



Appeal Decisions

Site visit made on 15 October 2020

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 2 December 2020

Appeal Ref: APP/U5930/C/20/3246274 (Appeal A)

5 Hilltop, The Drive, London E17 3BU

- 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 Mrs Ferzana Hameed against an enforcement notice issued by the Council of the London Borough of Waltham Forest.
 - The enforcement notice was issued on 9 January 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of an outbuilding at the rear of the land.
 - The requirements of the notice are 1) Demolish and remove from the land the outbuilding located to the rear of the land; and 2) Remove from the land 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)(b), (c) and (f) of the Town and Country Planning Act 1990 as amended.
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Appeal Ref: APP/U5930/C/20/3246364 (Appeal B)

5 Hilltop, The Drive, London E17 3BU

- 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 Mrs Ferzana Hameed against an enforcement notice issued by the Council of the London Borough of Waltham Forest.
 - The enforcement notice was issued on 9 January 2020.
 - The breach of planning control as alleged in the notice is: without planning permission, the material change of use of the land from a single dwellinghouse to two separate self-contained dwellings.
 - The requirements of the notice are: 1) Cease the use of the self-contained unit in the rear dormer for separate residential use; 2) Remove from the self-contained unit in the rear dormer the kitchen and all associated drainage connections which facilitate the use of dormer for separate residential use; 3) Remove from the self-contained unit in the rear dormer the bathroom and all associated drainage connections which facilitate the use of the dormer for separate residential use; 4) Remove the separate front entrance from the side extension and reconstruct this part of the property to accord with the extract of the approved plan attached to the planning permission dated 28 May 2013 (attached to the enforcement notice as Plan B); and 5) Remove from the land all resultant debris.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) (e) (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decisions

1. Appeal A is dismissed and the enforcement notice is upheld.

2. With reference to Appeal B, it is directed that the enforcement notice be varied by deleting 'Step 4- Remove the separate front entrance from the side extension and reconstruct this part of the property to accord with the extract of the approved plan attached to the planning permission dated 28 May 2013 (attached to the enforcement notice as Plan B)' in its entirety.
3. Subject to this variation, Appeal B is dismissed, and the enforcement notice is upheld.

Application for costs

4. An application for costs was made by the Council of the London Borough of Waltham Forest against Mrs Ferzana Hameed. This application is the subject of a separate Decision.

Appeal A on grounds (b) and ground (c)

5. Ground (b) is that the breach of control alleged in the enforcement notice has not occurred as a matter of fact. Ground (c) is that there has not been a breach of planning control. The onus of proof lies on the appellant for each of these grounds.
6. Turning first to ground (b), the appellant confirms that the outbuilding in question replaced a previous outbuilding. The Council's statement of case includes photographic evidence of the unauthorised outbuilding in the process of being constructed on 11 June 2019. The appellant does not dispute this evidence. Therefore, there can be little doubt that the outbuilding has in fact been constructed, and so the appeal on ground (b) fails.
7. Turning then to ground (c), the appellant needs to show that the outbuilding is not a development that is subject to planning control in order to succeed on this ground. Section 55(1) of the 1990 Act says that 'development' includes the carrying out of building, engineering, or other operations. Such operational development comprises activities which result in some physical alteration to the land with some degree of permanence. From what I have seen, it is clear that the outbuilding falls within this definition of a building operation for the purposes of the 1990 Act.
8. There is little evidence to support the appellant's claim that her builder applied for planning permission for the structure. Subsequently, it is necessary to consider whether the outbuilding falls within the permitted development limits for the property. Firstly, until it has been confirmed that the unauthorised use of the loft as a flat in the main building has ceased, the appeal property does not benefit from householder permitted development rights. However, for the sake of the following assessment, I will presume that the use has ceased.
9. I have therefore had regard to Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), which relates to the provision within the curtilage of a dwellinghouse of any building or enclosure required for a purpose incidental to the enjoyment of the dwellinghouse. New buildings under Class E are subject to size restrictions. For buildings, enclosures or containers within 2m of the boundary of the curtilage of a dwellinghouse, as is the case here, the height should not exceed 2.5m. The 'Permitted development rights for householders - Technical Guidance' (TG, Department for Communities and Local Government, 2017) explains that the 2.5m limit refers to the total height of the building.

10. On their visit of 11 June 2019, Council officers measured the height of the eaves of the outbuilding to be 3.25m. For clarity, the TG explains that the height of the building should be measured from the highest ground level immediately adjacent to the building. The Council's appeal statement (21 August 2020) includes on page 10 a photograph taken on that date, showing that the ground level in front of the building was substantially lower at that time.
11. The appellant disputes the Council's statement, firstly saying that the outbuilding is 2.6m high. In her comments of 24 July 2020, she states that they have tiled around the building, with the result that the building is now less than 2.5m high. I take this to refer to the square paving slabs that have been laid to the front of the outbuilding. However, the appellant is not clear about whether she is referring to the eaves height or the total height of the building. She has not given a precise measurement, or indicated where she has taken the measurement from, or offered any corroborative evidence to show that the building does not exceed a total of 2.5m in height.
12. If the top of the door in the elevation facing the house is taken as being a standard height of around 2.1m, plus the height of the rendered section above the door and the board the gutters are fixed to, plus the height of the roof to the top of the ridge, it is likely that the total height of the building exceeds 2.5m. Again, the onus of the proof is on the appellant, and there is insufficient evidence for me to accept her assertion that the outbuilding falls within permitted development limitations. It may be the case that the new building is only 10cm higher than the previous building, but that is not relevant to my consideration.
13. Drawing these threads together, I conclude that the matters alleged in the notice therefore constitute a breach of planning control and the appeal on ground (c) fails.

Appeal A on ground (f)

14. Ground (f) is that the steps required to comply with the requirements of the notice are excessive and lesser steps would overcome the objections. The appellant offers no considerations as to why the requirements are excessive in this case, and makes no suggestions regarding any alternative lesser steps.
15. The purpose of the enforcement notice is to remedy the breach. It seems to me that the requirements are commensurate with that aim. In the absence of evidence to the contrary, the appeal on ground (f) fails.

Appeal B on ground (e)

16. Ground (e) is that the notice was not properly served on everyone with an interest in the land.
17. The Council state that copies of the notices were issued to all parties with a known legal interest in the property, and they provide a list of the recipients. They confirm that the notices were dated 9 January 2020 and served on the same day. The case officer hand delivered the notices addressed to the first four parties on the list. The Council state that Mrs Hameed, the appellant, was the person who answered the door and who took the notices addressed to these four parties. The notices issued to the last two parties on the list were sent by recorded delivery on 9 January 2020.

18. The appellant does not dispute the Council's evidence with regard to ground (e) and has offered little detailed or substantive evidence to show that the notice was not served correctly.
19. The appeal on ground (e) therefore fails.

Appeal B on ground (d)

20. Ground (d) is that, at the time the enforcement notice was issued, it was too late to take enforcement action against the material change of use of the upper floor of the appeal site to a separate flat. The onus of proof for this ground lies on the appellant, and the test is the balance of probability.
21. Section 171B(2) of the Town and Country Planning Act 1990 (as amended) gives a four year limit for enforcement action against the change of use of a building or part of a building for use as a single dwellinghouse. The enforcement notice was issued on 9 January 2020, and so to succeed on ground (d), the appellant needs to show that the unit was occupied on or before 9 January 2016, and that the use was continuous during the four-year period.
22. The appellant states that the flat has been occupied since March 2014. In support of this claim, the signature page of a tenancy agreement with a tenant named Ms Hidigan is submitted at Appendix 2. Appendix 3 contains bank statements showing that rent was paid by Ms Hidigan to the appellant between March 2014 and December 2016, with the deposit being returned in January 2017.
23. At Appendix 5, the appellant submits a copy of one page of a tenancy document which she states is an agreement with Ms Buchara, who opted to pay her rent in cash. The document is so poorly reproduced that the dates cannot be made out. Even if the dates were legible, there appears to be no signature from the tenant. For those reasons, I can afford this document the minimum weight in my consideration.
24. In her final comments, the appellant addresses the Council's concerns over the tenancy agreement with Ms Buchara. She states that she has misplaced the signed agreement, but provides an email from Daniela Racovita (nee Buchara), dated 24 August 2020, in which Ms Racovita states that she was a tenant of the appellant from 20 February 2017 to 20 September 2017. Although Ms Racovita attaches a copy of her passport, she does not provide a copy of the tenancy agreement in question.
25. The next tenancy, agreed with Mrs Maroufi and Mr Habaieb, appears to commence in October 2017 and end in July 2018. Subsequently, there is a gap until September 2018, when Angelique and Charlie Ville rent the property, and payments are shown up until May 2019. The last use of the property is as an Airbnb and reviews are submitted from August 2019 to October 2019. No explanation is given for this overlap.
26. An unauthorised use must continue substantially uninterrupted before it can acquire immunity from enforcement action. Any periods of non-occupation should be de minimis. This evidence is unsatisfactory insofar as rental agreements in themselves are not proof that the rented property was physically occupied by the tenants throughout the tenancy period. The

evidence relating to Ms Buchara's tenancy in particular falls short of offering any certainty that the flat was occupied during the relevant time frame.

27. The appellant produces no other corroborative proof of continuous occupancy. There is no evidence of the Council Tax arrangements for the flat. Similarly, there is no evidence indicating how utilities were supplied to the flat, for example, gas/electricity, water, telephone and or internet provision. It is usual, for example, for meter readings to be taken at the beginning and end of a tenancy, but there is no documentary evidence of this. No supporting documents are provided in terms of the Airbnb bookings. Furthermore, no statutory declarations or sworn statements have been provided in respect of any part of the appellant's evidence.
28. In view of these shortcomings, I am satisfied that there is wholly insufficient evidence to show that the property in question has been continuously occupied for four years prior to the issuing of the enforcement notice.
29. Although I have taken the rest of the appellant's evidence into account, for example the building control completion certificates, none of these documents assist her case under ground (d). I have also had regard to the Council's allegation of deliberate concealment of the breach. However, because the evidence with regard to ground (d) falls short, there is no need to consider this matter further.
30. I therefore conclude that immunity from enforcement action has not been proven, and so Appeal B on ground (d) fails.

Appeal B on ground (f)

31. Ground (f) is that the steps required to comply with the requirements of the notice are excessive and lesser steps would overcome the objections.
32. The enforcement notice attacks the change of use of the flat, and the purpose of the notice is to remedy the breach. A notice should go no further than is necessary to correct the breach. In this case, the breach can be remedied by cessation of the use of the building as flats and the removal of the works that enabled that use.
33. Step 4 requires the separate door to the side extension to be removed and replaced with window to accord with Plan B, an approved plan attached to the planning permission dated 28 May 2013. However, there is little evidence to confirm that these plans were implemented and built as approved. That being the case, I am concerned that Step 4 goes beyond remedying the breach.
34. It may be that requiring this work to be done would result in a change to the previous condition, and there is no statutory power to require an appellant to undertake anything other than a reversion to the condition the building was in before the breach took place.
35. I am satisfied that Steps 1-3 and Step 5 are commensurate with the aims of the notice. I am mindful that the appellant offers no evidence as to why she considers the requirements to be excessive, and she has not suggested any lesser steps with a view to overcoming the Council's objections. Nevertheless, I conclude that Step 4 amounts to a positive requirement that would possibly alter the previous condition of the building and is thus excessive.

36. The appeal on ground (f) therefore succeeds to that limited extent, and I have directed that the enforcement notice be varied to reflect this finding.

Appeal B on ground (g)

37. Ground (g) is that the time given to comply with the notice is too short. The enforcement notice gives three months for the completion all the requirements. The appellant has offered no alternative time frame that she considers would be reasonable.

38. Although the appellant has made no comment on it, I am mindful of the ongoing coronavirus pandemic, and the difficulties it may present in terms of arranging for the works to be done. However, the Council indicate that they are willing to consider an extension of time should it be needed.

39. The original requirements were not particularly onerous, and they are less so with the removal of Step 4. In view of the Council's willingness to exercise a flexible approach, I am therefore satisfied that three months is a reasonable time frame in this instance.

40. The appeal on ground (g) thus fails.

Appeals A and B - other matters

41. Throughout her comments on both the allegations, the appellant makes reference to matters that would pertain only to appeals brought on ground (a), which is that planning permission should be granted for the developments in question. With reference to the outbuilding, for example, she states that it is needed for security reasons, and reference is made to issues of living conditions and parking in relation to the unauthorised loft flat. However, for clarity, I am unable to take any such matters or any other planning merits into account because ground (a) has not been pursued in either of the appeals.

Conclusion

42. Appeal A is dismissed, and the enforcement notice is upheld.

43. Appeal B is dismissed, and the enforcement notice is upheld as varied above.

Elaine Gray

INSPECTOR