



Appeal Decision

Inquiry Held on 1 February 2021

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26th February 2021

Appeal Ref: APP/A5270/C/19/3228814

8 St Georges Avenue, Southall, Middlesex UB1 1PZ

- 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 Jayvir Walia against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice was issued on 8 April 2019.
- The breach of planning control as alleged in the notice is Without Planning Permission: Material Change of Use of outbuilding to use as a separate self-contained residential dwelling.
- The requirements of the notice are 1. Cease the use of the outbuilding as a separate self-contained residential dwelling; 2. Remove the kitchen and drainage connections which facilitate the use of the outbuilding a separate self-contained residential dwelling; 3. Remove 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)(c) and (d) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a correction.

Preliminary Matters

1. The Council conceded at the beginning of the Inquiry, that it had given notice of the event marginally in breach of the two-week notification period that had been stipulated in accordance with the enforcement inquiry regulations. However both parties accepted that they would not have been prejudiced by this situation. I have no reason to take a different view.
2. The parties also agreed that there was no need for me to visit the site, as it was accepted that the outbuilding is currently in use as a separate self-contained residential dwelling and that my decision would turn on the evidence provided.
3. Within the second requirement of paragraph 5 of the notice, the word "as" is missing immediately following the word "outbuilding". I am satisfied that the notice can be corrected accordingly without resulting in injustice.
4. All evidence given to the Inquiry was taken on oath.

Reasons

The appeal on ground (c)

5. The appeal on ground (c) is that the matter alleged does not constitute a breach of planning control.
6. The meaning of development is set out in s55(1) of the Act and includes the material change in the use of any buildings or other land. As set out above it is undisputed that the outbuilding is currently in use as a self-contained dwelling. The use of the outbuilding as an independent dwelling results in such a material change in the use of the building. As such the development would have required planning permission.
7. The appellant's case is that a lawful development certificate (LDC) was granted in relation to the use of the outbuilding, such that it does not require planning permission.
8. The relevant date for considering the question of the breach of planning control is the date on which the enforcement notice was issued.
9. The date of the LDC was 28 August 2019, and as such it was not in place at the time when the enforcement notice was issued. Besides this, it is common ground between the parties that the said LDC has now been revoked by the Council, the date of revocation being 4 August 2020. The appellant has not therefore provided evidence to demonstrate that there has not been a breach of planning control. The ground (c) appeal fails.

The appeal on ground (d)

10. The ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. In order to succeed on this ground it would be necessary for the appellant to show, on the balance of probability, that the use of the outbuilding as a dwelling had commenced at least 4 years before the notice was issued, that is by 8 April 2015, and had continued in such use over a four year period. It must be shown that there has not been any significant interruption in the use, in order to demonstrate the necessary continuity.
11. In support of the appeal the appellant has submitted various evidence, including copies of tenancy agreements; a notice of alteration to the Council tax valuation list; signed and witnessed statements; gas bills and wage slips purportedly relating to various residents of No 8. Also before the Inquiry, were documents undisputed to comprise the aforementioned LDC application, and submitted as part of the Council's proof of evidence. These documents included further tenancy agreements and gas bills, as well as an affidavit purportedly signed by a resident of the outbuilding.
12. The appellant's position, as set out at the Inquiry, is that the outbuilding has been occupied by the same two residents, Mr Jose Mergulhao and his wife, Mrs Rosaria Fernandes, since July 2013. On the face of it, this is supported by a signed and witnessed statement, purportedly provided by Mr Murgulhao¹. However although this statement has been signed by a witness it does not constitute a sworn statement. Accordingly there would be no risk to the statement provider of facing a penalty, should it later come to light that they

¹ Dated 3 August 2020.

- were giving untruthful information. This alone serves to limit the weight that I give to this document.
13. However, significantly, this statement appears to be contradicted by the aforementioned affidavit, submitted as part of the appellant's own documentation in support of his LDC application. That document, allegedly signed by a Mr Shaun Fernandez in May 2019, sets out that he had occupied the outbuilding with his wife, Asha, since January 2015.
 14. When asked, at the Inquiry, about this contradiction in the evidence, the appellant's explanation was that he knew nothing about the aforementioned affidavit, but speculated it had been provided by a family relative who was responsible for having pulled together the supporting evidence for the LDC. He went on to say that despite the LDC application having been submitted in his name, such that he is identified by name, address and contact details as the applicant, he had no part in the submission of that application. In this context the appellant referred, during the Inquiry proceedings, to strained family relations as a result of an ongoing feud.
 15. However, frankly, I am not persuaded that the appellant was somehow oblivious to the making of the LDC application. Furthermore, despite the appellant's father indicating that Shaun Fernandez and Jose Mergulhao were one and the same person, such that his name had been changed in connection with obtaining a British passport, I did not hear any evidence put to me which would clearly and satisfactorily explain the apparent contradiction between the identities of these residents and their differing period of occupation of the outbuilding, as set out within the respective witnessed statement and affidavit.
 16. It would be highly unusual for an individual to be known by two completely different names, and even if this is the case here then it would be entirely reasonable to expect documentary evidence to be provided linking the names with the said individual. No such evidence has been provided and their contradictory nature leads me to attach very little weight to the credibility of both the affidavit and witnessed statement documents.
 17. It was conceded at the Inquiry that an explanation previously given by the appellant to the Council², that Asha and Shaun Fernandez were actually the children of Jose and Rosaria was also incorrect. This only serves to add to the confusion as to the true identities of the tenants.
 18. Furthermore, the witnessed statement of Mr Mergulhao contains within it the admission that he was previously forced to give false information, to visiting Council officers, about the period of his occupancy³. I concur with the Council's view that given this person was seemingly prepared to lie in support of his landlord, then the credibility of his purported witnessed statement is further undermined.
 19. The ambiguity, however, is still further compounded by subsequent email correspondence from the appellant confirming that the outbuilding was only occupied since January 2019⁴. This also serves to contradict the witnessed

² See letter dated 22 July 2020 (Council POE p.129).

³ This would appear to relate to a previous Council visit to the property, under warrant, when the outbuilding was found to be occupied. A contemporaneous email referring to the visit confirms that the Council were told by the tenants then that they had lived in the outbuilding for a few months (Council POE p.26).

⁴ See appellant's email dated 13 February 2019 (Council POE p.106).

statement of Mr Mergulhao, referred to earlier, in relation to which a persuasive explanation was not provided at the Inquiry.

20. The gas bills provided relate to various intermittent periods from early 2015. The bills are either in the name of Mr S Fernandez at 'The Outbuilding 8A' or Rosaria Fernandes at '8b', with both occupiers having separate customer numbers.
21. Irrespective of the identity of the occupier, it seems to me that the information provided does at least demonstrate that the outbuilding has been occupied and used for residential purposes, to some degree, since at least January 2015⁵. However there are significant gaps between each of the periods covered by the bills thereafter, in one case by up to almost a year, to the extent that the documents in themselves do not demonstrate continued residential use over the key immunity period.
22. Two further witnessed statements, provided by tenants of the main dwelling, state that Jose Mergulhao and 'Rosaire Fernandez' have lived in the outbuilding since at least 2014. However the statements are phrased such that it is ambiguous as to whether that residential use has been continuous. Neither do these documents constitute sworn statements, such that there would be no risk to these individuals of any sanctions, should it later come to light that they were giving untruthful information. This therefore limits the weight I am able to give to the statements, in any event.
23. With regard to the copies of wage slips, provisional driving licence and banking correspondence provided, these reveal the address of a Mr Mergulhao as No 8 St Georges Avenue. However it is not clear, from this, that Mr Mergulhao was the occupier of the outbuilding specifically, or that he was the occupier for any continuous period. Similarly the electoral roll information, provided by the Council, appears to identify Jose Mergulhao and Rosaria Fernandes as registered at No 8 St Georges Avenue between 2015 and 2018, but not specifically the outbuilding.
24. Turning to the tenancy agreements, documents for consecutive years ranging from 1 January 2015 to 1 January 2020 were provided in support of the LDC application. On each of these documents the tenants of the outbuilding are named as Mr S and Mrs A Fernandez, and appear to be signed accordingly. However, as set out earlier, this is contradicted by the witnessed statement of Mr Mergulhao. Furthermore, it is not sufficient for the appellant to claim that reference to 'Shaun' and 'Asha' was simply a matter of mistaken identity, when the tenancy agreements in question have purportedly been signed by those very individuals, and certainly not by Mr Mergulhao, if it is accepted that his signature can be distinguished by his witnessed statement.
25. In addition, different versions of the tenancy agreement for the period 1 January 2019 – 2020 have been provided by the appellant in relation to this appeal and the LDC application respectively. These documents, purportedly both signed on the same day, vary in terms of the detail of the names and address, with what also appears to be a handwritten amendment on one of the agreements to clarify bill responsibilities. The reason for there being two distinct versions of the same document, but with only very minor differences between them, is not satisfactorily explained.

⁵ See in particular British Gas new account letter dated 24 January 2015 (Council POE p.91)

26. Drawing the above considerations together inevitably leads me to be sceptical as to the veracity of these tenancy agreement documents. I therefore accord these documents very limited weight in support of the appeal.
27. With regard to the Council's evidence, it refers to four visits that were undertaken to the property by various Council departments in 2014, 2016, 2018 and 2019.
28. The February 2014 visit found the outbuilding to be unoccupied and in use ancillary to the main dwelling. A note of the May 2016 visit also recorded that the building was unoccupied. Photographs taken during that visit do show typical household items and equipment to be present, such as juice bottles, cups and a kettle in the kitchen area and a towel and cleaning liquids in the bathroom. On the other hand they reveal a significant number of miscellaneous items being stored. It seems to me, from this evidence, that the circumstances of the outbuilding are ambiguous at this time, as to whether an independent residential use is taking place, or simply the storage of items associated with the main dwelling. However, I cannot go so far as to conclude that the photographs show it is more likely than not that there is independent residential use of the outbuilding at that time. The explanation given by the appellant that the timing of the Council visits coincided with periods of holiday being taken by the tenants is unsupported by evidence.
29. The June 2018 investigation was undertaken by the Council tax division. A contemporaneous note detailing the findings of the visit was provided⁶. Notably this refers to the storage within the kitchen of bedding and furniture, and within one of the other rooms of beds and furniture. I have no reason to doubt the authenticity of this note, the aforementioned findings of which strongly indicate the primary use of the outbuilding at that time to be storage rather than independent residential. Furthermore, the same note identifies occupiers present in the main dwelling, and as such appears to contradict the appellant's explanation that the outbuilding tenants were being temporarily accommodated within the loft space at this time, to allow for renovation.
30. It appears that the February 2019 visit, which progressed following a warrant, revealed the outbuilding to be occupied. A contemporaneous email indicates, that the tenants, "Jyse Mergulah" and "Rosetta Fernandes", purportedly told Council officers that they had only lived in the outbuilding for a few months⁷. This is consistent with the appellant's statement referred to earlier (see paragraph 19 above). I have already set out above that the contradictory information regarding the identity of tenants and duration of their occupation leads to a highly ambiguous picture.
31. Therefore notwithstanding that the appellant has failed to demonstrate the continuous independent residential use of the outbuilding, it seems to me that from its findings during the 2016 and 2018 site visits, the Council could not reasonably have concluded that independent residential use was taking place at these times in any event. I am therefore persuaded, on the balance of probability, that the Council could not have taken enforcement action against the use of the outbuilding as a dwellinghouse at these times, even if it could have been so used with little modification, because it was not actually occupied or used as a separate dwelling at these times.

⁶ See from Council POE p.42

⁷ See Council POE p.26

32. The effect of this is that any subsequent independent residential use of the outbuilding, following the cessation of a previous period of independent residential use, would have represented a new chapter in its planning history, at which time the 'four-year clock' would be restarted.
33. For the above reasons, and having taken into account all written information submitted and that provided orally at the Inquiry, the appellant's evidence falls some way short of being precise and unambiguous and is contradicted by evidence gathered by the Council during respective visits. Accordingly, I am unable to conclude, on the balance of probability, that the change of use is immune from enforcement due to the passage of time. The ground (d) appeal therefore fails.

Conclusion

34. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction.

Formal Decision

35. It is directed that the enforcement notice be corrected by the insertion of the word "as" immediately following the word "outbuilding" within the second requirement of paragraph 5 of the notice. Subject to this correction the appeal is dismissed and the enforcement notice is upheld.

Roy Merrett

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Jayvir Walia – Appellant

Mr Jagdeep Walia – Appellant’s father

Mrs Rosaria Fernandes – Tenant

FOR THE LOCAL PLANNING AUTHORITY:

Roderick Morton – Ivy Legal Limited