



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/X/21/3274688

Garage/Annex at rear of 81A St Georges Road, Leyton E10 5RQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development ("LDC").
 - The appeal is made by Mr S Mayet against the decision of the Council of the London Borough of Waltham Forest.
 - The application Ref 210435 is dated 15 February 2021
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is applied for is described as '*building and its change of use as a single dwellinghouse*'
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description on the application form is a narrative from which I have extracted the wording set out above in the banner heading. In the circumstances I consider that the development's description taken from the Council's decision notice better focusses on the development involved, and for which a lawful development certificate (LDC) is sought. The development comprises an outbuilding in the rear garden and its use as a single dwellinghouse (Class C3).
3. Related to this case is a s174 appeal (*APP/U5930/C/20/3261551*) following the Council's decision to issue an enforcement notice against the same development. I am treating this as the lead appeal in the circumstances but, as the issues are the same I have transposed text, particularly from that set out in my assessment of the ground (d) appeal whereby immunity from enforcement action, hence lawfulness, was claimed.

Background

4. S171B(2) of the 1990 Act, as amended, 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 contrast, s171B(3) says that, with all other breaches of control concerned with the use of land, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

5. In an appeal under s195 of the Act against the refusal of a LDC the burden of proof is upon the appellant. With the test of the evidence being on the balance of probability the planning merits of the matter applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law.

Main Issue

6. The main issue in this appeal is whether, on the balance of probability, the building and its use was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990.

Reasons

7. 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.
8. As regards the building itself, this is a detached single-storey outbuilding. I here refer to an appeal decision relating to this 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.
9. 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.
10. 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.
11. 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.

12. 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.
13. 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.
14. 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.
15. 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.
16. 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*".

17. 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."

18. 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.
19. In this context, I note the appellant's claim that the new building was first used as a domestic garage, which would have accorded with the terms and conditions of the 1995 planning permission. However, I have seen no convincing evidence to support this claim, and a sheet of paper headed 'Monthly Statement for 81A St George's Road - Annex and garage' showing tenants Mr D Atmakur and Miss M Konica, is dated 23 June 2021, some nine months after the Council's inspection of the property in September 2020. I would therefore question its relevance.
20. 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.
21. 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"*
22. 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 27 and 28 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.
23. I note the section 9 Witness Statements, all dated 21 July 2020, from Ebrima Singhadah, Magic Touray, Saikou Sillah and Ebrima Njie. At that time two had lived at the premises for eight months, one for nine months and one for six months. Together, the indication was that three to four people lived there, two of the above expound on this, saying that the people were unrelated, and all indicate that toilet, bathroom and kitchen facilities were shared.

24. In the above connection, the building's occupation arrangements in October 2019 (nine months before the Witness Statements were sworn) and 10 September 2020 (the date of the inspection by Council officials) suggest a consistent pattern in its use. Accordingly, I have little reason to doubt the authenticity of the Council's evidence and, besides, the appellant has not provided any evidential material of significant weight to demonstrate that the outbuilding had ever been used as a single dwelling.
25. 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.
26. 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.
27. 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.
28. 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 15 February 2011 (the '*material date*') 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.
29. 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.
30. 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.

31. 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.
32. I have examined and had regard to all of the evidence adduced, including representations from interested parties, but these have not affected my conclusions. I therefore find that the evidence produced in its entirety is neither sufficiently precise nor unambiguous for the appellant to have discharged his burden of proof.
33. For the reasons given above I conclude, on the evidence before me that, on the balance of probability, the use was not lawful on 15 February 2021 within the meaning of section 191(2) of the Town and Country Planning Act 1990.
34. Accordingly, I will exercise my powers under section 195(3) of the Act as amended.

Timothy C King

INSPECTOR