3189698.
6. Despite the unsuccessful appeal the link building remained. With the two separate outbuildings joined as one the resultant floorspace had allowed for it to be fitted out as a self-contained residential unit, albeit accessed via the gate to the side of the main dwelling. The appellant indicates that the new unit created is occupied by the appellants' daughter, child and partner. Given the planning position the Council considered it expedient to issue the notice, now at appeal. The current notice supersedes a previous enforcement notice issued which the Council later withdrew.

The Appeals on Ground (c)

7. An appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control. The onus of proof on matters of fact is on the appellant, and is on the balance of probabilities.
8. Ground (c) assumes the fact of the original development as it occurred at the time of the enforcement notice's issue, so it can only succeed on this basis if that original development does not now amount to a breach of planning control due to a change in the planning control situation.
9. At my site visit I took a series of measurements as to the 'link' building's height and its distance to the boundary. As I found that the development satisfied the limitations of both provisos (e)(ii) and (f), despite the Council's belief otherwise for the height measurement, this is no longer a material factor in my assessment of this appeal.
10. The appellants do not accept the Council's view that the building's occupation for habitable purposes constitutes a material change of use. Section 55(1) of the 1990 Act as amended includes in the definition of the word development the making of any material change in the use of the land, which includes the use of any building as a dwellinghouse. The principal consideration in this particular case is whether the development amounts to a material change of use constituting development requiring the benefit of planning permission. Accordingly, an assessment is necessary as to whether the use of the building constitutes a separate, self-contained dwellinghouse and, therefore, the creation of a separate planning unit.

11. There is no definition of 'dwellinghouse' in the Act but, in the judgement of *Gravesham BC v SoS & O'Brien* [1982], it was accepted that 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.
12. My own inspection of the building at issue revealed a double bedroom, a single bedroom and a living room. The contents of the latter including the wall fittings give the distinct impression of a settled and permanent residential unit of occupation. The 'link' section houses a small area behind the building's front entrance, a fully-fitted kitchen beyond which, in turn, provides access into a bathroom/wc towards the building's rear. The internal floorspace is not open plan as all rooms are separate. My findings are consistent with photographs submitted and evidence of inspection by the Council that, at the date the Notice was issued, the building then also contained the sleeping, cooking, washing and toilet facilities which I have described.
13. Externally, to the side of the main bedroom is a narrow pathway which leads to the space at the building's rear, beyond which is the property's boundary fence. Garden buildings, including a gazebo type structure and a small summerhouse are positioned on an expansive decking area situated on the opposite side of the path, but it is not clear whether these features are used in connection with the main dwelling or the habitable use of the adjacent building. Given that the building lies at the rear of No 8's rear garden I shall not include these particular items in my overall assessment as to the totality of the building's habitable use. However, whilst the building's internal accommodation has facilities consistent with that referred to in *Gravesham*, the key issue is whether it is occupied in such a way as to form a separate planning unit.
14. In the case of *Burdle and Another v SoSE and Another* [1972] 3 All E.R. 240 the judge gave the opinion that when determining what was the appropriate planning unit, the whole of the area which is used for a particular purpose should be looked at, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose. There is no distinction to be made in practice between ancillary and incidental uses, and so the use of the word "incidental" both in s55(2)(d) of the Act and in Part 1, Class E of the Second Schedule to the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) is equally apt to refer to uses that are ancillary to the primary residential use of a dwellinghouse.
15. S55(2)(d) of the Act provides that the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose "incidental to the enjoyment of the dwellinghouse" is not to be taken for the purposes of the Act to involve development of the land. This provision is effectively otiose with the inclusion of dwellinghouses (as Class C3) in the Use Classes Order, so that s55(2)(f) now applies to dwellinghouses, not only in respect of their curtilage but in respect of a whole planning unit which is in residential use.
16. This was readily accepted by the High Court in *Whitehead v SSE* [1992] JPL 561 where the interpretation of the word "incidental" was considered. This case related to a proposal to provide accommodation for a live-in housekeeper in an existing outbuilding. It did not matter whether the converted building happened to include its own kitchen or bathroom. Nonetheless, the whole purpose was to provide somewhere to live for the housekeeper who would be looking after the house at all relevant times, and walking to and fro the short

distance to the house to cook meals in it and so on. Here, the judge reasoned it impossible to hold that the use of the building to be converted would be otherwise than for a purpose incidental to the enjoyment of the main dwelling as a unit of living accommodation, or would form an integral part of the main use of the planning unit as a single dwellinghouse.

17. The essential feature of an ancillary use is that there should be some functional relationship with the primary use of the planning unit. That functional relationship is one that is normally found; it is not founded on the personal choice of the person carrying out both activities together. A 'granny' annexe, for instance, even in a separate building in the curtilage of the main dwellinghouse, would normally be regarded as part and parcel of the use of the main dwelling.
18. The appellants place heavy reliance on the High Court judgement in the case of *Uttlesford DC v SSE & White* [1992] JPL 171. This related to an application for a change of use of a building detached from the main house to private living accommodation for use in conjunction with the existing dwelling; in other words, as an annexe. That scenario does not appear to be the case with the facts of the appeal before me. It was held that the basic question to be answered was whether there was a material change of use that created a separate planning unit. The Court considered that, even if the accommodation provided facilities for independent day-to-day living, it would not necessarily become a separate planning unit from the main dwelling; it would be a matter of fact and degree.
19. In this particular instance, the building is apparently occupied by the appellants' daughter and her family but, although it has not been severed from the main dwelling by the provision of an identifiable and independent residential curtilage, I find that the totality of the building's internal facilities is an important factor to be taken into account here. Further, there is an absence of detail provided by the appellants as to the degree of interdependence between the living accommodation in the building and the main dwelling and how the extended family might function as a single household.
20. Instead, the information that has been advanced lacks clarification and precision. Access to the building, via a pathway set within the rear garden, is gained from a gate to the side of the main dwelling which is secured by a 'Yale' type lock. In this regard I note that an interested party has made representations suggesting that there are comings and goings via this gate at late hours, rather than through the main house.
21. It is interesting to note the previous Inspector's findings in the s78 appeal from 2018 (*APP/G5180/D/17/3189698*). She found, consistent with my assessment, that this generously sized building, with accommodation and facilities apparently set up for independent living, appears to be used independently of the main house. I therefore find that a separate unit of occupation has been carved out of No 8's original planning unit which, in itself, has resulted in the creation of a new planning unit.
22. My findings are reinforced by the general realisation that it cannot be the case that all buildings erected within residential curtilages, falling within the parameters of Class E of the GPDO ('buildings etc incidental to the enjoyment of the dwellinghouse'), if fitted out as self-contained residential units, can be automatically used as dwellings in their own right, independent of the main

dwelling. The *Uttlesford* judgement does not allow for such a degree of latitude and the appellants' apparent belief otherwise is not well founded. As mentioned, fact and degree is the determinant factor in such cases.

23. From the evidence before me it would certainly seem to be the case that the erection of the link building was integral to, and part and parcel of, the making of the material change of use. There is nothing before me to suggest that the said works were undertaken for a different purpose.
24. By the authority of *Murfitt v SSE* [1980] JPL 598 and discussed in *Bowring v SSCLG & Waltham Forest BC* [2013] EWHC 1115 (Admin), given the clear connection between the operational development carried out and the material change of use - both set down in the enforcement notice - the Council is entitled to require for the removal of the link building. The extent of this building can still be seen externally from the roofline, and its differentiation from the two previously separate outbuildings is shown on Plan B, attached to the notice.
25. Bringing all the relevant factors together, as the building contains all the necessary facilities for day-to-day living, and with due regard to all the evidence provided I conclude, on the balance of probability, that the use of the single building created by the erection of the 'link', amounts to a separate and independent residential use, as a matter of fact. Such a use constitutes a material change of use in planning terms and is therefore 'development' within s55 of the Act. Since planning permission has not been granted for the development it is, in effect, a breach of planning control.
26. The appeals on ground (c) therefore fail.

The Appeal on Ground (a) and the deemed planning application (DPA).

Main Issue

27. The main issue in this appeal is the effect of the development on the character and appearance of the area.

Reasons

28. As I understand it there have been no changes of significant materiality as to the size, appearance or use of the building since the s78 appeal decision in March 2018. In the current appeal both main parties, with reference to case law, namely *Henderson v Henderson* [1843] 3 Hare 100, 67 ER 313 and *Thrasivoulou v SSE* [1990] 2 AC 273, argue the matter of estoppel and whether the appellant should open fresh litigation in respect of matters which should have been brought forward previously.
29. The initial grounds of appeal put forward by the appellant, under the DPA, requests only that planning permission should be given for the link building. I suspect this is due to the appellant being of the opinion that no material change of use had occurred, yet seemingly accepting that the link building did represent a breach. However, the ground (a) appeal made essentially involves the request that planning permission be granted for all matters enforced against; here, the operational development and also the material change of use.

30. The previous Inspector identified the main issue as being whether the development constitutes a separate unit of residential accommodation rather than an ancillary use, and the effect on the character and appearance of the local area. Her decision has to represent a clear material consideration in the DPA, and I have had due regard to her comments.
31. In paragraph 8 of the decision letter she states:
- "Although the garden is of a good size, this is a very large building and a dominant and incongruous structure, out of scale with the dimensions and proportions of outbuildings normally associated with houses and gardens of this scale. Given its dimensions and scale, it has the appearance of a separate dwelling..."*
32. The Inspector continued:
- "Given the remaining area of available rear garden I consider that this has resulted in a cramped form of development which harms the spacious character of the local area."*
33. Whilst having regard to the above Inspector's reasoning, and the issue of estoppel aside, I have taken into account all the evidence before me. This is especially clear from my reasoning and assessment under the ground (c) appeal. Upon visiting the site and viewing the development in its context I consider that the overriding planning issue in this case is not the link building as an individual entity – it has, of course, been subsumed into the resultant single building – but the cumulative size of the building now in situ relative to its immediate surroundings and the use to which the building has been put. In essence, that is a material change of use which the link building has directly enabled and essentially facilitated.
34. No 8 Austin Avenue now accommodates a two-storey dwelling plus a building which is in use as a two-bed bungalow. I consider this to be an over-intensive use of the site, and uncharacteristic of the prevailing pattern of development. From this I must also agree with the Council's argument as to visual incongruity. In the circumstances, I have seen nothing compelling, either visually or by way of evidence produced, that would lead me to reach a different conclusion from the previous Inspector. Given my findings I fully concur with her reasoning.
35. The appellant is of the opinion that, should the enforcement notice be upheld, and the link building be demolished in accordance with its requirements, there would be nothing to prevent a new annexe building from being erected. However, relating to permitted development rights the Council refers to the judgement of *Evans v SoS* [2014] EWHC 4111.
36. In summarising the relevance of this judgement to the current appeal, and with reference to Article 3(5) of the GPDO, the law specifies that the permission granted by Schedule 2, (Class E thereto in this instance) does not apply if the permission relates to an existing use which is unlawful. In other words, unlawful development at the property nullifies permitted development rights which the property would otherwise benefit from. Given that I have found that an unauthorised material change of use has occurred I consider this to be a case in point. Accordingly, so long as the residential use continues, no permitted development rights will exist.

37. Given the implications of my decision I have had regard to Articles 1 and 8 of the Human Rights Act (HRA). Interference with Article 1 will depend on whether there is a legitimate aim in the Council's decision to issue the enforcement notice. In this instance the aim was clearly to secure the cessation of the use of the building as an additional self-contained dwelling within the site, facilitated by the link building erected, and with regard also to the building's substantial size relative to its contextual setting.
38. With the breach identified and the resultant building involved I am satisfied that the Council's action was necessary and proportionate. In, therefore, weighing up all the relevant factors I am not convinced that the notice's requirements constitute a violation of the occupiers' right to peaceful enjoyment of the land nor does it unduly compromise the right of respect for their private and family life. Accordingly, neither Articles 1 nor 8 of the HRA have been unacceptably violated by the enforcement notice, and the reasons for its issue are stated clearly within the document.
39. In the event that I were to allow the ground (a) appeal and grant planning permission for the application deemed to have been made, the Council suggested the imposition of a condition requiring that the existing building be used only by members of the household occupying the main dwelling, and shall thereby be used only in an incidental capacity thereto. However, should the appeal have been successful, in light of my findings that the current use of the building is independent of the main dwelling, I do not consider this to be a meaningful nor an appropriate condition to be applied in the circumstances.
40. I conclude that the development is harmful to the character and appearance of the area, contrary to the design objectives of policy 37 of the Bromley Local Plan (LP). Although the Council also cites LP policy 7, this is concerned more with extensions to existing dwellings to provide accommodation for family members. As the development at issue relates to an outbuilding I find this policy as not directly applicable to the case.
41. For the above reasons, and having had regard to all matters raised, the application for planning permission deemed to have been made under s177(5) does not succeed and the appeal is dismissed.

The Appeals on Ground (f)

42. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. S173(4) provides that the purpose shall be either to remedy the breach of planning control or to remedy any injury to amenity. In this case it would appear from the requirements of the notice that its primary purpose is to remedy the breach by restoring the land to its condition prior to the breach taking place.
43. Under this ground the appellants have put forward a scheme, originally submitted to the Council under ref 19/04784/FULL6, which would involve the link building section being redesigned with a gabled roof overlying a porch area, deeper than the projection currently housing the building's entrance door. As the said application was submitted to the Council subsequent to the enforcement notice being issued and, given the notice's requirements, the Council exercised its right, under s70C of the 1990 Act, to decline to determine it.

44. Whilst this might represent an obvious alternative scheme the physical alterations involved, as an attempt to improve the appearance of a section of the roof, would actually result in the building being enlarged. In effect this would only compound the problems which I have already highlighted under the ground (a) appeal. Neither would it address the unauthorised material change of use.
45. Further, in the Court of Appeal judgement in *Ioannou v SSCLG* [2014] EWCA Civ 1432 it was held that the power to allow an appeal on ground (f) is not a power to grant planning permission. There is no free-standing 'obvious alternative' test. The Inspector's powers to vary the enforcement notice mirror those conferred on the Council to under-enforce under s173(4)(b). It is only the buildings, works or activities in existence when the enforcement notice is issued which can benefit from s173(11), not a different scheme.
46. Accordingly, s173(11) cannot be a means to sidestep the limitation to ground (a), which is only to grant planning permission under s177(1). As such, s174 appeals made under ground (f) do not provide a vehicle to grant permission for developments not physically in existence at the time the notice was issued.
47. In the circumstances, the appeals under ground (f) do not succeed.
48. Finally, two additional matters are apparent to me from this case. First, the enforcement notice's requirement to '*leave the land in a clean and tidy condition*' is imprecisely worded and, following compliance with Requirement (4) which involves the removal of materials from the land, it realistically goes beyond the scope of the notice. Accordingly, I shall correct the notice and delete Requirement (5).
49. Second, the compliance period, stipulated at 56 days after the notice has taken effect, has not been challenged as no ground (g) appeal has been lodged. Nonetheless, given the notice's requirements, in the event that this period proves too short for compliance to be exercised, it is open to the Council, under s173A(1)(b) of the Act as amended, to extend the period for compliance, should it see fit.

Timothy C King

INSPECTOR