
Appeal Decision

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 December 2020

Appeal Ref: APP/A5270/C/20/3246377

Land at 8 Primrose Way, Wembley, Middlesex HA10 1DR

- 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 Arvin Assani against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice was issued on 6 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 the premises to separate residential use.
 - The requirements of the notice are:
 1. Cease the use of the land for separate residential use
 2. Remove from the outbuilding currently on the land the kitchen and all associated drainage connection which facilitate the use of the land from separate residential use;
 3. Remove from the outbuilding currently on the land the bathroom and all associated drainage connection which facilitate the use of the land from separate residential use;
 4. Demolish and remove from the land the outbuilding currently on the land;
 5. Remove from the land all resultant debris; and
 6. Restore the land to the condition it was before the breach took place.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2) (d) (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied by deleting the requirements listed as 2, 3, 4, 5, and 6. in paragraph 5. Subject to this variation the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matter

2. In response to the travel restrictions currently in place due to the COVID-19 pandemic, I consider that this appeal can be determined without the need for a physical site visit. This is because I am satisfied that a decision can be made based on the representations and supporting information submitted by the main parties as a matter of course as part of the appeal process.

Appeal on ground (d)

3. In order for the appeal to succeed on ground (d) it has to be demonstrated that at the time the enforcement notice was issued it was too late to take enforcement action.

4. The alleged breach of planning control is, without planning permission, the material change of use of the land to the rear of the premises to separate residential use. The Council consider that the relevant time limit is as set out in Section 171B (3)¹ of the Town and Country Planning Act, 1990 (the Act), and therefore the appellant needs to show on the balance of probability that the use of the land to the rear of the premises changed to separate residential use on or before 6 January 2010, and that this use then continued for at least 10 years after the change without significant interruption.
5. The main parties agree that a new planning unit and material change of use to a separate residential use has taken place. The matter in dispute is whether or not the building that has been constructed was built as a dwelling and used as a separate residential unit from the outset, thus resulting in a material change of use of the land. The appellant asserts that the building was constructed as an outbuilding and used for purposes ancillary to the residential use of No 8 Primrose Way prior to its later conversion to separate residential use. If the latter is the case, the relevant time limit is as set out in Section 171B (2) of the Act and it is only necessary to show four years use as a single dwellinghouse without significant interruption, with the relevant date then being the 6 January 2016.
6. The appellant relies on a Certificate of Lawfulness (LDC) being granted under s192 (as amended) of the Act for a "*single storey outbuilding (games room/gym) to the rear*" at 8 Primrose Way on 21 May 2010. When he purchased the property in 2014, the outbuilding was in use as a separate, self-contained dwelling. However, he was advised by the vendor that the building had originally been constructed as a gym during 2010 for use incidental to the main dwelling, No 8. It was only later that it had been converted into a separate residential unit. In addition, the appellant points out that the outbuilding has only been banded by the Valuation Officer Agency as separate residential use since 19 September 2012.
7. On the other hand, the Council has provided detailed site notes from building control records which indicate that works commenced on the building at the start of 2010. On 7 April 2010 these notes show that drainage connections for a WC within the building, which was still under construction, were being laid. However, there was no WC shown on the plans submitted and approved as part of the LDC. Furthermore, I have been provided with copies of site visit notes and records of conversations between Council Officers and tenants residing at No 8 from March 2010. These indicate that the building was being fitted out as a self-contained unit, including a record of the tenant occupying No 8 stating that in May 2010 they had no access to the new outbuilding. In May 2010 the building was not therefore being used for purposes ancillary to the primary residential use of No 8. A visit to the site from Council Officers in November 2010 found the building to be fitted out with a separate bathroom and kitchen facilities and to be rented out and occupied as a separate residential unit independent from No 8.
8. The LDC was for a gym/games room for use incidental to that of the main dwelling, No 8. However, the appellant has not provided any substantive evidence to show that it was the building proposed in the LDC which has been built. Only seven days after the certificate was granted, a site visit by Council

¹ Section 171B(3) establishes the 10 year immunity period for breaches of planning control other than operational development or the change of use of a building to a single dwelling.

Officers confirmed that the main house was rented, and its tenant had no access to the new building. Furthermore, site records of the visiting officer in November 2010 record that it was the officer's view that the development as it was being occupied and constructed was not in accordance with the plans and description of the development approved in the LDC.²

9. The Council's evidence casts significant doubt over the veracity of the claim that the outbuilding was erected and used for ancillary purposes, because of the lack of precision in the appellant's version of events. Therefore, in the absence of any substantive evidence that would lead me to come to a different conclusion, I conclude that on the balance of probability, the building was erected unlawfully and used as a dwellinghouse from the outset. That being the case, the relevant time period for immunity is 10 years.³
10. The Council has provided building control site inspection records and photographs which show the building still under construction post January 2010. This evidence has not been disputed by the appellant. Moreover, the appellant has not provided any evidence at all that would suggest that the use of the land to the rear of the premises changed to a separate residential use on or before 6 January 2010.
11. For all the reasons given, I conclude that the appellant has failed show, on the balance of probability, that the use of the land changed to use for separate residential purposes on or before the 6 January 2010 and that this use then continued for at least 10 years after without significant interruption. The appeal on ground (d) therefore fails.

Appeal on ground (f)

12. The issue is whether the requirements are excessive to achieve the purpose(s) of the notice.
13. Section 173 of the Town and Country Planning Act 1990 (as amended) indicates that there are two purposes which the requirements of an enforcement notice can seek to address. The first is to remedy the breach of planning control that has occurred and the second to remedy any injury to amenity which has been caused by the breach. The Council has confirmed that the purpose of the notice in this case is to remedy the breach of planning control.
14. The appellant considers that the building itself is lawful, by reason of the LDC which was granted. Furthermore, there is no need to demolish the building in order to achieve the Council's objective of ending its use as an independent dwelling. It is their view that having a bathroom or shower room is consistent the building's original use as a gym, and removal of the kitchen alone would be sufficient to ensure that the building is no longer a separate, self-contained residential unit.
15. It is the Council's view that the building is not lawful as the LDC was not implemented. Instead, what was constructed was a new dwelling and only ever occupied as such. The Council contend that following the principle in *Murfitt v SSE and East Cambridgeshire DC (1980) 40 P. & C.R. 254*, the notice can require the removal of all items which facilitated the change of use,

² Appendix 5, Local Planning Authority's Statement of Case.

³ *Lawson Builders Ltd & Ors v Secretary of State for Communities & Local Government & Anor* [2013] EWHC 3368

whether or not those items are themselves immune development or not development at all. It is their case that a notice alleging material change of use of land to residential use can require the removal of the building, as well as the cessation of its use.

16. In *Murfitt*, Waller LJ said (at page 8G – 9A):

“If one wishes to see some logic as to the distinction between the two types of breach, that is a breach where the variation has existed for four years or more and a breach where that which is described as a variation is something ancillary to the use, as it seems to me the former cases are cases where something is done which on the whole would have been obvious, which on the whole would be permanent by the mere fact that it was done and therefore one which should be dealt with within a period of four years; whereas the second case, where it is an ancillary purpose, the planning matter [sic] might leave land, as in this case, in a useless condition for any purpose and therefore it is logical that when the apparent use which has no planning permission is enforced the condition should be restored to that in which it was before that use started.”

17. Considering the view expressed in *Murfitt*, in this appeal the erection of the building would have been obvious and permanent. Given its nature and scale, and as a matter of fact and degree, the erection of the building/dwelling in this case cannot be properly described as for a purpose “ancillary” to the material change of use of the land. Furthermore, the works undertaken to construct the building were operational development. Considering that this development was substantially complete some nine years before the notice was issued, the building itself would be immune from enforcement action because of the four-year rule⁴.
18. For the reasons set out above and in a case such as this, I am not persuaded that the removal of the building can be required. This premise also extends to the fixtures and fittings within it, which form part of the building operations and are too immune from enforcement action. Furthermore, in this case there is an obvious alternative use for the building. Once the requirement to cease separate residential use has been met, the building/land could be used for incidental purposes in connection with the main dwellinghouse, No 8.
19. In conclusion, a requirement to cease the use of the land (which includes the building) for separate residential use is the minimum necessary to remedy the breach of planning control. The requirement to remove the building does exceed what is necessary to remedy the breach of planning control in the circumstances of this case. Ground (f) therefore succeeds in so far as the notice should be varied to delete that requirement and to also delete the requirements to remove the facilities within it. Nevertheless, the remaining requirement, 1., will prohibit separate residential use of the building comprised within the ‘Land’. This variation will not therefore cause injustice to either party.

Appeal on ground (g)

20. The issue is whether the compliance period of six months is reasonable. The appellant considers that given the financial circumstances of the tenant and

⁴ Section 171B(1) establishes the four year immunity period for breaches of planning control consisting in the carrying out without planning permissions of building, engineering, mining or other operations.

shortage of accommodation available, the existing tenant would require as much time as possible to find new accommodation. The Assured Tenancy Agreement requires at least two months' notice to be served by the Landlord. Therefore, the appellant suggests that when you take into account the need to have the property vacated and then implement the demolition and clearance works, a period of 12 months would be a more reasonable time period within which to comply.

21. I have varied the notice requirements and the appellant does not have to demolish the building currently used as a dwelling. I am therefore satisfied that six months is a reasonable and proportionate period for compliance, even though the tenant will need to find a new home. The appeal on ground (g) therefore fails.

Human Rights

22. I have taken into consideration the Human Rights Act, 1998 which enshrines in UK law most of the fundamental rights and freedoms contained in the European Convention on Human Rights. I recognise that dismissal of the appeal would interfere with the occupier's rights under Article 8 and the appellant's rights under Article 8 and Article 1 of the First Protocol. However, given the harm identified and taking into account the variation to the notice to allow the building to remain, the action is in accordance with the law and pursues legitimate aims of protecting the environment and is necessary and proportionate to the situation.

Conclusion

23. For the reasons given above I conclude that, whilst the appeal of ground (d) and (g) fail, the appeal succeeds in part on ground (f), as the requirement to demolish the building and its fixtures and fittings is excessive. I will therefore vary the notice, prior to upholding it.

Elizabeth Pleasant

INSPECTOR