



Appeal Decisions

Site visit made on 29 September 2020

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 17 November 2020

Appeal A: APP/U5360/C/20/3248599

Appeal B: APP/U5360/C/20/3248600

50 Sach Road, Hackney, London E5 9LJ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- Appeal A is made by Mr MY Roth of MZR Estates Limited against an enforcement notice issued by the Council of the London Borough of Hackney.
- Appeal B is made by Mr C Perlman of Ventella Estates Limited.
- The enforcement notice was issued on 29 January 2020.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land to the rear of 50 Sach Road to use as a self-contained residential dwelling.
- The requirements of the notice are:
 1. Remove the unauthorised single storey self-contained residential dwelling from the rear garden area of the property.
 2. Make good all damage to the Property resulting from the removal of the unauthorised works and restore the garden area to the condition it was before the unauthorised single storey self-contained residential dwelling was constructed.
 3. Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises.
- The period for compliance with the requirements is 3 months.
- Appeal A is proceeding on the grounds set out in section 174(2)(d) and (g) of the 1990 Act as amended. Appeal B is proceeding on grounds (a), (d) and (g).

Summary of Decision: No further action is taken.

Application for costs

1. An application for costs was made by Mr MY Roth of MZR Estates Limited and Mr C Perlman of Ventella Estates Limited against the Council of the London Borough of Hackney. This application is the subject of a separate Decision.

The Enforcement Notice

2. There is a relevant planning history for the site and the development alleged. An enforcement notice was issued on 7 March 2013 alleging the erection of a single storey outbuilding to the rear of the property (the first notice). No appeal was made against that notice and, in April 2019, the Council commenced non-compliance proceedings. However, the Council subsequently notified the solicitor acting on behalf of Ventella Estates that it intended to "withdraw the matter"¹.

¹ Email dated 20 June 2019.

3. The first notice remains in place. However, there is a dispute over whether this notice was a nullity as there appears to be a discrepancy between the notices held by two of the recipients and that held by the Council, concerning the date the notice took effect. This is not a matter on which I can reach a view as the first notice is not before me. The Council explains that it decided to re-issue the notice, without withdrawing the first. Thus, a second enforcement notice alleging the erection of a single storey outbuilding was issued on 1 October 2019.
4. The Council then reviewed its investigations and concluded that the breach of planning control was a material change of use of the land because it concerned the construction of a new building for residential use. A third notice was issued to that effect. Subsequently, the second notice was withdrawn² following a query from myself as I needed to clarify the alleged breach.
5. Turning to the notice before me, as set out in the banner heading above, there is some contradiction in the way the notice is worded. The description of the alleged breach specifies a material change of use of the land. It describes the unauthorised use as a "self-contained residential dwelling". This constitutes operational development as opposed to a use of the land. Furthermore, the reasons for issuing the notice all concern the impact of the building itself in terms of design, size, standard of accommodation etc, rather than the use of the land for residential purposes.
6. The implication becomes further apparent in the requirements. Crucially, the requirements do not require the unauthorised use of the land to cease. This would be necessary to remedy the breach of planning control alleged, if it were the intention of the Council for the purpose of the notice to do so. Removal of the building would not, on its own, bring about the cessation of the use of land as a separate residential planning unit. This presents a potential problem when Section 173(11) of the 1990 Act is considered. This provides that - *an enforcement notice in respect of any breach of planning control which could have required any activity to cease, but does not do so; and all the requirements of the notice have been complied with, then planning permission shall be treated as having been granted by virtue of section 73A in respect of the carrying out of the activities*. In this case, that would be the formation of a separate planning unit for residential use, which would be an unintended consequence of the notice as drafted.
7. S173(5) of the 1990 Act gives power to require the alteration or removal of buildings or works, or the carrying out of building or other operations, for the purposes of remedying the breach. Caselaw has established that a notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement, so that the land is restored to its condition before the change of use took place³.
8. A further difficulty arises in determining whether the principle set out above extends to the removal of the unauthorised building that has been used as a dwellinghouse, where that structure would otherwise be immune from

² Letter from Council – 15 October 2020.

³ *Murfitt v SSE* [1980] JPL 598 and *Somak Travel Ltd v SSE* (1987) JPL 630.

enforcement action under the four-year rule⁴. In the light of the comments of Waller LJ in the *Murfitt* case, *where such works are likely to represent obvious and permanent operational development that should clearly be dealt with within a period of four years, rather than operational development which serves an ancillary purpose in circumstances where the land would otherwise be left in a useless condition for any purpose, such a requirement may go beyond what can be regarded as necessary to remedy the breach.*

9. To correct the notice to remove this requirement, without introducing a new requirement to cease the use, would render the notice ineffective, since it would not require anything to be done. To add or change the requirement to require the use of land to cease would potentially make it more onerous and in any event, would not reflect the allegation as currently drafted. In order to correctly reflect the allegation, if accepted to relate to the change of use of land, the requirement would be along the lines of 'cease the use of the land as a separate residential use'. Works to facilitate that use may include, for example, removal of any fences that sub-divide the land.
10. The appellants also argue that the Council's case is uncertain and they approached the matter on the basis that it was necessary to make the case that the four-year rule applied, pursuant to s171B(2) of the 1990 Act. This concerns a breach consisting in the change of use of any building to use as a single dwellinghouse. The Council has sought to explain its stance, maintaining that the breach is a material change of use of the land, which falls within Section 171B(3) – *any other breach of planning control*, and hence, *no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach*. The time limit is not stated on the enforcement notice which, although not necessary, has further compounded the uncertainty.
11. All of these matters lead to uncertainty about what the notice is actually directed at, but when considered as a whole, seem to indicate the concern relates to the erection of the dwellinghouse rather than the use of land. In conclusion, the notice as drafted introduces so much uncertainty as to make it a nullity.
12. It is not, therefore, necessary for me to go on to consider other matters raised, such as, whether or not a material change of use of land has occurred as this would be more appropriately considered under specific grounds of appeal rather than the content of the notice. Similarly, I cannot take account of the comments of interest parties, since these concern the effect of the development and are relevant to the ground (a) appeal and the deemed planning application.

Conclusion

13. I have concluded that the notice is a nullity. In these circumstances, the appeals on the grounds set out in section 174(2)(a), (d) and (g) of the 1990 Act as amended, and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended, do not fall to be considered.

⁴ Section 171B(1) of the 1990 Act as amended.

Formal Decisions

14. Since the enforcement notice is found to be a nullity, no further action will be taken in connection with the appeals. In the light of this finding, the Local Planning Authority should consider reviewing the register kept under Section 188 of the 1990 Act as amended.

Debbie Moore

Inspector