



Appeal Decision

Inquiry Held on 4 – 5 October 2022

Site visit made on 5 October 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 November 2022

Appeal Ref: APP/F5540/C/19/3224860

Premises known as 2B Aylett Road, Isleworth TW7 6NP shown edged red on the attached plan with the position of the first floor element hatched black.

- 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 Kulwinder Kumar against an enforcement notice issued by the Council of the London Borough of Hounslow.
- The enforcement notice, numbered BWR/2015/00577, was issued on 18 February 2019.
- The breach of planning control as alleged in the notice is: Without planning permission, the erection of a first floor structure and the use of this structure along with the ground floor as a separate residential unit.
- The requirements of the notice are:
 - i. Cease the use of the ground floor and first floor of the structure as a separate residential unit
 - ii. Remove all the kitchen facilities and associated kitchen facilities from the ground floor of the building (i.e. all kitchen and washroom facilities, facilities to include the following items – kitchen wall and base units, units kitchen sink, kitchen worktop surfaces, cooking facilities and cooker hood). In addition, to the above items all water and gas supply piping and waste connections from the structure
 - iii. Remove all the bathroom and associated bathroom facilities from the ground floor of the building (i.e. Shower/bathing facilities, WC, wash basin and pedestal). In addition to the above items all water piping and all waste connections from the structure.
 - iv. Demolish the first floor element of the structure
 - v. Remove all resultant debris from the Land
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (d), (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.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

Preliminary Matters

1. All evidence at the Inquiry was given under oath. As no ground (a) appeal has been made under section 174(2) of the 1990 Act, I cannot consider any planning merits or disbenefits of the appeal development.
2. The appellant's case includes an assertion that what has occurred does not amount to the erection of a structure, as alleged in the notice, but "a limited

programme of renovation". By the time the Inquiry opened, both main parties had reached a position where they agreed this constitutes an appeal on ground (b).

3. At the Inquiry, the Council raised no objection to ground (b) being added to the appeal and, as the Council had identified this ground (b) appeal in the preparation of its evidence, I am satisfied that no prejudice arises as a result of it being added to the appeal. So I have dealt with the appeal on the basis that it includes ground (b).
4. There is some repetition in the wording of requirement (ii) in paragraph 5 of the notice. At the Inquiry both main parties agreed I should make clarificatory amendments to the wording of the notice in this regard and so I have done so, as set out in my Formal Decision below.

Main Issues

5. Based on the grounds pleaded, the main issues are:
 - whether the matters stated in the notice have occurred, ie the ground (b) appeal;
and
 - whether it was too late for the Council to take enforcement action due to the time limits set out in section 171B of the 1990 Act, ie the ground (d) appeal;
and
 - if the above ground of appeal is not successful, whether 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 those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach, ie the ground (f) appeal;
and
 - whether the period for compliance with the notice falls short of what should reasonably be allowed, ie the ground (g) appeal.

Reasons

The ground (b) appeal

6. An appeal on ground (b) is that the matters stated in the notice have not occurred as a matter of fact. In a ground (b) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.
7. The focus of the appellant's ground (b) appeal is that the enforcement notice mischaracterises "a limited programme of renovation" as the erection of a structure, (described in the notice as "the erection of a first floor structure").
8. The appellant has not suggested that the alleged use as a separate residential unit is not correct, a matter I shall return to later under the ground (d) appeal.
9. According to the appellant, "there were works in 2015 to replace the roof and walls of upstairs... and floorboards some were replaced... new cladding and

double glazing upstairs... There was recladding and renewal of most of the timber...”

10. At the Inquiry the appellant said that wooden elements within the first floor, that were installed before 2015 are still present but that some of the wood was very rotten and that was replaced with new timber as part of the 2015 works. He also said that the staircase was replaced.
11. Based on the photographs provided, all the windows which now exist at first floor level post-date the 2015 works. In other words, they do not appear to have replaced any previously existing window openings. At the Inquiry, the appellant and tenant said there was a window on the front elevation but this is not what is shown in any photographs prior to the 2015 works. Moreover, it has not been quantified how much of the structure at first floor level pre-dates the 2015 works.
12. During the Inquiry, comparisons were made between photographs taken in 2009 and 2015, of the flank elevation of the structure, facing 2 Aylett Road. It appears that timber garden fence panels were attached to this elevation of the structure. The appellant’s position is that this is clear evidence that the structure, in particular the rear section of the roof and the internal timber frame supporting it, has remained in place and unchanged.
13. However, a comparison was also made between photographs taken in 2015 of the flank elevation facing St John’s Road. These indicate that timber garden fence panels were previously attached to a new flank elevation, after it was constructed. So I am not satisfied that the panels seen on the flank elevation facing 2 Aylett Road in 2015 mean that the structure has remained in place and unchanged. The panels could have just been reattached, following the 2015 works. Whilst the panels appear not in a good state, on the balance of probabilities, this could just mean that the same panels were reattached, rather than new panels attached, as occurred on the elevation facing St John’s Road.
14. At my site visit I inspected a hole drilled through the external wall at first floor level, beside the small external door which opens on to the flat roof at the front. On the same elevation I was able to inspect the timber behind the exterior cladding and damp proof membrane. I was also able to see behind the cladding on the eastern corner at first floor level. In none of these locations was I able to identify any fabric which looked old or weathered.
15. At the front of the structure, I saw that a part of the roof is curiously laid over what appears to be another roof. This was the only visible indication on site of any fabric which might be older, although it appears to have been entirely engulfed by a newer roof structure.
16. There is no photograph relating to any part of the works which shows the structure as having been demolished, nor any moment where the walls of any elevation are missing. But by the same token and bearing in mind where the burden of proof lies, setting aside the part of the roof referred to above, the appellant team has not been able to point to the location of any specific part of the original structure.
17. According to the surveyor, Mr Turner, the original structure contained a substantial frame with wooden uprights and cross-bracing, necessary to give

the structure stability against the wind. It is said this must survive as without it the original roof could not have been maintained. But I am not satisfied this is the case, bearing in mind a roof can be propped.

18. In any event, my attention has been drawn to a principle established in the *Oates*¹ case. In summary, the retention of some of the fabric of an original building within the building that has been erected does not preclude a finding by the decision-maker, as a matter of fact and degree, that the resulting building is, physically, a "new" building, and that the original building has ceased to exist. In my view, it makes no difference whether the basic size and shape of the structure has remained the same or not.
19. Taking all of the above into account, based on the cases put to me, on the balance of probabilities, the structure at first floor level does not amount to "renovation" as the appellant describes it, or maintenance, improvement or alteration, as per section 55(2) of the 1990 Act. Instead, it amounts to a new building, even though some parts of the old building may remain.
20. I conclude on the balance of probabilities that the matters stated in the notice have occurred as a matter of fact and as such, the appeal on ground (b) fails.

The ground (d) appeal

21. An appeal on ground (d) is that it was too late for the Council to take enforcement action due to the time limits set out in section 171B of the 1990 Act. In a ground (d) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities. The decision must be made on the evidence and that evidence must be precise and unambiguous.
22. The focus of the appellant's ground (d) appeal is that the premises have been used as a separate residential unit for more than 4 years before the enforcement notice was issued. However, there is no suggestion that it was too late for the Council to take action against the building works, ie "the erection of a first floor structure".
23. Section 171B(2) of the 1990 Act provides 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 4 years beginning with the date of the breach.
24. So based on the evidence, I must consider whether the premises changed use to a single dwellinghouse and continued to be so used for 4 years after the date of the change and before the enforcement notice was issued, such that the Council could have taken enforcement action at any time during that 4 year period.
25. In light of the oral evidence of the tenant, Mr Farooqi, the Council accepts that he has resided in 2B Aylett Road since 2010 on a sufficiently continuous basis that, had it not been for intervening periods of mixed use up until 2017, the appellant would be capable of demonstrating 4 years continuous residential use.
26. The appellant's position is that the use of the building as a single dwellinghouse started in 2010 or 2013 at the latest and was therefore immune from

¹ *Oates v SSCLG* [2019] JPL 251

- enforcement action by 2014/2017. The reason for this uncertainty regarding the date of the breach seems to be due to how the room annotated on the floor plans as 'studio workshop' was used and accessed.
27. The studio workshop was originally connected to the bakery at 23 St John's Road. But in 2009 or 2010 the appellant created a wall which prevented direct access from that property, at which point the only access to the appeal building was via the front door to Aylett Road.
 28. The earliest tenancy agreement provided indicates that Mr Farooqi's occupation of the premises began on 1 April 2010. However, at that time he had no access to the studio workshop, which was used by the appellant for storage, with access from Aylett Road via a hallway in No 2B. In addition, this hallway was also used for storage by the appellant, said to be until 2015 at the latest.
 29. It is the appellant's position that the storage use was an ancillary component of the primary use of the appeal building as a single dwellinghouse. But at the Inquiry, when discussing the initially cheaper rent paid by his tenant, the appellant commented that Mr Farooqi "only used the kitchen, bathroom, toilet and upstairs." The remainder of the property matches the areas used by the appellant for storage.
 30. The appellant's storage included items associated with the bakery and building materials. To my mind, this storage was entirely unrelated and functionally separate to the tenant's residential use and, from the floor plan provided, the areas used for storage constituted a significant part of the premises.
 31. At the Inquiry, Mr Farooqi said that in 2013 a seal was removed on the double doors to the studio workshop from the hallway of No 2B. From this point on, Mr Farooqi was able to access the studio workshop and used part of it for storage himself. From 2015 he used it as part of his home. He explained that he has used it as a dining room and for photography.
 32. From all of the evidence, it seems to me that the appellant's act of subdivision in 2009 or 2010 created one or more new planning units within the form of 2B Aylett Road, and, the removal of the aforementioned seal at some point in 2013 led to a change in Mr Farooqi's unit of occupation. This had a further effect on what constitutes the planning unit in this case.
 33. In other words, as a matter of fact and degree, since 2013 the planning unit has been 2B Aylett Road, including the studio workshop, the tenant having not had access to that space prior to then and that space having been used for unrelated non-residential storage purposes by the appellant.
 34. Taking all of the above into account, it seems to me that the storage use in the studio workshop and hallway was a primary component of a mixed use of the planning unit as storage and residential. Consistent with the *Beach*² case, until the unrelated storage ceased, which could have been as late as 2015, the building was in a mixed use as part storage and part residential.
 35. I am not satisfied that the cessation of the storage use did not result in a change in the character of the use, particularly given that the bakery paraphernalia and building materials stored did not relate to Mr Farooqi's residential use of the property.

² *Beach v Secretary of State* [2002] JPL 185

36. At some point in 2017 there was a period of about 3 weeks when, Mr Farooqi says, 2 employees of one of the appellant's businesses came and used the hallway of No 2B, all day, as their office. The appellant describes this use as *de minimis*. Whilst this use took place for a relatively short time, it did not relate to Mr Farooqi's residential use of the property.
37. In my judgement, and consistent with the *Beach* case, this office component of the use resulted in a further change in the character of the activities on the land and took place long enough to effect a material change of use of the property to a mixed use as residential and office. In my view, this interrupted any exclusively residential use of the property by Mr Farooqi.
38. It makes no difference whether, as the appellant says, the office use took place on a voluntary basis. In light of the above, it seems to me that the use of the property for residential purposes only would not have recommenced until after this mixed use ceased, in 2017.
39. At the Inquiry there were questions about Southall TV and Rowdy Productions, businesses which have been operated by the tenant from the appeal premises. But there is no suggestion by the appellant that these mean that the alleged use as a separate residential unit is not correct.
40. Moreover, Ms Fisk confirmed that she felt, having visited the site in 2019 when serving the notice, that at that time the building was in residential use and any business use was essentially no more than a home office. So in light of my findings above, these businesses make no difference to my conclusion on ground (d) in respect of the storage and office use.
41. Taking all of the above into account, I am not satisfied on the balance of probabilities that the premises changed use to a single dwellinghouse and continued to be so used for 4 years after the date of the change and before the enforcement notice was issued, such that the Council could have taken enforcement action at any time during that 4 year period. I conclude that the ground (d) appeal fails.

The ground (f) appeal

42. An appeal on ground (f) is 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 those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
43. Under section 173(4) of the 1990 Act, when serving an enforcement notice the Council may seek to (a) 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, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or (b) remedy any injury to amenity which has been caused by the breach.
44. Based on the requirements of the notice, the purpose of the notice is to remedy the breach, ie purpose (a), above. The appellant accepted this is the case at the Inquiry.

45. Having established under the ground (b) appeal that the breach is correctly described in the notice, no lesser steps have been suggested that would achieve the purpose of the notice. I conclude that the appeal on ground (f) fails.

The ground (g) appeal

46. An appeal on ground (g) is that the period for compliance specified in the notice falls short of what should reasonably be allowed.
47. At the Inquiry, my attention was drawn to the health of the tenant. The Council accepts that this is a relevant factor to consider for the ground (g) appeal.
48. As the tenant will have to seek alternative accommodation as a consequence of the notice being upheld, in the circumstances of this case, I am allowing additional time for this to happen and for the notice to be complied with.
49. So I am extending the compliance period for the notice to 12 months. This is the maximum period I consider reasonable in the circumstances and as such the appeal on ground (g) succeeds to this extent.

Conclusion

50. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations, as set out in my Formal Decision.

Formal Decision

51. It is directed that the enforcement notice is varied by:

- the deletion of requirement (ii) in paragraph 5 of the notice and its substitution with:

"Remove all the kitchen facilities from the ground floor of the building (i.e. all kitchen facilities to include the following items – kitchen wall and base units, kitchen sink, kitchen worktop surfaces, cooking facilities and cooker hood). In addition, to the above items all water and gas supply piping and waste connections from the structure.
- the deletion of "3 months" as the time for compliance in paragraph 5 of the notice and its substitution with "12 months".

52. Subject to these variations, the appeal is dismissed and the enforcement notice is upheld.

L Perkins

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Matthew Dale-Harris	Barrister, Landmark Chambers
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He called

Zamiruddin Farooqi	Tenant
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Kulwinder Kumar	Appellant
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Kevin John Turner	Surveyor
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FOR THE LOCAL PLANNING AUTHORITY:

Horatio Waller	Barrister, Francis Taylor Building
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He called

Laura Fisk	Senior Planning Enforcement Officer
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DOCUMENTS

- 1 *Beach v Secretary of State* [2002] JPL 185
- 2 *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207
- 3 *Oates v SSCLG* [2019] JPL 251
- 4 *Swale BC v First Secretary of State* [2006] JPL 886
- 5 *Winton v Secretary of State for the Environment* [1983] 46 P&CR 205
- 6 Assured shorthold tenancy agreement dated 24 October 2017