The Planning Inspectorate

Appeal Decision

Site visit made on 9 June 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 August 2021

Appeal Ref: APP/T5150/C/19/3243710
Land at 49 Lyon Park Avenue, Wembley HA0 4DX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Hetal Ajay Jansali against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice, numbered E/19/0455, was issued on 21 November 2019.
- 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:

  STEP 1 Cease the use of the land for separate residential use.

  STEP 2 Remove from the outbuildings currently on the land the KITCHEN and all associated drainage connections which facilitate the use of the land for separate residential use.

  STEP3 Remove from the outbuildings currently on the land the BATHROOM and all associated drainage connections which facilitate the use of the land for separate residential use.

  STEP 4 Demolish and remove from the land the outbuildings currently on the land.

  STEP 5 Remove from the land all resultant debris.

  STEP 6 Restore the land to the condition it was in before the unauthorised change of use took place.

- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: the appeal is dismissed and the enforcement notice is upheld with variations.

Application for costs

1. An application for costs was made by Mr Hetal Ajay Jansali against Council of the London Borough of Brent. This application is the subject of a separate Decision.

The enforcement notice

2. The notice alleges, without planning permission, the material change of use of the land to the rear of the premises to separate residential use. Although not defined as such in the notice itself or shown on the plan attached to the notice, it is apparent from the requirements of the notice that it is directed at the outbuilding at the rear of the main house. The appellant has clearly understood that to be the case and has prepared his case accordingly. Consequently, although the notice could have been more precisely worded in that regard, it is not necessary for me to correct and/or vary the notice.

The appeal on ground (b)

3. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters have not occurred. An appeal is this ground is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice have not occurred.

4. At the time of my site visit, the accommodation provided by the outbuilding comprised a gym; a toilet/shower; a room that was being used for general storage; a children's play area and an area that was used for the storage of various foodstuffs. That is consistent with the appellant's evidence that the outbuilding was constructed and used as a gym/playroom. It is also consistent with the appellant's evidence that the bathroom supports the gym, and the extra storage space supports private gatherings and ceremonies prepared and enjoyed by the occupants of the main house.

5. The situation at the time of my site visit is not, however, the same as that described in the appellant's response to the Planning Contravention Notice (PCN) dated 18 September 2019. In his response to the PCN, the appellant provides a floorplan of the outbuilding. In addition to a gym, that floorplan shows a kitchen, a bathroom and two 'bedspaces'. The appellant maintains in his response to the PCN that the use of the outbuilding is used for storage and uses ancillary to the main dwelling, and that the kitchen is also used for the preparation of food for religious functions.

6. The situation at the time of my site visit was also significantly different to that shown in photographs taken by a Council officer during a site visit on 23 August 2019. Those photographs show a fully functioning kitchen, including a hob with an extractor hood above, a microwave oven, a sink, preparation space and cupboards. There is evidence of the kitchen being used: there is washing up in the drainer beside the sink, and various foodstuffs on the preparation surfaces.

7. The photographs also show a living room, within which are sofas and a coffee table. There is again evidence to suggest that the space is being used: a laptop, a mobile phone, a handbag and what appears to be some currency all lying on the sofas. The photographs also show two separate bedrooms, both with beds and wardrobes. Again, there is evidence that the bedrooms are in use, with clothes on the bed and personal effects on a side table. Similarly, it is obvious from the Council's photographs that the bathroom has been recently used: there is water on the glass of the shower screen, and toiletries on the wash basin. Photographs of the outside of the building show washing hanging out to dry, and a set of keys in the lock to the front door.

8. In its evidence, the Council explain that when the case officer visited the appeal premises on 23 August 2019, they witnessed the occupants of the outbuilding cooking using the stove within the outbuilding itself, using food products which were stored within the kitchen. The case officer also noted that they had to wait for one of the occupants to finish showering in order to allow the case officer to view and take photos of the bathroom area.

9. It is evident from the photographs taken by the Council that, in August 2019, the outbuilding contained all the facilities required for day-to-day living. It is also evident that the outbuilding was occupied at that time. The appellant does not dispute the people were occupying the outbuilding at the time the Council's photographs were taken, but explains that the people present at that time were there solely because had attended a religious gathering held a few days previously and were there only temporarily. This is consistent with his response to the PCN.

10. The difficulty I have with the explanation provided by the appellant is that the day-to-day facilities present in the outbuilding are evidently not temporary fixtures. The kitchen is clearly a permanent fixture, as is the bathroom. The sofas, beds and wardrobes are substantial pieces of furniture, and are effectively permanent. There are several other domestic items present, such as the coffee tables present in at least two of the rooms.

11. The obvious corollary of the appellant's explanation is that the outbuilding is not used for residential purposes other than for a few days either side religious gatherings. I can accept that the bathroom is primarily intended to support the use of the gym. But I have great difficulty in reconciling the occasional occupation of the outbuilding following various religious events with the provision of a fully equipped kitchen, a furnished living area and two furnished bedrooms.

12. The appellant has also provided a set of photographs that show the inside of the outbuilding. The coverage is far from being comprehensive. Such views that are shown are tightly framed and are somewhat limited. As far as I can tell from these photographs, the situation is similar to that at the time of my site visit, with some evidence that the kitchen is being used for the preparation of food for religious ceremonies and the other rooms are being used for storage. The difficulty is that, unlike the photographs produced by the Council, the photographs are not dated. As such, they are of very limited evidential value. Furthermore, these photographs cannot counter the photographic evidence of the Council which, being dated and with the added benefit of commentary from the officer who took the photographs, are unequivocal in terms of what they show.

13. The appellant has also provided a number of letters from local residents which, amongst other things, confirm that the outbuilding has been used to host and/or provide catering for various religious ceremonies, community events and family gatherings held in the main house. I have no reason to dispute the information that they contain. Nevertheless, nothing in those letters counters the evidence shown in the Council's photographs taken on 23 August 2019. Those photographs show a well-equipped, furnished and self-contained outbuilding that provides all the facilities required for day-to-day living. The occasional use of the outbuilding in connection with various events hosted at the main dwelling does not change that.

14. The ground of appeal is expressed in the past tense: that the matters stated in the notice have not *occurred* (emphasis added). It is therefore of no relevance that the situation was different when I visited the property some 1½ years after the notice was issued. On the basis of the photographs provided by the Council, I am satisfied on the balance of probability that the outbuilding was being used for residential purposes separate from the main dwelling on or before the date on which the notice was issued. The matters stated in the notice have occurred.

15. Accordingly, the appeal on ground (b) fails.

The appeal on ground (c)

16. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. An appeal is this ground is also one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.

17. The breach of planning control alleged in the notice is the material change of use of the land to the rear of the premises to separate residential use. The notice does not allege the carrying out of any building operations in terms of the erection of the outbuilding.

18. The meaning of development for the purposes of the 1990 Act is defined at Section 55(1) of that Act as meaning:

    …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 building or other land.

19. The outbuilding for which the Certificate of Lawfulness (LDC) was granted in July 2014 (Council Ref: 14/1421) was found to be lawful on the basis that complied with the conditions and limitations set out Classes A,D and E, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). Class E of the GPDO permits the erection of a building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such.

20. The use of the land (outbuilding) to the rear of the premises as a separate residential use is not incidental to the enjoyment of the main dwellinghouse as such. As a matter of fact and degree, in terms of the level of activity associated with it, that use is significantly different in character to the use of the land (outbuilding) for purposes incidental to the enjoyment of the dwellinghouse as such. Consequently, a material change in the use of the land (outbuilding) has occurred. That material change of use of the land constitutes development for the purposes of Section 55(1) of the 1990 Act.

21. Section 57 of the 1990 Act states that planning permission is required for the development of land. No planning permission is in place for the development that has occurred. I therefore conclude that, on the balance of probability, the matters alleged in the notice do constitute a breach of planning control.

22. Accordingly, the appeal on ground (c) fails.

The appeal on ground (d)

23. The appeal on this ground is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters.

24. The time limits for taking enforcement action are set out in section 171B of the 1990 Act. These may be summarised as

    1): where there has been a breach of planning control consisting of operational development, no enforcement action may be taken after the end of the period of four years beginning with the date on which operations are substantially completed.

    (2): in respect of the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

    (3): in respect of any other breach of planning control no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

25. The breach of planning control alleged in the notice is the material change of use of the *land* to the rear of the premises to separate residential use (emphasis added). The notice does not allege a breach of planning control consisting of operational development (i.e the erection of the outbuilding). Neither does the notice allege the change of use of any building (i.e the outbuilding) to use as a single dwellinghouse. The notice specifically alleges a material change in the use of land. The breach of planning control alleged therefore constitutes 'any other breach of planning control' as set out in section 171(B)(3) of the 1990 Act.

26. Consequently, in order to succeed on this ground, the appellant must show that the use had been continuous for a period of ten years beginning with the date of the breach. The relevant date is therefore 21 November 2009. The test in this regard is the balance of probability and the burden of proof is on the appellant.

27. The Council's case is that the outbuilding erected to the rear of the premises was built with the intention to create a separate residential unit, containing all facilities required for day-to-day living from the outset. The appellant has provided no evidence to the contrary. It follows that the erection of the outbuilding facilitated the breach of planning control. In his response to the PCN, the appellant indicates that the outbuilding was completed in April 2015. It is therefore not possible for the breach of planning control alleged to have commenced more than 10 years prior to the issue of the notice.

28. The appellant indicates in his response to the PCN, and maintains in his evidence, that the outbuilding is and always has been used for purposes ancillary to the main dwelling. Indeed, the appellant maintains that the use of the building has not changed since the LDC was granted and the outbuilding completed, a position that he is not able to substantiate through evidence. It is no part of the appellant's case that there was a specific point in time when the use of the outbuilding changed from a purpose incidental to the enjoyment of the dwellinghouse as such to a separate residential use. For that reason, there is no reason to believe that the breach of planning control should more

properly be considered as a change of use of a building to use as a single dwellinghouse under section 171(B)(2) of the 1990 Act, in relation to which a lesser period of four years beginning with the date of the breach applies.

29. On the evidence before me, I am satisfied that, on the balance of probability, that the Council was in a position to take enforcement action on the date on which the notice was issue.

30. Accordingly, the appeal on ground (d) fails.

The appeal on ground (a) and the deemed planning application

31. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted.

32. The reasons for issuing the notice conflate the material change of use alleged in the notice with the physical presence of the outbuilding. The erection of the outbuilding forms no part of the breach of planning control alleged in the notice. I have therefore had no regard to the physical impacts of the outbuilding, in terms of its size, height and proximity to the boundaries with adjoining properties, or the standard of accommodation that it provides. I will therefore focus my considerations on the effect of the material change in use of the land.

33. With that in mind, the Council has stated two substantive reasons for issuing the enforcement notice[1], from which the main issues raised are:

- The effect on the character and amenity of the area
- The effect on the living conditions of the occupiers of surrounding residential properties, specifically in relation to noise disturbance and the availability of parking spaces

Character and amenity of the area

34. The appeal property is a semi-detached house located on the north side of Lyon Park Avenue. The properties on this side of Lyon Park Avenue typically have generous rear gardens. There are examples of outbuildings in some of these gardens, some of which are substantial structures. However, there is no evidence to suggest that these outbuildings are being used as separate residential units.

35. The character of this area is therefore one semi-detached houses fronting the road with private gardens to the rear associated with the host property. The levels of activity, including vehicular movements and use of the rear gardens, is commensurate with the residential use of a single host property. The material change of use alleged in the notice introduces a level of activity different to and greater than that which might be reasonably be expected with a single dwelling on the land. This is both out of keeping with and harmful to the character of the area.

36. I conclude that the breach of planning control unacceptably harms the character of the area. I therefore conclude that the development is contrary to

[1] The reason relating effect on the living conditions of the occupiers of surrounding residential properties is repeated verbatim on the notice.

Policy CP17 of the Brent Core Strategy 2010 (Core Strategy), as well as Policy DMP1 of the London Borough of Brent Development Management Policies Document 2016 (Development Management Policies). These policies indicate, amongst other things, that the distinctive suburban character of Brent will be protected from inappropriate development and that development will be permitted provided that it complements the locality.

37. The Council also cites Policy DMP18 of the adopted London Borough of Brent Development Management Policies Document in the reasons for issuing the enforcement notice. This policy indicates that planning permission will only be granted for outbuildings that will not be residential accommodation or do not support the increased occupation of a dwelling. On my reading, this policy therefore relates to the erection of new outbuildings. The breach of planning control alleged in the notice is a material change of use of the land. The notice does not allege the erection of an outbuilding. I therefore consider that Policy DMP18 is not directly relevant in this case.

Living conditions

38. The increase in activity resulting from the material change of use results in an attendant increase in noise and general disturbance at the rear of the host property, as well as from the use of the alleyway which provides access to the land to the rear of that property. The resultant noise and disturbance would be experienced in rooms in the rear elevations of the neighbouring properties as well as the rear gardens of those properties, and therefore in areas where the occupiers of the surrounding residential properties could reasonably expect to enjoy relative peace and quiet. This would unacceptably detract from the living conditions enjoyed by the occupiers of those properties.

39. I accept that the use of the land as a separate residential unit generates an attendant requirement for additional parking spaces. However, I have no evidence to show that there is a shortage of parking spaces in Lyon Park Avenue or that any shortage of parking spaces would cause inconvenience to the occupiers of surrounding residential properties. I therefore have no reason to conclude that the breach of planning control alleged in the notice detracts from the living conditions of the occupiers of surrounding residential properties in that respect.

40. I conclude that the breach of planning control unacceptably harms the living conditions of the occupiers of surrounding residential properties, specifically in relation to noise and disturbance. I therefore conclude that the development is contrary to Policy DMP1 of the Development Management Policies which, amongst other things, states that development will be permitted provided that it does not unacceptably increase exposure to noise and general disturbance.

Conclusion on ground (a) and the deemed planning application

41. For the reasons set out above, the breach of planning control alleged in the notice is contrary to the development plan. I have not been advised of any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan.

42. Accordingly, I conclude that planning permission ought not be granted for the matters stated in the notice.

The appeal on ground (f)

43. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach. In this case, STEP 1 of the requirements of the notice is to cease the use of the land for separate residential purposes. The purpose of the notice must therefore be to remedy the breach.

44. The breach of planning control alleged in the notice is the material change of use of the land to the rear of the premises to separate residential use. The requirement set out in STEP 1 of the notice, namely to cease the use of the land for separate residential purposes, would be necessary to achieve the purpose of the notice.

45. It is convenient to consider STEP 4 next. This step requires the demolition of the outbuilding. I recognise that the outbuilding facilitates the use of the land for separate residential purposes. It is settled case law that where an enforcement is issued in respect of a material change of use, and works were carried out to facilitate that material change of use, the enforcement notice *may* require that the works are removed in order that the site is restored to its previous condition and the breach is thereby remedied.

46. In granting the LDC for the outbuilding (Council Ref: 14/1421), the Council accepted that the outbuilding could be lawfully used for a purpose incidental to the enjoyment of the dwellinghouse as such. Although I have found that the outbuilding was used as a separate residential unit from the outset, there is no reason why the appellant could not now use the outbuilding for purposes incidental to the enjoyment of the main dwelling as contemplated in the LDC. The complete demolition of the outbuilding would be not be required to achieve the purpose of the notice, and the outbuilding could still serve a useful purpose. STEP 4 is therefore excessive, and I shall vary the notice to delete that step. It follows that STEP 5 and STEP 6 then become otiose. I shall vary the notice to delete these steps as well.

47. This leaves STEPS 2 and 3 to be considered. These steps require, respectively, the removal of the kitchen and the removal of the bathroom. Both are facilities required for day-to-day living. I can accept that a bathroom might reasonably be required in connection with a gym, a purpose incidental to the enjoyment of the dwellinghouse as such. The latter already forms part of the use taking place in the outbuilding and I see no reason why the bathroom should not be retained in association with that. I shall vary the notice by deleting STEP 3 in its entirety

48. However, the same cannot be said for a kitchen, which is generally an integral part of the ordinary residential use as a dwelling house. A fully equipped kitchen, such as that fitted in the outbuilding, cannot be considered as being reasonably required for a purpose incidental to the main dwelling. The removal of the kitchen is essential to achieving the purpose of the notice, and is therefore not excessive. It follows that STEP 2 must remain in place.

49. The appeal on ground (f) succeeds to the extent set out above, but otherwise fails.

The appeal on ground (g)

50. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is six months.

51. The essence of the appellant's case on this ground of appeal is that the appellant would need time to find alternative arrangements for his gym equipment and to rent a place nearby to set up his personal items. Due to the difficulty of finding a suitable place in vicinity of the appellant's home, a period of compliance of 12 months is sought.

52. The appellant's case on this ground of appeal is predicated on the steps required to comply with the notice as originally drafted. Those steps included the demolition of the outbuilding in its entirety. The steps required to comply with the notice, as I propose to vary them, do not now include the demolition of the outbuilding and the attendant steps to restore the land to the condition it was in before the breach of planning control took place. There would be no need for the appellant to make alternative arrangements for his gym equipment or to rent a place nearby to set up his personal items.

53. I see no reason why ceasing the use of the land for separate residential purposes and removing the kitchen could not be accomplished within the six-month period of compliance stated in the notice. I am therefore satisfied that the period of compliance stated in the notice is a proportionate response to the breach of planning control that has taken place.

54. Accordingly, the appeal on ground (g) fails.

Conclusion

55. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decision

56. It is directed that the notice be varied by:

    - In Schedule 4 of the notice, delete STEP 3, STEP 4, STEP 5 and STEP 6 in their entirety.

57. Subject to the variations, the appeal is dismissed and the enforcement notice is upheld.

Paul Freer
INSPECTOR