



Appeal Decision

Site visit made on 17 January 2022

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 February 2022

Appeal Ref: APP/A5270/C/20/3265794

Premises known as 130 Clarence Street, Southall, Middlesex UB2 5BW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Varinder Singh Khera against an enforcement notice issued by London Borough of Ealing.
 - The notice was issued on 4 November 2020.
 - 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 for separate self-contained residential use.
 - The requirements of the notice are to:
 1. Cease the use of the land to the rear of the premises as a separate self-contained residential unit;
 2. Demolish the outbuilding; and
 3. Remove all resultant debris.
 - The period for compliance with the requirements is: 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is varied by the deletion of requirement 2 and requirement 3 from paragraph 5 of the enforcement notice. Subject to these variations, the appeal is dismissed and the enforcement notice is upheld.

Ground (d)

2. An appeal under ground (d) is made on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. The main thrust of the appellant's case is that the appeal building was constructed around November or December 2010 and has been used as a separate self-contained residential unit since.
3. Section 171B(2) states where there has been a breach of planning control consisting in 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. However, in *Lawson Builders Ltd & Lawson & Lawson v SSCLG & Wakefield MDC* [2013] EWHC 3368 (Admin), the court reinforced the application of the principles established in *Welwyn Hatfield*¹, which held that if a dwelling house is erected unlawfully and used as a dwellinghouse from the outset, the unlawful use can still properly be the subject of enforcement action within ten years, even if the building itself, as a structure, becomes immune from enforcement action after four years.

¹ *Welwyn Hatfield DC v SSCLG and Beesley* [2011] UKSC 15

4. From the appellant's own evidence, a change of use of the building has not occurred. The building was constructed and occupied as a residential dwelling. Section 171B(2) does not therefore apply in this case. The relevant time period against which to consider the breach is, in my view, ten years, as set out in section 171B(3). As the enforcement notice was issued on 4 November 2020, the appellant will need to show that the alleged breach occurred on or before 4 November 2010 and continued without significant interruption for at least 10 years thereafter.
5. The Council has provided an aerial survey, dated 26 May 2010, which shows that the outbuilding had not yet been constructed. Aerial images, dated 27 June 2010 and 19 March 2011 similarly show that no outbuilding had been constructed at those times. Details of an inspection, carried out by the Council on 13 February 2012, also confirm that, at that time, there was no outbuilding at the property. The first time the outbuilding is evident in an aerial photograph is on an image dated 30 March 2012. It would therefore appear that the outbuilding was constructed some time between 13 February 2012 and 30 March 2012.
6. The appellant has provided a series of tenancy agreements, dated between 28 October 2014 and 5 February 2020. The same tenant is identified on the agreements dated between 28 October 2014 and 25 October 2019. A different tenant is identified on the agreement dated 15 February 2020. While the agreements demonstrate a tenant's right to occupy the building, they do not show how the building has been occupied. Furthermore, the agreements only go back as far as 2014 and do not show at least 10 years occupation.
7. I have been provided with a series of signed statements which are asserted to be a form of statutory declaration. However, while the statements are signed, they not been witnessed by and signed in the presence of a solicitor, commissioner for oaths or notary public, nor do they include the form of words set out in the Schedule to the 1835 Act². While this limits the weight which can be attributed to the statements, I shall nevertheless consider the information provided.
8. The current occupant of the outbuilding states they have been living in the outbuilding since January 2009 and that between January 2009 and February 2019, the tenancy was under a different name. In February 2019, the occupant states they took over the tenancy as the named tenant moved out of the premises. However, the tenancy agreement dated 25 October 2019 remains in the previous tenant's name. Moreover, no explanation as to why the current occupant was not identified on the tenancy agreements prior to February 2019 has been provided.
9. The co-owner of the property, in response to a Planning Contravention Notice (PCN) issued by the Council, confirmed the name of the tenants of the property, which includes the name of the individual identified on the tenancy agreements for the outbuilding, not the current occupant. This is inconsistent with the information provided by the current occupant. Given the potential sanction for making a statement which is knowingly or recklessly false or misleading, I consider the evidence given in its support is to be preferred.

² Statutory Declarations Act 1835

10. The resident of 132 Clarence Street, states that in November 2009, works to the outbuilding were underway and that the outbuilding became occupied in early January 2010. This also appears to contradict statement made by the current occupant. Furthermore, both the statement made by the current occupant of the outbuilding and the resident of 132 Clarence Street are inconsistent with the photographic evidence, which shows that the outbuilding had not yet been constructed in 2009 and was most likely not constructed until after 13 February 2012. As a consequence, I am unable to give the statements made in either of these documents any weight.
11. The resident of the first floor flat of the host building states that the current occupants of the outbuilding have lived there from at least 2013. However, their period of knowledge does not cover a ten year period. Furthermore, the tenancy agreements provided by the appellant indicate a different individual was authorised to occupy the premises.
12. The resident of the ground floor flat of the host building, states that since their occupancy, the outbuilding has always been occupied. However, they have only lived at the premises since 1 December 2013 and while they confirm who the current occupants of the outbuilding are, they do not identify whether anyone else has lived in the outbuilding.
13. There are numerous inconsistencies in the appellant's own evidence. Furthermore, photographic evidence provided by the Council points towards the building not having been substantially completed until well after 4 November 2010. Since the building was necessary for the change of use to occur, it has not been demonstrated, on the balance of probabilities, that the change of use of the land to the rear of the premises for separate self-contained residential use occurred on or before 4 November 2010 and continued for at least 10 years thereafter. The appeal under ground (d) must therefore fail.

Ground (f)

14. An appeal under ground (f) is made on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by the matters stated in the notice, or... to remedy any injury to amenity which has been caused by any such breach.
15. Section 173 of the Act sets out that a notice may remedy the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land. It is clear from the wording of the notice that the purpose of the notice is to remedy the breach by ceasing the use, demolishing the building and removing resultant debris.
16. The Council is seeking the removal of the building on the basis that a notice alleging a material change of use of land to a separate self-contained residential unit can require the removal of the building, in addition to requiring the use to cease. The appellant asserts that requirement 2 is excessive and unreasonable and that lesser steps would overcome the objections and remedy the breach.
17. The Council has drawn my attention to appeal decision APP/A5270/C/16/3156816 and 3156817, which related to 39 Leonard Road.

The Inspector in this case was similarly tasked with considering whether the requirements of the notice could include removal of a building, where the alleged breach was a material change of use of land.

18. The Inspector in that case found that the requirements did not exceed what is necessary to remedy the breach and upheld the notice, which required the building to be demolished. I acknowledge the apparent similarities with this appeal, and the desirability of achieving consistency in decision making. However, I am not ultimately bound by previous appeal decisions, and I have to reach my own view.
19. I accept a notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or immune from enforcement³. However, although the construction of the building clearly facilitates the unauthorised use, the building which has been erected in this case is a substantial brick built structure which represents obvious and permanent operational development.
20. I respectfully take a different view to the Inspector in the Leonard Road appeal above, and consider that the operational development in this case should have been dealt with within a period of four years, rather than treated as operational development which serves an ancillary purpose.
21. The appellant suggests lesser steps of removing the kitchen facilities, including cupboards, kitchen sink and worktop and removing the internal partitions that subdivide the outbuilding and forms the bedrooms. However, the kitchen facilities and internal partitions form part of the building and so would also be immune under the four year rule.
22. The Council raises concern that the effect of the notice would be to grant planning permission under section 173(11) of the Act. However, this relates to buildings or works which the enforcement notice could have required to be removed. Since I have found the building is not operational development which serves an ancillary purpose, the enforcement notice could not have required it to be removed. Consequently, the provisions of section 173(11) would not apply, and section 75(3) would not operate to grant planning permission for use of the building as a dwellinghouse.
23. Section 57(4) sets out that where an enforcement notice has been issued, planning permission is not required for its use for the purpose for which it could lawfully have been used if that development had not been carried out. Prior to the development, the appeal site was in use as a single family dwelling and so the lawful use of the land would have been as a residential garden. However, the host building has since been subdivided to form flats.
24. The host dwelling is not the subject of this notice and so it is doubtful that it would be possible to revert back to the previous lawful use of the land. As such, it may be that the building would have a nil use, but these are not matters for me to determine in this appeal. It would be open to the appellant to apply for a certificate of lawful use or development, or submit a planning application, if so advised.

³ *Murfitt v SSE* [1980] JPL 598 and *Somak Travel Ltd v SSE* [1987] JPL 630 cited in the Leonard Road appeal.

25. Thus, for the reasons given above, I consider the requirements to demolish the outbuilding and remove the resultant debris exceed what is necessary to remedy the breach of planning control. I shall delete requirement 2 and 3. The appeal under ground (f) succeeds to this extent.

Ground (g)

26. An appeal under ground (g) is made on the basis that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed. The appellant states that the compliance period is too short in light of the Covid-19 pandemic and associated restrictions and suggests a period of 18 months.
27. Under the Human Rights Act 1998, Article 8 affords the right to respect for private and family life, home and correspondence. This is a qualified right, and interference may be justified where in the public interest. Although such matters are not relevant in relation to the above grounds of appeal, they are of relevance to an appeal under ground (g), which concerns matters of judgement.
28. My task is to balance the public interest in the enforcement notice being complied with expeditiously against the private interests of the appellant and the occupants of the building. Since there is no ground (a) appeal, there is no dispute that the development causes the harms identified in the reasons for issuing the enforcement notice. During my visit, I saw that the building is lived in by a number of people. Compliance with the notice would result in interference with the occupiers' rights under Article 8.
29. The appellant has provided me with a copy of an Assured Shorthold Tenancy Agreement, however, it finished on 15 February 2021 and no subsequent agreement has been provided. Consequently, I do not know what the current arrangements are, whether there is a fixed-term tenancy and if so, when it would expire. I note the appellant raises concern regarding requirements to give notice under section 21 of the Housing Act 1988 (as amended), which suggests the appellant is able to give notice under this section.
30. Since the appeal was lodged, the situation around the pandemic has fluctuated and restrictions, including the notice period under section 21 of the Housing Act 1988 (as amended) have been changed. At this moment in time, I consider 6 months is a reasonable and proportionate time period, which would enable the appellant to give notice and allow the occupants of the building sufficient time to secure alternative accommodation.
31. Should this change, the Council has powers under section 173A of the Act to extend the period for compliance. Whilst I note the appellant's concerns regarding the Council's alleged failure to respond to email communication, it is the Council that has drawn my attention to its powers under this part of the Act and so I have no reason to believe it would not utilise them if there was a demonstrable need to do so.
32. Consequently, the appeal under ground (g) fails.

Conclusion

33. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the

enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that extent.

M Savage

INSPECTOR