



Appeal Decision

Site visit made on 28 June 2022

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 October 2022

Appeal Ref: APP/U5930/C/20/3261551

Land at 81A St Georges Road, London E10 5RQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr S Mayat against an enforcement notice issued by the Council of the London Borough of Waltham Forest.
 - The enforcement notice was issued on 23 September 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the rear section of the Land (outlined by the yellow dotted line in attached Plan A) to a separate residential use and any works undertaken or any items brought onto the Land which are material in facilitating the material change of use of the Land.
 - The requirements of the notice are to:
 - 1) Cease the use of the rear section of the Land (as outlined by the yellow dotted line in attached Plan A) for separate residential use;
 - 2) Demolish and remove from the Land the outbuilding (as shown in attached Photograph A) and remove from the Land all of the contents of the outbuilding; and
 - 3) Following compliance with Steps 1) – 2), remove from the Land all resultant debris and restore the Land to its former condition prior to the breach occurring.
 - The period for compliance with the requirements is within (six) 6 months after this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Formal Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

2. On 14 June 2022, the appellant wrote to PINS indicating that the building, the subject of this appeal, was being occupied by persons which he had not authorised, and due to their apparent threatening behaviour eviction was being sought through the courts. In the circumstances the appellant questioned whether my forthcoming site visit could be carried out by viewing the property from the street. Given that a considerable amount of evidence had already been supplied, and I considered it would not be necessary to view the building internally, I was satisfied that this approach was appropriate.
3. From the evidence put forward by both main parties an inordinate amount of material relates to the actual enforcement investigation with both sides disputing each other's version of events and matters of only peripheral importance – ie who said what and when - being highlighted. Instead, the crux of this case involves essentially the following matters:

- i) the date the building was substantially completed;
 - ii) in terms of its use, the intended purpose of the building and the approximate date on which its occupation for habitable means commenced;
 - iii) the actual use of the building with reference to the Town and Country Planning (Use Classes) Order 1987, as amended; and
 - iv) on the above basis, whether the Council's decision to issue an enforcement notice, requiring for both the demolition of the building and the cessation of its use, was lawful.
4. I shall deal with the above points under the relevant and respective grounds below. In terms of the appeal grounds I have noted that the appellant has made the point that no planning permission was required for the building's erection, nor its subsequent use. This, though, is properly dealt with under a ground (c) appeal and, although not lodged, I shall assess this matter as if this ground had been cited on the appeal form at the outset.
5. My remit is limited only to the above points and, in this respect, examining the content and wording of the enforcement notice. No other matters are legally relevant to this case, nor does it require me to comment on the Council's assessment that it was expedient to issue the notice. That is a matter for the Council alone as part of its statutory decision making process. As regards the appellant's grievance with Council officials, this must remain a matter between the two main parties and has not had, and cannot have, any bearing on my decision.
6. An appeal (*APP/U5930/X/21/3274688*) relating to the Council's decision not to issue a lawful development certificate for development which has been enforced against is the subject of a separate decision letter.

Background

7. The background to this case is well documented, and I will deal with it only briefly here. Essentially, from the evidence taken as a whole, it is indicated that a former outbuilding at the site was rebuilt and was subsequently found to be in use for residential purposes. Physically demarcated from the main property's rear garden area, the Council considered that this separate residential unit amounted to a material change in the use of the land.
8. In the circumstances the Council saw it expedient to issue an enforcement notice in an attempt to secure the cessation of the use which it alleged to be a breach of planning control.

The appeal on ground (b)

9. An appeal made on this ground is that the breach or breaches alleged have not occurred as a matter of fact. In other words, the planning position is not as the Council alleges in the enforcement notice and a material change in the use was not taking place on 23 September 2020 (the date the notice was issued).
10. The onus of proof on such matters of fact is on the appellant who must prove, on the balance of probabilities, that the alleged breach had not occurred.

11. I shall only deal with the substantive element in this appeal; that of the alleged creation of an independent residential use to that occurring within the existing flat at No 81A, which is a physically separate building. This ground does not confirm that the said use, if occurring, was lawful in planning terms or immune from enforcement action. That is discussed in the assessment of the ground (d) appeal. As regards the planning status of the outbuilding itself this is covered under the 'hidden' ground (c) appeal.
12. The Council, in its representations, says that an inspection of the outbuilding by Council officials took place on 10 September 2020. The inspection appears to reveal that the building accommodated three bedrooms, a shared kitchen and a shared bathroom. It was apparently occupied by three unrelated persons who, when questioned, said they had no relationship prior to taking residence at the building and had only been acquainted through their occupation.
13. Although the single storey building appears as a garage from the street due to the installation of a roller shutter door the inspection also appears to reveal that one of the bedrooms was situated behind this door, but with a plastered wall installed between. A photograph has been provided to illustrate this, along with others, all said to have been taken on the date of the inspection, which show the individual bedrooms, the kitchen and the bathroom. I note that the appellant disputes the said arrangement but I acknowledge the relevance that the photographs and residents' comments hold. Their comments, albeit heresay, are reasonably believable when considering the other evidence adduced and carry significant weight.
14. In light of the findings the Council then served a planning contravention notice (PCN) on the appellant who apparently admitted that the use of the outbuilding constituted a separate residential use and that it had been used as a single dwelling for a couple. I am not convinced that the appellant's account gives the full picture of the degree and form of the occupation occurring at the date of the inspection. Irrespective of any immunity from enforcement action that may have accrued – which I shall deal with under the ground (d) appeal – I find, therefore, that the residential use cited constitutes development for which planning permission is required.
15. To conclude, at the date the enforcement notice was issued, the residential use was occurring and, accordingly, the appeal under ground (b) must fail.

The appeal on ground (c)

16. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control.
17. Ground (c) assumes the fact of the original development as it occurred at the time of the enforcement notice's issue, so it can only succeed on this basis if that original development does not now amount to a breach of planning control due to a change in the planning control situation.
18. The appellant says that the "building" (garage) was substantially completed in August 2014 and, although it was first used as a domestic garage it had a self-contained dwelling attached to it which, in February 2016, commenced use as a 'granny annexe'.
19. The appellant has provided separate correspondence from local occupiers which both refer to the previous garage which occupied part of the footprint of

the existing outbuilding. One from the occupier of 40 Francis Road, who apparently owned No 81a until 2007, says in his letter of 18 March 2017, that when he had purchased it there was an outbuilding, part used as a garage and part used as "liveable space". He rented out the flat and the garage, but had occupied the residential element himself. He goes on to explain that, in 2006, the outbuilding's flank walls developed a significant crack and, following damage caused by a vehicle, the building was demolished. He states this left *"only the foundation upon which it was built and only the fence side wall"*.

20. The above account is roughly corroborated by the contents of a letter dated 27 May 2016 from the occupier of 79 St Georges Road who states:

"I can confirm that a garage of similar shape and size as the one standing now stood at the location between 1996 or 1997 to 2004."

21. Admittedly, there is a discrepancy from the above persons as to when the previous building was demolished but the essence of the claim is the same in that the previous building was, indeed, removed.
22. In this connection I turn now to the appeal decision relating to the appeal site (APP/U5930/X/16/3151442), dated 24 October 2016, which was concerned with the Council's decision not to issue a lawful development certificate (LDC) for a double garage in the property's rear garden. The description of the development at issue being a *"double garage"* was provided by the appellant on his application form, and this would have been transposed to the Inspector's decision letter. Nonetheless, the building referred to is that which is currently in situ.
23. Here, the Inspector, in dismissing the appeal, found that the said garage had not been in position since March 2012, as claimed, but did conclude it was likely that the garage was completed some time between 2014 and 2016. As such, the requisite four year immunity period had not been reached.
24. To narrow the time period down, in its representations on the current appeal, the Council has provided an aerial photograph from June 2015 where there is no discernible structure present on the area of land on which the outbuilding was erected. However, a subsequent aerial photograph, dating from August 2016, clearly shows the outbuilding now in place. As such, I must agree with the Council's view that the outbuilding was erected between June 2015 and August 2016, and I cannot therefore accept the appellant's claim that the building was substantially complete by August 2014 as it didn't then exist. Indeed, the aerial photographic evidence would also accord with the photographs provided by the Council relating to a site visit carried out on 13 January 2016. These show an un-rendered breezeblock built structure which had clearly yet to be fitted out.
25. The Inspector, in his decision letter, commented that the appellant's case was that the garage was lawful by reason of being constructed on the same footprint as a previous garage building granted planning permission in 1995. Despite the appellant's claim that the new building became suitable for domestic use, in January 2016, when *"the double garage was partitioned at the back to make an annex"*, it is hard to imagine that the building would have yet been ready to be used for residential purposes.

26. With reference to the judgement of *Hancock v SSCLG & Windsor & Maidenhead RBC* [2012] EWHC 3704 where a building is demolished and a replacement building(s) is erected without the benefit of planning permission, the only lawful use is that of the land. Accordingly, there can be no reliance here on the 1995 planning permission (ref 950129) which allowed for the erection of no more than a domestic garage was ill-conceived.
27. With the former garage having been demolished down to foundation level the subsequent reconstruction of the building constituted development under s55(2) of the 1990 Act by virtue of the definition of "building operations" under s55(1A). Besides, I refer to the previous Inspector's comments that the previous building was rectangular in shape where as the current building was T-shaped. Its erection was not, therefore, replacing like with like. Nonetheless, by reason of s55, and the apparent absence of householder permitted development rights due to the use of 81A (and 81B for that matter) as residential flats, the new building required the benefit of planning permission for its lawful retention. Further, by legal principle, any previous use rights that may have accrued for the land would have been expunged upon the previous building's demolition, save for the land's role as incidental to the enjoyment of the main property.
28. In this context, whether or not the new building was first used as a domestic garage, to accord with the terms and conditions of the 1995 planning permission – although I have seen no convincing evidence to support this claim – it does not alter the fact that the building, and the residential use it facilitates, did not enjoy the requisite permission.
29. To conclude, given my findings on the ground (b) appeal, as planning permission was required, both for the replacement building and its use for residential purposes, and no such permission has been granted, the appeal under ground (c) cannot succeed.

The appeal on ground (d)

30. Appeals on this ground are that it is too late for the Council to take enforcement action as the breach is now effectively immune from any enforcement action due to the passage of time. Again, the onus is on the appellant to demonstrate that this is the case on the balance of probability.
31. Section 171B(2) of the 1990 Act says that 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. In the case of all other material changes of use which commence without the requisite planning permission the period over which immunity is achieved is ten years.
32. At my site visit, through a gap in the fence along Salisbury Road, I observed that the garden to the rear of the main property had been sub-divided and severed to facilitate the independent use of the outbuilding. The entrance door to the outbuilding could be accessed via a short, narrow pathway beyond a break in the fence on Salisbury Road. The two sites were now physically demarcated by means of timber fencing and, as the outbuilding extends to the common boundary with 79 St Georges Road, 81A effectively now comprised two separate and independent sites. Accordingly, I am satisfied that a new planning unit has been created, additional to that of the building known as 81A.

33. The appellant, in his representations, makes the following statement:

"As at 22/9/20, this rebuilt building was 6 years and 7 months old and the change of use of an existing building, 4 years and 7 months. Hence, the building and its use have acquired lawfulness under section 171B(1)(2) of the T & CPA 1990"

34. From my findings, this cannot be the case. As mentioned, aerial photographic evidence indicates that the outbuilding was not in place in February 2014. Instead, the building was erected between June 2015 and August 2016. Further, by way of photographs taken by a Council official at a site visit on 13 January 2016, the outbuilding appears as an un-rendered breezeblock built structure which had yet to be fitted out. In this context I find it unlikely that the building's residential use commenced during the following month, as claimed. Moreover, even if the use did start in February 2016 this is an irrelevance in planning terms as explained from my reasoning in paragraphs 37 and 38 of this decision letter. Instead, to enjoy immunity from enforcement action the building would have needed to be in use for habitable purposes from a much earlier date.
35. I have no reason to doubt the authenticity of the Council's evidence and, besides, the appellant has not provided any evidential material of significant weight to suggest otherwise. Similarly, I have seen nothing compelling to counter the Council officials' findings from their site visit on 10 September 2020 (as referred to in paragraphs 12 and 13 of this decision), nor any photographic or documentary evidence to indicate that the outbuilding had ever been used as a single dwelling.
36. Whether or not the tenants of no 81A had taken in lodgers, as claimed, this does not alter the use of the outbuilding itself. The appellant's claim that there was no third bedroom is contrary to the photographic evidence which carries considerable weight. The tenancy agreements provided are not conclusive otherwise, neither is the assertion that the building holds a sub-meter.
37. In this connection, turning to the Use Classes Order, class C3 'Dwellinghouses' has three parts. Class C3(a) is concerned with occupation by a single person or family, class C3(b) covers up to six people living together as a single household, but receiving care, and class C3(c) relates to groups of up to six people living together as a single household, but covers groupings such as a small religious community which would not fall within the class C4 HMO definition.
38. From the evidence I consider that the outbuilding was likely purpose-built to accommodate a residential use and is consistent with the C4 definition which relates to small, shared accommodation occupied by between three and six unrelated individuals who share basic amenities such as a kitchen and bathroom. This description covers the use to which the outbuilding has been put and, as such, it represents an additional planning unit on the site of 81A, which has been sub-divided. The immunity period for the use in question is therefore ten years, rather than the four years claimed by the appellant.
39. Accordingly, for the residential use created here to enjoy immunity from enforcement action the appellant must successfully demonstrate, on the balance of probability, that the breach of control identified commenced ten years before the date the enforcement notice was issued, ie prior to

23 September 2010 and has continued since. As the replacement outbuilding did not exist at this date the material change in the use of the land cannot be lawful.

40. The appellant makes reference to the judgement of *R (Welwyn Hatfield Council) v SSCLG* [2010]. This does not support his appeal, though, as the background to the case concerned a planning permission granted to erect a barn, yet the landowner had, instead, constructed a dwelling by way of concealment. In fact, the case law here provides an important limitation on the ability of LDC applicants to rely on the four year rule provided by s 171B(2) in cases involving a newly built structure intended for use of a building as a single dwellinghouse. This is because s 171B(2) is not apt to encompass the use of a newly built structure as a dwellinghouse where the intention for such is clear. Instead, the said legislative sub-section is concerned with a change of use of any existing building.
41. From the evidence I consider, instead, that the outbuilding was purpose-built for a means of residential occupation. Its size and shape are also a consideration here and from the totality of evidence, and on the balance of probability, the four year rule cannot apply. Moreover, the Welwyn case does not parallel with the current appeal as it has been shown that the development enforced against here does not fall within the parameters of use class C3.
42. Turning to the lawfulness of the outbuilding itself, the judgement of *Murfitt v SSE & East Cambridgeshire CC* [1980] JPL 598 established the principle that where operational development – in the current appeal being the erection of the outbuilding which facilitates the residential use – is part and parcel of the material change of use then the four year bar will not apply, and the works would be subject to the ten year enforcement limit. This judgement followed on from the ruling of *Somak Travel Ltd v SSE & Brent LBC* [1988] where it was held to be lawful for an enforcement notice to require for the removal of operational development integral to an unauthorised use of the land.
43. Accordingly, an unauthorised material change of use may lawfully require the land in question to be restored to its condition before the change of use took place by the removal of associated works as well as cessation of the use itself. In this particular instance, therefore, the building would have been in place over four years at the date the enforcement notice was issued, but because it facilitated an unauthorised residential use, the notice was correct in requiring for the building to be demolished and removed from the land.
44. The appeal on ground (d) must also, therefore, fail.

The appeal on ground (f)

45. The appeal on ground (f) is that the requirements of the enforcement notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. S173(4) provides that the purpose shall be to remedy the breach of planning control or to remedy any injury to amenity. It would appear that the notice here was drafted to remedy the breach.
46. The appellant's representations on this ground relate more to points more applicable to a ground (a) appeal or a deemed planning application, with local policies cited in an attempt to show that the outbuilding meet their aims and

objectives. However, no such appeal was lodged and the planning merits and/or impacts of the development enforced against do not fall to be considered. A ground (f) appeal cannot be used as a back-door method to obtain a grant of planning permission.

47. The principle that requirements should not be excessive is found in the judgement of *Mansi v Elstree RDC* [1965] where it was held that an enforcement notice's requirements could not lawfully remove any existing use rights attached to the land. In this case, from the evidence taken as a whole, it is seems clear that the only permissible use this piece of land enjoys is that of residential garden, despite the site's sub-division.
48. With reference to my reasoning on the ground (b), (c) and (d) appeals, the notice's requirements that the use of the land ceases, the outbuilding be demolished and the resultant debris and materials be removed from the land and that the land be returned to its former condition prior to the contravention occurring are all measures reasonably necessary to remedy the breach. Any lesser requirements would not properly serve the enforcement notice's purpose.
49. In the circumstances the appeal on ground (f) does not succeed.

Timothy C King

INSPECTOR