
Appeal Decisions

by Brian Cook BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 06 January 2022

Appeals A and B: Appeal A: Appeal Ref: APP/C3810/C/20/3249296 and Appeal B: Appeal Ref: APP/C3810/C/20/3249297

Land at 44 Christchurch Crescent, Aldwick, West Sussex PO21 5SJ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr David Kilhams (Appeal A) and Mrs Sandra Kilhams (Appeal B) against an enforcement notice issued by Arun District Council.
 - The enforcement notice was issued on 21 February 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the property that was a single dwellinghouse, to use as two separate dwellinghouses.
 - The requirements of the notice are:
 - i) Remove one of the kitchens; and
 - ii) Return the use of the property to a single dwellinghouse.
 - The period for compliance with the requirements is three months.
 - The appeals are proceeding on the grounds set out in section 174(2)(b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
-

Decisions

Appeals A and B: Appeal A: Appeal Ref: APP/C3810/C/20/3249296 and Appeal B: Appeal Ref: APP/C3810/C/20/3249297

1. The appeals are allowed on ground (f), and it is directed that the enforcement notice be varied: by the deletion of "5.1 Remove one of the kitchens; and 5.2" without substitution in section 5 of the notice "*What you are required to do*". Subject to these variations the enforcement notice is upheld.

Procedural matter

2. The appellants have not sought planning permission for the development carried out. The notice can only be defeated therefore through success on one of the legal grounds of appeal.
3. In appeals on the legal grounds the Planning Practice Guidance confirms that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the appellants' version of events less than probable, there is no good reason to dismiss the appeal, provided the appellants' evidence alone is sufficiently precise and unambiguous to allow the appeals on the balance of probability. That guidance is based on established case law. The burden of proof does however rest on the appellants, not the Council.

4. The appellants' evidence includes three statutory declarations made in accordance with the provisions of the Statutory Declarations Act 1835 and declared before and signed by a Commissioner for Oaths. Each is therefore evidence to which I attach substantial weight.
5. I did, nevertheless, consider whether the evidence should be tested under oath at a public inquiry. However, both parties indicated on the relevant appeal documents that they wished the matter to be dealt with by the written representations procedure. I have therefore done so having already indicated in a note sent by the case officer why a site visit would not be taking place. The appeals have therefore been determined on the written evidence without a site visit.

Appeals A and B: the appeals on ground (e)

6. An appeal on this ground is that the notice was not served as required by s172 of the principal Act. Two points are made.
7. First, it is said that the Council served neither a Planning Contravention Notice nor a Requisition for Information before issuing the notice. There is no requirement to do so in s172 so this is not a point that can lead to success on this ground.
8. Second, the notice was not served on those who the Council claim to be occupying one of the two dwellings created by the material change of use alleged. The Council accepts this. However, the appellants volunteer that those persons are aware of the notice and have not been prejudiced by the Council's omission. The Secretary of State on appeal may disregard the omission in those circumstances (s176(5) of the Act) and I shall do so.
9. The appeals on ground (e) therefore fail.

Appeals A and B: the appeals on ground (b)

10. An appeal on this ground is that the matters alleged as the breach of planning control have not occurred. The use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change of use of the building and each part of it which is so used (s55(3)(a) of the Act). The allegation follows this formula.
11. The appellants refer to caselaw in the context of establishing the correct planning unit. However, both cited cases involve separate buildings in the curtilage of a residential dwelling. In another case¹, the court of appeal decided that where a single dwellinghouse was changed to use as two or more separate dwellinghouses consideration of the planning unit was not necessary in order to determine whether there had been a material change of use. As a matter of law, there had (s55(3)(a)).
12. *Moore*² cited by the Council is a decision of the same court in which *Van Dyke* is referred to. The issue in *Moore* was how the Secretary of State determined whether or not the converted outbuildings were dwellinghouses when applying the relevant part of s171B for the purposes of determining the appeal on ground (d). In short, the Secretary of State accepted the finding of the Inspector that, although the 10 units had all the attributes of self-contained

¹ *Van Dyke v Secretary of State for the Environment* [1993] 1 PLR 124

² *T A J Moore v Secretary of State for the Environment and The New Forest DC* [1998] JPL 877

dwelling, they were not used in the normal sense as independent residential units (they were holiday lets). Together, they therefore comprised one planning unit with the main dwelling and s171B(3) applied rather than s171B(2) when addressing the appeal on ground (d).

13. The court found that analysis to be wrong in law. Whether a self-contained unit of residential accommodation is being used as a single dwellinghouse is a matter of fact and degree judgement. If, following the tests established by *Gravesham*³, it is concluded that it is, it cannot lose that characteristic by the way it is occupied.
14. As I understand the law, for this ground of appeal to succeed, the appellants must show, on the balance of probabilities, that the two parts of the building have not been used as separate, self-contained dwellinghouses. Given the use of the past tense in the construction of ground (b), the position at the date of issue of the notice is not determinative of this ground of appeal. What must be shown is that the breach of planning control has not occurred at all.

The evidence

15. There is no serious disagreement between the parties as to the facts. The main difference is one of perception about the way the building is occupied.
16. When the appellants purchased the appeal property in 2012 it was a modest-sized single-storey dwelling. It was always the intention of the appellants to build a side extension to accommodate them, their son, daughter-in-law and granddaughter within the enlarged building. The building is situated on the inside of a bend in Christchurch Crescent.
17. Planning permission (Ref: AW/250/12) was approved in November 2012 for a side extension (the 2012 permission). The approved drawing shows an extension with a footprint not significantly smaller than the host dwelling. The accommodation included two bedrooms, the larger of which would be en-suite, a study and a dressing room. While there would be an external door to the garden from the main bedroom, there would be a single principal external access to both parts of the extended building with rooms leading off a passageway. The approved plans clearly show a single dwelling, albeit much enlarged. Importantly, there would be only one kitchen following implementation of the permission.
18. This development was never carried out as shown on the approved plans. A kitchen was laid out where the study should have been. This was finished around the autumn of 2014. A loft extension was also installed in 2015 but that is not material to the determination of these appeals. The sworn evidence of the appellants states that ‘...we had closed up the original opening (between the original dwelling and the extension) to provide a cupboard in the original dwelling.’ This took place in 2014.
19. The Council first became aware of a potential breach of planning control at the property in April 2017 when it was alerted to the erection of fencing which was not permitted by a condition on what I take to be the original planning permission for the whole development. Although this issue was resolved, officers noted that the building was being used, in their view, as two separate dwellinghouses.

³ *Gravesham BC v Secretary of State for the Environment* [1982] 47 P&CR 142

20. The sworn evidence of Mr David Kilhams is that he pointed out to the Council officer that the opening between the two parts of the building could easily be reopened as it was only thin plasterboard. In final comments on behalf of the appellants it is confirmed that a door was in fact inserted in 2017 and that this can be seen in photographs supplied by the appellants in evidence.
21. Following discussions between the Council and the appellants, a further planning application was submitted in February 2018 in an attempt to regularise matters. The application (Ref: AW/368/17/HH) proposed alterations to create an elderly persons annexe and was approved in April 2018 (the 2018 permission). Condition 4, in short, prevented the use of the annexe accommodation permitted as a unit of accommodation separate from the main dwelling.
22. The 'existing' and 'proposed' layout drawing submitted and approved is DRG NO 640-01C although this is wrongly listed on the decision notice. The proposed annexe approved would have a porch area providing external access to both parts of the building and changes to the annexe to provide a living area, a bedroom, a utility area and a study/bedroom. The latter would replace the kitchen that had been provided in the extension thus leaving the whole building with a single kitchen.
23. This permission was not implemented either since it would not meet the needs of the family group. In particular, the appellants wished to retain two kitchens at the property and advised the Council that a further application for planning permission would be submitted.
24. This application (Ref: AW/320/19/PL) was, in effect, an application under s73 of the Act. It proposed to carry out the 2018 permission according to different plans (condition 2) and without compliance with condition 4. Planning permission was refused in January 2020. The 'proposed' drawing showed a wholly self-contained dwelling comprising an en-suite bathroom/shower, a bedroom, a study/bedroom, a combined dining/living area and a kitchen. A separate external access is shown for each part of the building.
25. The notice that is the subject of these appeals was issued shortly thereafter.

Appraisal

26. The onus is on the appellants to provide unambiguous evidence.
27. The appellants have explained in some detail how the family group lives. The parents and children share some activities within the building while carrying on other aspects of their lives entirely independently of one another in their own part of the building. Nevertheless, in my judgement, it has always been the intention to arrange the extended building as two self-contained units of accommodation.
28. While planning permission was gained for an extension, the approved plans were never implemented. Instead, the extension was provided with a kitchen and thus had all the facilities to be characterised as a dwellinghouse applying *Gravesham* principles. The only issue remaining is independent access.
29. On the balance of probabilities, I conclude that the accommodation in the extension became wholly independent of that in the original dwelling in 2014 when the opening between the two was closed. Once this happened, it is not

clear to me how access was then achieved to the original dwelling from outside the building. Nevertheless, the far more detailed and accurate drawings submitted for building regulations approval purposes clearly show this opening as being sealed and the only external access shown on the drawing giving onto the hall from which it is only the rooms within the extension that can be entered.

30. In the absence of any clear evidence to the contrary from the appellants, I can only assume that access to the original dwelling was then through the conservatory. Certainly, the evidence from the Council's site visit in August 2017 is that there was no access between the two parts of the building at that date.
31. That arrangement appears to have ended when the internal door was inserted in 2017 to allow access between the two parts of the building again.
32. While the 2018 permission would have allowed an annexe to be provided, this has not been implemented. The refused application clearly demonstrates the appellants' continuing wish to have two separate dwellinghouses, in my view.
33. Having regard to the case law referred to above, I therefore conclude on the balance of probabilities that the building was arranged as two separate dwellinghouses between 2014 and 2017. Although the appellants argue that such a conclusion would mean success on this ground since it would mean the use was not taking place when the notice was issued, that is a misreading of the law. As set out earlier, since the breach of planning control alleged has occurred as a matter of fact before the notice was issued, the appeals on this ground must fail.

Appeals A and B: the appeals on ground (c)

34. Although appeals have been made on this ground, the evidence in support is inextricably bound into that presented for the appeals on ground (b). In the absence of any clear separate argument in support of this ground, it too must fail.

Appeals A and B: the appeals on ground (d)

35. In the appeal on this ground the appellants must show that the breach of planning control alleged continued substantially uninterrupted for a period of four years between the date of the breach and the issue of the notice. The evidence is that summarised and appraised in the consideration of the appeals on ground (b).
36. The breach occurred when the building became two self-contained dwellinghouses. This was when the opening between the two parts of the building was sealed in 2014, probably in the autumn. On the appellants' own evidence, the opening was reinstated with the installation of the internal door in 2017, possibly around August.
37. For this ground of appeal to succeed, the opening would have had to have been sealed for the whole of the years 2014 to 2017 inclusive. The evidence is that it was not. Even if it had been sealed up again (and there is no evidence that it has been), the period between 2017 and the issue of the notice is substantially less than the required four years.

38. The appeals on this ground must therefore fail.

Appeals A and B: the appeals on ground (f)

39. An appeal on this ground is that, in short, the steps required by the notice exceed what is necessary to remedy the breach of planning control or remedy any injury to amenity caused by the breach. The Council has not identified which of these two, set out in s173(4), is its purpose in issuing the notice. This may be inferred from the reasons for it being issued.
40. Two reasons are given. The first reason is that the development carried out harms the character of the area since there has been an overdevelopment of the site and the introduction of a terrace of three dwellings, untypical of the pattern of development locally. In seeking to remedy this, the notice seems to me to be for a purpose falling within s173(4)(b), remedying the injury to amenity.
41. The second is essentially a technical breach of a policy that requires new residential development to make provision towards accessible new green spaces by way of an agreement under s106 of the principal Act. The appellants cannot dispute this by way of an appeal on ground (f) and do not seek to do so. This seems to me to fall within the scope of s173(4)(a).
42. It seems to me that the purpose of the notice is therefore to achieve both s173(4)(a) and (b).
43. It could be argued that by reinstating the internal opening and door between the extension and the original dwelling, the second requirement of the notice has already been complied with and, in fact, had been when the notice was issued. To that extent, the second reason for issuing the notice is addressed and the breach of planning control remedied (s173(4)(a)); indeed, the appellants do not seek to challenge this requirement.
44. The first reason and requirement are more problematic. The Council's Compliance Investigation Report (CIR) concluded with a recommendation that the notice be issued with requirements to (a) cease the use of the property as two separate dwellings and (b) remove one of the kitchens. The issued notice substituted requirement (ii) as set out in the summary details above for the recommended step (a).
45. The Council has not explained why, but by not following the CIR recommendation, the notice does not require the material change of use alleged as the breach of planning control to cease. It may be that the Council considers the second requirement as being one that has a continuing effect rather than a 'once only' requirement. That in my view and experience is uncertain and arguable.
46. The appeals on this ground concern only the (first) requirement to remove one of the kitchens. This is said to be unreasonable since there is nothing in law to say that a dwelling should only have one kitchen or that an annexe cannot have its own kitchen. In its statement the Council accepts this is correct as a matter of law. Its stated reason for the requirement is however '...the presence of a single kitchen in a family dwelling shared by 5 people should provide sufficient culinary accommodation and prevent the potential for a separate dwelling to be re-created once the notice has been complied with.' (emphasis added)

47. To my mind this is a tacit acknowledgement by the Council that the second requirement may not have a continuing effect. However, since compliance with the second requirement remedies the breach of planning control, removal of one of the kitchens is excessive unless it is necessary to remedy the injury to amenity.
48. The injury to amenity arises from the effect of the breach of planning control alleged on the character of the area. However, as made very clear in the objection to the 2018 permission development by Aldwick Parish Council, it is the extension itself that has this effect, not its subsequent use as a self-contained dwellinghouse. The removal of a kitchen would have no effect on the character of the area and therefore exceeds what is necessary to remedy the injury to amenity.
49. The notice will therefore be varied by the deletion of requirement (i) as set out in the summary details above. To that extent the appeals on ground (f) succeed.

Appeals A and B: the appeals on ground (g)

50. The appeals on this ground related solely to the period required to remove a kitchen and rearrange the property. As a result of the success on ground (f) that work is no longer necessary. The appellants do not challenge the period allowed in the notice for compliance with the other requirement. Formally therefore the appeals on this ground fail.

Appeals A and B: Overall conclusions

51. For the reasons given above I conclude that the requirements are excessive, and I am varying the enforcement notice accordingly, prior to upholding it. The appeals under ground (f) succeed to that extent.

Brian Cook

Inspector