



Appeal Decision

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

an Inspector appointed by the Secretary of State

Decision date: 27 January 2021

Appeal A: APP/W5780/C/19/3243988

Appeal B: APP/W5780/C/19/3243989

Appeal C: APP/W5780/C/19/3243990

Appeal D: APP/W5780/C/20/3244226

Appeal E: APP/W5780/C/20/3245052

5 De Vere Gardens, Ilford IG1 3EB

- 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 Michael Greene against an enforcement notice issued by the Council of the London Borough of Redbridge.
- Appeal B is made by Mrs Nicola Greene.
- Appeal C is made by Mr Richard Buckley.
- Appeal D is made by Ms Heather Patricia Reynolds McIntosh.
- Appeal E is made by Mr Bimal Rai.
- The enforcement notice was issued on 28 November 2019.
- The breach of planning control as alleged in the notice is without planning permission, the unauthorised extension of the property on the ground floor by six metres and change of use of the single family dwelling house into seven self-contained flats.
- The requirements of the notice are:
 - i. Remove the unauthorised six metres single storey rear extension in its entirety.
 - ii. AND cease the use of the single family dwelling house as seven self-contained flats and revert the property into a single dwelling house.
 - iii. AND remove from [sic] all partitions, fixtures and fittings relative to the conversion into flats.
 - iv. Clear from the land all building materials and rubble arising from compliance with steps i-iii.
- The period for compliance with the requirements is 6 months.
- Appeals A, B and C are proceeding on the grounds set out in section 174(2)(b), (c), (d) and (e) of the 1990 Act as amended.
- Appeal D is proceeding on grounds (c), (d) and (f).
- Appeal E is proceeding on ground (d).

Summary of Decision: The enforcement notice is quashed.

Costs

1. An application for an award of costs has been made by Mr Michael Greene. This is the subject of a separate Decision.

Preliminary Matters

2. I consider that these appeals can be determined without the need for a site visit. This is because I have been able to reach a decision based on the information already available.
3. The appeals concern a two-storey, mid-terrace house, which has been extended and converted into seven flats. The Council describes the property as follows: –

4. *"Behind a main door there is a communal hallway, and on the ground floor there are two doors to the right and two doors to the left of the central corridor that lead to the front and rear flats, respectively, located on the ground floor of the property. On the first floor, there is a private door to the right and another to the left of the central staircase. On the second floor, there is another private door that leads to the seventh flat located in the extended loft."*
5. The Council goes on to explain that the property benefits from a 3m single-storey rear extension and a first-floor rear extension, which it says were constructed prior to 2012 ('the pre-2012 extensions'). It states that the ground floor extension has been further extended by approximately 3m. There is also a rear dormer.
6. The allegation concerns operational development and a material change of use. It is directed to the property as a whole and requires the cessation of the use as flats, and the removal of an unauthorised extension and internal partitions etc which facilitate the change of use. The notice has been served on the owners/occupiers of Flats 1-7, among others.
7. There is no dispute that planning permission has been granted for the "conversion of the property into four flats and part single, part two-storey rear extension" (ref 2678/04, dated 9 February 2005). Unfortunately, the approved plans relative to that permission are not available. The Council has provided some details from the planner's report that led to the permission being granted, from which it says it is possible to deduce that the planning permission included: -
8. *Two 1-bedroom flats on the ground floor and one 1-bedroom flat and one studio flat on first floor with internal space ranging between 33sq.m and 42sq.m; a single-storey rear extension measuring 3.4m deep, 9.3m wide with 3.1m high with a flat roof in line with original rear projection; a two-storey rear extension measuring 3.4m deep, 4.6m wide and 7.7m high to roof ridge, pitched roof to match existing similar to extension at no.1 De Vere Gardens; and a front garden landscaped.*
9. In addition, I have been supplied with a plan by Appellant D, which is dated July 2006, drawing no 21-27-802D, and has been stamped amended plan 06/1666, rec'd 13 Mar 2007, by the Council's Building Control service. A further stamp, dated 28 March 2007, confirms a conditional approval for Building Regulations purposes. The proposed layout corresponds with the description of the approved development as deduced by the Council above.
10. A further drawing, supplied by Appellant A, shows the 'proposed loft floor plan', alongside the first floor which is a reproduction of the approved Building Regulations plan. The proposed loft plan shows the staircase access has been created by continuing the ground to first floor staircase, as opposed to reducing the size of one of the first floor flats. It seems that a dormer extension enabled the headroom for the staircase and also the provision of habitable space within the former roof. This drawing is marked 'existing loft conversion to form two bedroom flat to be regularised, drawing showing converted FF & loft floor plans' and is dated December 2009. This suggests the loft conversion did not have planning permission as of that date, but the first floor had been converted.

11. On the basis of the information before me, it seems more likely than not, that the planning approval was for two flats on the ground floor and two on the first floor, which would be contained within the original building as extended on the ground and first floor by no more than 3.4m, as shown on the drawing no 21-27-802D, received by the Council's Building Control service 13 March 2007.
12. The Council argues this is immaterial since the development is in contravention of 'a condition precedent'. It claims that the planning permission has lapsed, therefore. Condition 4 of permission ref 2678/04 required certain matters related to the front garden to be submitted to and approved in writing by the local planning authority. This detailed hard and soft landscaping, car parking, boundary treatment and refuse enclosures. The reason for the condition was to ensure a satisfactory appearance in the street scene and a satisfactory provision at all times to accommodate vehicles within the site. To consider this matter further, I have had regard to caselaw.
13. In *Whitley*¹, the Court of Appeal held that the only question, when deciding whether development was begun in accordance with a planning permission, is whether the development was permitted by that permission with its conditions. If the development was in contravention of a condition precedent, it cannot properly be described as commencing in accordance with the planning permission. Woolf LJ held in *Whitley* that it is not necessary to try to determine whether or not the relevant condition is properly capable of being classified as a condition precedent, on the basis that what had taken place was development without planning permission and a breach of condition, and so enforcement action of some kind could be taken.
14. However, in *Hart Aggregates*², Sullivan J held that a distinction had to be drawn between a condition which required some action to be undertaken and one that expressly prohibits any development taking place before a particular requirement has been met. He found that a condition will only be a condition precedent where it expressly prohibits the commencement of development and goes to the heart of the planning permission. If both tests are satisfied, the *Whitley* principle applies and there would be development without planning permission. Otherwise, there would merely be a breach of the condition. The Court of Appeal endorsed and applied these tests in *Greyfort Properties*³.
15. The condition in question is worded such that it prohibits development until the required details are approved. In practice, because the matters concern the front garden of the property, it would not be necessary for the requirements of the condition to be met prior to the commencement of development. The condition is worded in a general sense and seeks to ensure the satisfactory appearance of the front garden and the satisfactory provision for vehicles. It is not apparent that car parking is a major concern, nor that there are any particular reasons why the front gardens in the area are of particular appeal or value. I am not aware of any trees or shrubs of merit that require retention nor is the site within a designated area.
16. In support of its stance, the Council refers to *Meisels*⁴, which it argues is consistent with the matters at issue in these appeals. That case concerned

¹ *F G Whitley & Sons v SSW & Clwyd CC* [1992] JPL 856.

² *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin).

³ *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908.

⁴ *M and D Meisels v SSHCLG and LB Hackney* [2019] EWHC 1987 (Admin).

extensive works to a Synagogue. The planning permission was subject to several conditions which included - condition (2) concerning the approval of external materials to be used on the surfaces of the buildings and (4) soundproofing. The Inspector found that although the arrangements made necessary by condition 4 could arguably be made later, condition 2 fundamentally controls the final appearance of the building and its relationship to its surroundings and should be considered as going to the heart of the permission. The Inspector's approach was endorsed by the Court.

17. While the principles considered in the Judgement are relevant, there is a clear distinction. In *Meisels*, the external materials of the building controlled the final appearance of the Synagogue. This is an entirely different set of circumstances to the condition in these appeals, which concerns the front garden area of the property. The approved extension is at the rear and the treatment of the front garden is physically distinct. Landscaping and boundary treatment may enhance the appearance in the street scene, but such matters could be addressed later. In the meantime, the front garden area may still be used for the car parking and storage in the absence of the approved scheme. Hence, it was not crucial that these matters be agreed before development commenced, which distinguishes the situation from the Synagogue example where the materials were integral to the development approved. In my judgement, the condition is not of such significance that it goes to the heart of the planning permission. Therefore, the *Whitley* principle does not apply and the breach is a breach of condition.
18. A finding on whether or not the development was begun for the purposes of section 56(1) of the 1990 Act is necessary. I am hindered due to the lack of approved plans, however, I have found that it seems more likely than not that the planning approval was as shown on drawing no 21-27-802D. In practice, little is needed for development to be begun under s56(2). 'Material operations' are defined in s56(4) as including the digging of a trench which is to contain the foundations of a building. The erection of the single-storey rear extension and a first-floor rear extension, which the Council acknowledges were constructed prior to 2012, would satisfy this test. In comparing the Building Regulations approval with what has been built, these works would have constituted a material operation comprised in the development. As such, the permission would have been implemented, provided the works were begun within five years of the date of that permission, which would be 9 February 2010 (condition 1).
19. Information submitted in support of Appeal D includes a series of 'Google earth' images with embedded dates. This shows no extension on 1 January 2006, although the extension to No 1 referred to by the Council is in existence. The image dated 5 March 2008 shows an extension which appears to accord with the approved Building Regulations plans, insofar as is visible. The rear roof slope of the main house is unaltered in that image, save for where the hipped roof of the extension cuts in. The image dated 27 June 2010 suggests an alteration to the main rear roof slope, which is much clearer in the 19 July 2013 image, where a flat roofed dormer is evident. From this evidence, I am satisfied that the operations to implement the planning permission occurred before 5 March 2008, within five years of that permission being granted. In addition, the images show that further operational development took place

- sometime later. I note that the date and content of the images accords with the Council's comment that the dormer was 'immune from action 02.04.2012'⁵.
20. Overall, I do not agree that the approved scheme has lapsed, as the Council has argued. The implications of this are significant. Firstly, the allegation includes the change of use of a single family dwelling house, which would be incorrect. Furthermore, the requirements would be excessive to remedy the breach of planning control.
21. I have considered whether I could correct the notice to delete reference to the former use and vary the requirements to comply with the planning permission and its terms and conditions. In my judgement, this would introduce uncertainty and injustice because the full particulars of the relevant planning permission are not available. I note the Council's reference to *Lipson*⁶, but I do not consider this to be comparable. That case concerned a situation where the owner did not know the previous condition of the property. In the circumstances, it was found that they could not be expected to comply with the requirements, which would be an effective defence. These appeals differ in that the requirement would be asking recipients of the notice to comply with plans that are not available, which is where the injustice lies. Moreover, such a correction may affect the grounds of appeal pleaded or the nature of the evidence provided.
22. Even if I were to accept the Council's argument that the permission has lapsed, there are further matters that would need to be addressed. The Council explains that it considers the unauthorised operational development includes a second floor created by a rear dormer extension, incorporating the two-storey extension, and a single-storey rear extension projecting 4m beyond a previous 3.4m extension, which would give a total projection of 7.4m.
23. The point of concern arises when this latest description is compared to the allegation. The notice states "*the unauthorised extension of the property on the ground floor by six metres*" with a consequent requirement that this extension should be removed in its entirety. There is no mention of a two-storey extension or a rear dormer extension, and the reference to six metres appears inaccurate compared with what has been built.
24. It is important that the allegation is accurate, and that the requirements flow from it. The Council initially invited me to correct the notice to delete "*on the ground floor by six metres*" from the allegation, leaving the allegation as "*the unauthorised extension of the property and the change of use of the single family dwellinghouse into seven self-contained flats*" and make a consequent correction to requirement (i). This would have the effect of making the notice more onerous since it would widen the allegation to include extensions other than those on the ground floor. Therefore, I am not satisfied that I can make such corrections without injustice.
25. The Council's subsequent suggestion was the allegation could be made more specific by targeting "a rear ground floor extension measuring approximately 4m deep by 9.3m wide". This would omit the pre-2012 extensions from the allegation. The rear dormer would remain excluded. I note that, in the Officer

⁵ Officer Report dated 13.12.2017.

⁶ *A and E Lipson v SSE and Salford CC*.

report that sought authority to issue the notice, the Council acknowledged the “flat in loft” was “immune from action 02.04.2012”. It may be that the Council actively sought to exclude this element from the notice by not referencing it within the allegation. However, the use of the second floor flat remains within the scope of the notice so the matter is unclear. It would be illogical to require the use of the second floor as a self-contained flat to cease while allowing the extension that enables it to remain. The Council clearly seeks to attack the later ground floor extension, which enables the use of the ground floor flats, so it would be a contradiction within the notice not to treat the rear dormer in the same way.

26. Overall, I am not satisfied that the defects in the notice could be remedied through my powers of correction and variation since I would be making assumptions about the Council’s intentions, and potentially making the notice more onerous, which would cause injustice to all parties. The Council acknowledges the notice could be improved. It may use the ‘second bite’ provision under section 171B(4) to re-issue the notice correctly, should it be considered expedient to do so in the light of the evidence now available.

Conclusion

27. For the reasons given above I conclude that the enforcement notice does not specify with sufficient accuracy the alleged breach of planning control and the steps required for compliance. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances the appeal under grounds (b), (c), (d) (e), and (f) as set out in section 174(2) of the 1990 Act as amended do not fall to be considered.

Formal Decision

28. The enforcement notice is quashed.

Debbie Moore

Inspector