



Appeal Decisions

Site visit made on 7 June 2022

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 July 2022

Appeal A Ref: APP/A5270/C/20/3257380 & Appeal B: 3257381 20A Friary Road, Acton, London W3 6AF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeals are made by Mr Habib Rehman (Appeal A) and Mrs Razia Rehman (Appeal B) against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The notice was issued on 25 June 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 to separate residential use.
 - The requirements of the notice are to:
 1. Cease the use of the land to the rear of the premises as separate residential use;
 2. Demolish the outbuilding; and
 3. Remove from the land all resultant debris
 - The period for compliance with the requirements is: Six months.
 - The appeal is proceeding on the ground set out in section 174(2)(b), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Decisions

1. It is directed that the enforcement notice is varied by:
 - the deletion of requirement 2 and requirement 3 in section 5 of the notice.
2. Subject to the variations above, the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The appellants make reference to an application for costs in their appeal statement. However, no costs application has been received by the Planning Inspectorate to date and no basis for a costs claim is provided. I have therefore not considered this matter further.
4. The appellants only ticked ground (d) on the appeal form, however, they advise this was an error and they intended to appeal under ground (b) also. In my view, one of the arguments advanced under ground (b) should be considered under ground (c). Nevertheless, since these matters were raised in the appellant's statement of case¹ and the Council has dealt with them within its evidence, albeit in the context of time limits under section 171B of the Act, I consider there would be no injustice in dealing with it in this way.
5. Although the appellants did not appeal under ground (f), they raise matters concerning the building operations in their Statement of Case and assert that

¹ Paragraphs 2.12 to 2.17 and 4.1 of the Statement of Case (SoC) and Appendix A of the SoC and Appendix B, document B11.

enforcement action is not available to the local planning authority, as it is barred by statute. The Council suggest that in a ground (f) appeal, the burden of proof would be for the appellant to demonstrate that the requirements of the notice are excessive. However, given my wide powers of correction, I have a duty to be alert to any hidden ground (f) and to check whether any steps are excessive for the purposes of the enforcement notice. I have therefore raised with the parties whether the requirement to demolish the building is excessive and shall deal with this matter under ground (f).

Ground (b)

6. An appeal under ground (b) is made on the basis that the matters stated in the notice have not occurred. The appellants' case under ground (b) is advanced on the basis that no change of use of the land has occurred. The burden of proof in an appeal under ground (b) is firmly on the appellants, on the balance of probabilities.
7. The enforcement notice alleges the material change of use of the land to the rear of the premises to separate residential use. I saw that the appeal building has all the facilities required for day to day living and has its own outside space, delineated from the rear garden to the main property by fencing. From the appellants' own evidence, it is clear that the building has been occupied by individuals separately to the main dwelling. In my view, therefore, the land has been used for separate residential use and the alleged breach has occurred as a matter of fact.
8. Although not advanced under ground (b), the appellants also state that, as an alternative, the existing lawful garage was redeveloped, that it was being used for storage and has now been converted to a residential dwelling. This is essentially an argument that the breach is the material change of use of a building and is a matter which should be considered under ground (b). Since the Council has addressed the points raised in its Statement of Case, I consider there would no injustice in dealing with these matters under ground (b).
9. Though it is clear from aerial photography that an outbuilding has previously existed at the property, the building which is currently on site appears to have a substantially larger footprint. The Council has provided a picture of the previous outbuilding, which appears to have been a modest wooden structure. The current building, by contrast is a more substantial building both in terms of height and footprint and is finished in white render.
10. While I note that an interested party refers to the building as a 'garage conversion', they also confirm that 'an old garage...was later on replaced with a new construction'. Within their statutory declaration, one of the appellants also states that the property was 're-constructed and updated in 2013 as the building [sic] fallen into disrepair'.
11. As established in *Arnold v SSCLG* [2015] EWCH 1197 (Admin), whether works comprise a new building or a remodelled version of the original is a question of fact for the decision maker. Even if some of the original garage has been retained, given the difference in size between the previous outbuilding and the appeal building and the difference in materials used, I find as a matter of fact and degree, that the building work involved amounted to the construction of a new building rather than the conversion of the garage.

12. The appellants suggest that the appeal building was used for storage. Within a Planning Contravention Notice (PCN) the appellants state that construction was finished in December 2013² and was used for storage for a month. However, the appellants have not provided any substantive details as to what that storage comprised or whether that storage use was the primary use of the building.
13. Within the PCN, the building is stated to have been constructed with cooking and washing facilities and so, appears to have been constructed as a self-contained dwelling from the outset. Moreover, within the statutory declaration made by one of the appellants, they state that the property was 'converted to residential use between October 2013 and January 2014'. I therefore consider it likely that any storage was in relation to the works being undertaken to the building, rather than as a storage use which is incidental or ancillary to the use of the dwellinghouse.
14. For the reasons given above, the appellant has failed to show, on the balance of probabilities, that the breach has not occurred or that there has been a material change of use of the building. Thus, the appeal under ground (b) must fail.

Ground (c)

15. An appeal under ground (c) is made on the basis that the matters stated in the notice, if they occurred, do not constitute a breach of planning control. The main thrust of the appellants' case under this ground is that the planning unit had a lawful use of residential C3³ prior to the development and still has a lawful use of residential C3.
16. While section 55(2)(f) of the Act provides that a change within a use class is exempted from development, Article 4 of the Town and Country Planning (Use Classes) Order 1987 (as amended) provides 'In the case of a building used for a purpose within class C3 (dwellinghouses) in the Schedule, the use as a separate dwellinghouse of any part of the building or of any land occupied with and used for the same purposes as the building is not, by virtue of this Order, to be taken as not amounting to development'.
17. As set out in *Wakelin v SSE & St Albans DC* [1978] JPL 769, a material change of use can arise from the subdivision of a residential planning unit to form separate planning units. While I acknowledge the circumstances in the *Wakelin* case are different to the appeal scheme, the principle it established is relevant. Whether a material change of use has occurred will be a matter of fact and degree.
18. While there is no ground (a) appeal, and so I cannot consider the planning merits of the appeal scheme, whether there would be a material change of use depends upon whether there would be a change in the character of the use of the land. The enforcement notice identifies some of the planning implications of the creation of the separate planning unit.
19. Although the rear garden was previously in residential use, the use of the land to the rear of the premises for separate residential has implications for the

² The date given on a Lawful Development Certificate application form is 30 November 2013.

³ Class C3 of The Town and Country Planning (Use Classes) Order 1987 (as amended), use as a dwellinghouse.

living conditions of occupants of the main dwelling, with respect to overlooking and privacy. It also has implications for the living conditions of the appeal building, with respect to the standard of accommodation provided and the availability of private outdoor amenity space for both occupants of the appeal building and occupants of the main dwelling.

20. Consequently, as a matter of fact and degree, I consider there has been a material change of use and so the appeal under ground (c) must fail.

Ground (d)

21. 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 appellants' case is that the appeal building was constructed by at least July 2013 and has been used as a separate self-contained residential unit since January 2014.
22. Section 171B(2) of the Act 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, as set out above, I have found that a change of use of the building has not occurred.
23. 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*⁴, 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.
24. 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) of the Act. As the enforcement notice was issued on 25 June 2020, the appellants will need to show that the alleged breach occurred on or before 25 June 2010 and continued without significant interruption for at least 10 years thereafter.
25. The appellants have provided a range of evidence to show that the building has been in continuous use as a residential dwelling since January 2014. However, the appellants do not suggest that the building was occupied as a self-contained dwelling prior to this date and so the appeal under ground (d) must fail.

Ground (f)

26. 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. It is clear from the wording of the notice that its purpose is to remedy the breach of planning

⁴ *Welwyn Hatfield DC v SSCLG and Beesley* [2011] UKSC 15

- control by ceasing the use, demolishing the building and removing resultant debris.
27. 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.
28. 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 suggests that requiring the removal of the building is excessive, as the building has been there for more than 4 years, and it is only the use which the Council is arguing is unlawful.
29. 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 enforcement⁵. However, in this case, the appellants have constructed a substantial building on their land and, having done so, proceeded to allow it to be used as a dwellinghouse.
30. The building is visible from the public domain and can clearly be seen from neighbouring properties. Although the construction of the building clearly facilitates the unauthorised use, the building which has been erected in this case is a substantial structure which represents obvious and permanent operational development. Irrespective of whether the building would meet the limitations set out in the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended) the operational development in this case should, in my view, have been dealt with within a period of four years, rather than treated as operational development which serves an ancillary purpose.
31. The Council has drawn my attention to appeals APP/A5270/C16/3156816 and 3156817, which I shall refer to as 'the Leonard Road appeal', where the Inspector upheld a notice requiring an outbuilding to be demolished. The Council has also drawn my attention to APP/A5270/C/20/3265794, which is an appeal I dealt with, where I respectfully took a different view to the Inspector in the Leonard Road appeal and varied the notice, deleting the requirement to demolish the building. Whilst I have noted the approaches taken in both appeals, I must consider this appeal on the facts of the case.
32. The Council suggests that since the purpose of the notice is to require a 'full' remedy of the breach, the only way of doing that is to restore the land to its pre-breach condition and immunity under section 171B(1) does not prevent it. However, section 173(4)(a) sets out that the breach may be remedied '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, by discontinuing any use of the land or by restoring the land to its condition before the breach took place'. Requiring the appellants to discontinue the use of the land would, in my view, remedy the breach.
33. 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

⁵ *Murfitt v SSE* [1980] JPL 598

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.

34. The appellant has drawn my attention to Lord Mance's comments in *Welwyn Hatfield* "once a planning authority has allowed the four year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless." However, whether to issue the enforcement notice was a matter for the local planning authority's discretion.
35. 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.
36. The parties advise that the main building is tenanted, however, I do not have full details of the nature of the occupation of the main dwelling. It would be open to the appellant to apply for a certificate of lawful use or development to determine whether a proposed use of the building would be lawful. Nevertheless, if the main building remains a dwellinghouse, once the notice has been complied with, the occupants of the main dwelling could use the appeal building in connection with their use of the main dwellinghouse, either as part and parcel of the use of the dwellinghouse or for any purpose incidental to the enjoyment of the dwellinghouse. Whether the appellants choose to allow their tenants to use the building is a matter for them.
37. I note the Council's concern that leaving the building would encourage a further breach. However, the requirement to cease the use of the land to the rear of the premises as separate residential use would have enduring effect and would prevent resumption of the separate residential use of the land and therefore the building which is sited within it. If the enforcement notice is complied with but there is a later breach of this requirement, section 181(1) and (2) mean that this remains enforceable under section 179.
38. 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 requirements 2 and 3. The appeal under ground (f) succeeds to this extent.

Conclusion

39. 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 appeals on ground (f) succeed to that extent.

M Savage

INSPECTOR