



Appeal Decisions

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 March 2022

Land at 58 Sturgess Avenue, London NW4 3TS

Appeals Refs: APP/N5090/C/20/3259541, APP/N5090/C/20/3259543, APP/N5090/C/20/3259548

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the Council of the London Borough of Barnet.
- The enforcement notice, numbered ENF/0717/20, was issued on 5 August 2020.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of land in the rear garden of 58 Sturgess Avenue to a use for/as two dwellinghouses and operational development in the form of the construction of the building in which these dwellings are situated carried out incidental to making of the change of the use.
- The requirements of the notice are:
 1. Cease the use of the building as self-contained dwellings
 2. Permanently remove all bathroom facilities from the building including the removal of all toilets, basins and showers
 3. Permanently remove all kitchen facilities from the building including all kitchen units, sinks, cookers and food preparation areas.
- The period for compliance with the requirements is 7 months after the notice takes effect.

Appeal A Ref: APP/N5090/C/20/3259541

- The appeal is made by Mr Namir Moslawy.
- The appeal was made on the grounds set out in section 174(2)(a), (b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a,) the application for planning permission is deemed to have been made under section 177(5) of the Act as amended.

Appeal B Ref: APP/N5090/C/20/3259543

- The appeal is made by Moving Homes Limited.
- The appeal was made on the grounds set out in section 174(2)(a), (b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Appeal C Ref: APP/N5090/C/20/3259548

- The appeal is made by Mr Steven Thomas.
 - The appeal was made on the grounds set out in section 174(2)(a), (b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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DECISIONS

1. The appeals are allowed and the enforcement notice is quashed.

REASONS

Procedural matters

2. Three appeals have been made against the enforcement notice. The cases of the appellants are similar and therefore I will deal with them together.
3. An application for costs was made by each appellant against the Council and by the Council against the appellant making Appeal A. These applications are the subject of separate Decisions.

Planning history of the site

4. 58 Sturgess Avenue was built as a semi-detached house with garden land to the front and rear. Planning permission was granted on appeal for a change of use to a House in Multiple Occupation for no more than six people¹.

First Enforcement Notice

5. An enforcement notice was issued on 6 February 2019 alleging without planning permission the use of the single storey outbuilding aligned along the rear boundary as two dwellinghouses.
6. In the subsequent appeal decision dated 27 May 2020 the Inspector concluded that "the notice is drafted in terms that must be understood as relating to a change of use of an existing building and that four years is the appropriate time period."² The appeal on grounds (e) and (c) failed but the appeal succeeded on ground (d). The enforcement notice was corrected, the appeal allowed and the notice quashed. A certificate of lawfulness was not issued as there was no corresponding appeal before the Inspector.

Second Enforcement Notice

7. The second notice issued on 5 August 2020, now under appeal, differs in the wording of the alleged breach of planning control because the alleged material change of use relates to the garden land.

Lawful Development Certificate

8. On 6 August 2020 an application was made for a certificate of lawful use or development (LDC) for use of the building as two self-contained flats.
9. The Council refused the application by notice dated 5 October 2020. An appeal against that decision was allowed and a LDC was issued on 1 April 2021 for use of the building as two self-contained flats³. The use was found to be lawful because the time for enforcement action had expired and the use did not contravene the requirements of any enforcement notice in force.
10. The Council applied for leave to bring a statutory review against the appeal decision (and a costs decision). The application was refused by the Court on 20 July 2021 and the matter against the LDC appeal decision proceeded no further.

¹ Appeal decision dated 21 December 2020 ref APP/N5090/W/20/3246389

² Appeal decision dated 27 May 2020 ref APP/N0590/C/19/3224484 paragraph 11

³ Appeal decision dated 1 April 2021 ref APP/N0590/X/20/3261864

Current position

11. As a matter of fact the local planning authority has not used its powers under section 173A of the 1990 Act to formally withdraw the second enforcement notice. The three appeals remain to be determined.

Enforcement notice

12. The notice contains all elements required to be included under section 173 of the 1990 Act.
13. The allegation is directed at the creation of two dwellinghouses. The requirements are directed at ensuring the use of the building as self-contained dwellings ceases. There is no ambiguity or uncertainty. The notice tells the recipients fairly what they have done and what they must do to remedy matters.
14. The reasons for issuing the notice in places are worded in the singular, referring to 'a self-contained residential dwelling' and 'occupiers of the dwelling'. Nevertheless, when read within the context of the notice as a whole, there is no doubt that the reasons relate to the two dwelling units. If necessary, minor drafting errors could be corrected.
15. In conclusion, the notice complies with all relevant statutory requirements and is not a nullity.

Appeals on ground (e)

16. An appeal on ground (e) is that copies of the enforcement notice were not served as required by section 172 of the 1990 Act. The burden of proof is on an appellant in this legal ground of appeal, not the Council.
17. The appellants confirmed they raised no concern with regards to service of the enforcement notice. The nub of the appellants' case is that the enforcement notice is not valid because there was no validly delegated authority in place at the time to issue it.
18. In my view whether the local planning authority acted outside its powers in issuing the notice is a matter more properly dealt with by means of a challenge to the notice by way of judicial review.
19. The appeals on ground (e) do not succeed.

Appeals on ground (b)

20. The appellants confirmed in their statement of case that they no longer rely on this ground of appeal. That being so I take no further action on ground (b).

Appeals on ground (c)

21. The issue is whether the matters stated in the allegation constitute a breach of planning control.
22. The alleged unauthorised development is a material change of use of land. More particularly, the alleged unauthorised development is the change in the use of land in the rear garden to use for/as two dwellinghouses. The primary residential use of the land has not changed. The operational development, the construction of the building which contains the two dwellings, is described as

incidental to the making of the change of use. The building operation is not identified as a breach in its own right. The reasons make clear that it is the two dwellings that cause harm.

23. The notice in effect requires the use of the building (not the land) as self-contained dwellings to cease. The building is not required to be demolished and the remedial works are limited to the removal of bathroom and kitchen facilities from within the building.
24. After the issue of the enforcement notice the two self-contained units were found to be lawful and a LDC issued. Legal proceedings against the decision by the Secretary of State have come to an end. The LDC can be considered to have been correctly issued and is in force. Section 191(7) states that the lawfulness of any use for which a certificate is in force shall be conclusively presumed. There is no evidence of circumstances changing since the LDC was issued.
25. Section 174(2)(c) is worded in the present tense. The two dwellings attacked by the notice are now lawful. The two dwellinghouses do not constitute a breach of planning control.

Conclusion

26. For the reasons given above I conclude that the appeals should succeed on ground (c). Accordingly the enforcement notice will be quashed. In these circumstances the appeals under grounds (d), (f) and (g) set out in section 174(2) to the 1990 Act as amended and in respect of Appeal A ground (a) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Diane Lewis

Inspector