



Appeal Decision

Hearing held on 9 June 2021

Site visit made on 10 June 2021

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 July 2021

Appeal Ref: APP/M5450/C/19/3239613

Land at 51 Curzon Avenue, Stanmore HA7 2AL

- 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 R Irabor against an enforcement notice issued by the Council of the London Borough of Harrow.
 - The enforcement notice was issued on 12 September 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission: the material change of use of the detached outbuilding to use as a guest rental unit ("the Unauthorised Use").
 - The requirements of the notice are:
 1. Cease the Unauthorised Use
 2. Remove bathroom / shower facilities from the outbuilding
 3. Remove internal partition walls and doors that facilitate the unauthorised use
 4. Remove from the Land all material and debris arising from compliance with the above requirements
 - The period for compliance with the requirements is: 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

Application for Costs

2. At the Hearing an application for costs was made by Mr R Irabor against the Council of the London Borough of Harrow. This application is the subject of a separate decision.

Preliminary Matters

3. I have recently dealt with another appeal¹, lodged by the appellant's brother, on a neighbouring site, concerning an enforcement notice drafted in identical terms. This is the subject of a separate decision.

¹ APP/M5450/C/19/3238654

The Notice

4. The appellant considers the breach of planning control alleged in the notice lacks precision and is not a 'use'. Also, that there is no 'unit' in the sense of 'planning unit' as per *Burdle*² and that if that is what is meant, it is unclear. But an enforcement notice need not be directed at a whole planning unit or identify it, and, taking into account the provisions of section 173 of the 1990 Act and The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002, I am satisfied that the allegation is clear and that the notice contains all that is necessary to satisfy the above statutory requirements.

Reasons

Ground (b)

5. An appeal on ground (b) is that the matters stated in the notice have not occurred, as a matter of fact. The onus in a ground (b) appeal is on the appellant to make out their case and the standard of proof is the balance of probabilities.
6. On the appellant's own evidence, stated at the Hearing and in the written material provided, there has been use of the outbuilding by paying guests. The materiality of any change to that use is a matter for the ground (c) appeal, below. So the matter stated in the notice has occurred as a matter of fact and the appeal on ground (b) fails.

Ground (c)

7. An appeal on ground (c) is that the matters stated in the notice do not constitute a breach of planning control. This may be because what is alleged in the notice is not "development", as defined by section 55 of the 1990 Act, or because planning permission exists for what is alleged in the notice, granted by, for example, a development order³ or by the local planning authority following receipt of an application for planning permission.
8. In an appeal on ground (c), the onus is on the appellant to make out their case and the standard of proof is the balance of probabilities. The appellant's evidence should not be rejected simply because it is not corroborated. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted.
9. In summary, section 55 of the 1990 Act states that "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any **material** change in the use of any buildings or other land, (my emphasis).
10. The appellant's ground (c) case is that the use alleged is not a material change of use and remains ancillary to the main dwelling. There is no statutory definition of what constitutes a material change of use. Whether there has been a material change of use in terms of section 55 depends upon whether there has been a change in the character of the use of the land from what has gone on previously, as a matter of fact and degree.

² *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

³ Such as The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO)

11. The appeal site contains a 4 bedroom semi-detached dwellinghouse. Its rear garden contains an outbuilding sited close to the rear of the dwellinghouse. The outbuilding may be accessed via a driveway to the side of the dwellinghouse, or through the dwellinghouse via an external door from the kitchen in the rear part of the dwellinghouse.
12. The outbuilding contains a room with a shower, toilet and wash-handbasin and 2 other rooms. Photographs provided by the Council show the smaller of these rooms laid out as a double bedroom and the larger room laid out as a living room with a sofa bed. At the time of my site visit, the smaller room contained gym equipment and the larger room was occupied as a bedroom. During the Hearing I heard that the current occupant is the appellant's mother-in-law who was convalescing and I encountered her at my site visit.
13. Whilst the lawful use of the land is not stated in the enforcement notice, there is nothing to indicate that its use as a dwellinghouse is not the lawful primary use of the land and I have determined the appeal on this basis.
14. According to the evidence provided, the outbuilding was constructed prior to October 2011, the Council issued a lawful development certificate (LDC) for use of the outbuilding as 'a non-self-contained granny annexe ancillary to the main dwellinghouse' in June 2018 and advertisement of the outbuilding on Airbnb started in February 2016. The appellant states that the use of the outbuilding is for family and guests and this is reflected in his response to a planning contravention notice served by the Council.
15. At the Hearing I asked how much the outbuilding has been used to host guests and with what turnover. I was referred by the appellant to Table 1 in Appendix E of their witness statement for what I was told was "part" of the answer. This shows that between 5 June 2017 to 20 April 2019 there were 8 bookings, made by 4 different parties. Their lengths of stay comprised 4 bookings for 4 nights, one booking for 14 nights, one booking for 5 nights and 2 consecutive bookings for 6 months each by the same party. This party are said to have been in Hong Kong for 5 months of that period. Emails have been provided from each party as corroboration of their stay.
16. The appellant states the actual non-family guest occupation in the year to 31 August 2020 was just 27 days in 365, ie 8% non-family, and that from the LDC date it has been in family use 70% of the time. In this regard, no evidence to contradict the appellant's version of events has been drawn to my attention and so I have based my understanding of the characterisation of the use on the above data. As such, there is fluctuation in use between paying guests and family members, who use the building as part of the main dwelling.
17. Whilst the outbuilding may have occasionally been rented to persons unrelated to the main dwelling, in practical terms it would seem in this case that this is not materially different to renting out en-suite sleeping accommodation in the main dwelling, and, the use of the outbuilding has remained subsidiary to the primary use of the appeal site as a dwelling.
18. There is no physical separation between the outbuilding and the main dwelling, apart from the lockable external doors on each, which are a few paces apart across the rear garden patio. In terms of a functional connection, no cooking facilities have been provided in the outbuilding. The appellant states that guests have unrestricted access to the kitchen in the main dwelling for cooking,

food preparation and washing and drying clothes and that the outbuilding is only in use when the main dwelling is occupied by his family.

19. The appellant's case is supported by a copy of his advertisement for the outbuilding (included in the Council's evidence) which states that "kitchen, laundry and extra cleaning services are available for certain charges to be discussed and agreed with each guest as and when required." At the Hearing the appellant explained that in practice he does not charge for use of his kitchen, but that this is stated in the advertisement to ensure respect of his home by guests.
20. The appellant's case is further supported by the aforementioned emails and a review by a guest (included in the Council's evidence) which states that there is "a kitchen to prepare your own meals". Based on the evidence available, the kitchen referred to can only be that which I saw in the main dwelling. So taking into account the above points, I am satisfied there is a physical and functional connection between the use of the outbuilding and the main dwelling. For this reason, I consider the planning unit to be the whole appeal site, rather than just the outbuilding, and that in this case the use of the outbuilding by paying guests, hosted by the appellant and his family, to the degree described, is ancillary to the overall site's main use as a dwellinghouse, ie it is in addition to but not as important as the main use.
21. Nevertheless, the appellant states: "The outbuilding still did not contain any cooking facilities as at the notice date. Accordingly, it was not a self-contained dwelling (ie planning unit)." But it is not right to say that the outbuilding cannot be a separate planning unit because it does not have any cooking facilities, as this is a test more appropriate for considering whether the outbuilding is a dwellinghouse or not, and a dwellinghouse is not what is alleged by the notice.
22. According to the evidence provided, facilities within the outbuilding have included a fridge/freezer, disposable plates, a kettle, cutlery and cups. In addition, the outbuilding may be accessed independently of the main dwelling. So the Council is concerned that these factors mean the outbuilding may be independently occupied, with no access to the main dwelling, and with pre-cooked food (including takeaways) consumed within the outbuilding.
23. I accept some guests may have occupied the outbuilding in this way (as is reflected in correspondence from a previous occupant). But this is not determinative in deciding whether a separate planning unit has been formed and a material change of use has occurred, particularly in light of the aforementioned physical and functional connections that exist between the main dwelling and the outbuilding.
24. The Council considers that reviews of the outbuilding do not support it having a functional connection with the main dwelling. In particular, my attention has been drawn to a review which says there are no cooking facilities and a review which describes the outbuilding as a 'flat'. But these comments must be viewed in context. Their true meanings are unclear and they were written by guests for Airbnb purposes. So they do not necessarily give a complete picture of the use of the site, which has been explained in the appellant's written and oral evidence.

25. In terms of specific changes in the character of the use of the land, the Council points to the timing and frequency of arrivals and departures by guests, noise and disturbance resulting from this and a lower level of respect and consideration for neighbours by guests. But there is no specific evidence of these effects. Moreover, in my judgement, such effects would be significantly modified by the close proximity of the outbuilding to the main dwelling and guests' reliance on the main dwelling for at least some facilities.
26. In other words, inconsiderate behaviour by guests would directly affect the appellant and his family as hosts, as well as any neighbours, meaning inconsiderate behaviour is not likely in this case and there is no evidence to suggest otherwise. So from the information available, I am satisfied that the character of the use of the land is not significantly different to what has gone on previously, as a matter of fact and degree.
27. My attention has been drawn to DCP⁴ online which states that the creation of an annex would be unlikely to require permission provided the building was occupied by a family member. But this is a guide only. Such sources can only provide general advice and cannot account for the specific facts and circumstances of every case.
28. My attention has also been drawn to the GDPO technical guidance and its comments relating to Class E of the GPDO. But Class E and the associated commentary in the technical guidance relate to the provision of a building within the curtilage of a dwellinghouse, they do not relate to such a building's subsequent use, as is the case here.
29. The officer report for the aforementioned LDC clearly acknowledged that the outbuilding has been rented out on Airbnb. So this element of the use was taken into account by the Council when it granted the LDC. Section 191(6) of the 1990 Act states that the lawfulness of any use for which a certificate is in force under this section shall be conclusively presumed. There is no evidence the use of the outbuilding has materially changed since the LDC was granted and the LDC has not been revoked. So my finding that the use of the outbuilding is ancillary to the overall site's main use as a dwellinghouse is consistent with the LDC.
30. My attention has been drawn to an appeal decision⁵ for 12 Felbridge Avenue. The Council has indicated that the enforcement notice before me was issued as a result of the receipt of that appeal decision for No 12. In particular, of the decision at No 12, the Council says: "...this decision makes it clear that the use of an outbuilding for short term letting is not permitted development and requires planning permission." But this is not what is said in that appeal decision for No 12 and so it does not change my conclusion in this case.
31. Based on all the evidence submitted (and heard at the Hearing), which is sufficiently precise and unambiguous, I conclude on the balance of probabilities that the change of use which has occurred is not a material change of use and so is not "development" for the purposes of section 55 of the 1990 Act. So the matter stated in the notice does not constitute a breach of planning control.
32. However, if the level of usage of the outbuilding by persons unrelated to the main household were to increase or intensify, or if the functional and/or

⁴ Development Control Practice

⁵ APP/M5450/X/18/3210523 dated 8 August 2019

physical links between the main dwelling and outbuilding were other than has been stated by the appellant, the situation may be different. Accordingly, it would remain open to the Council to take further action, under section 172 of the 1990 Act, if it were expedient to do so, having regard to the provisions of the development plan and to any other material considerations.

Conclusion

33. For the reasons given above, I conclude that the appeal should succeed on ground (c). The enforcement notice will be quashed. In these circumstances, the appeals on grounds (a), (f) and (g) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act do not fall to be considered.

L Perkins

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Raymond Irabor	Appellant
Mr Nicholas Kingsley-Smith	Kingsley Smith Solicitors LLP

FOR THE LOCAL PLANNING AUTHORITY:

Mr Mark Olding	Senior Planning Enforcement Officer
Mr Muhammad Sheikh	Planning Enforcement Officer