
Appeal Decisions

Inquiry Held on 6 and 7 December 2022

Site visit made on 7 December 2022

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 30 January 2023

Appeal A: APP/N5090/C/21/3288670

Appeal B: APP/N5090/C/21/3286671

Rear of 46, 48 and 50 Hurstwood Road, London NW11 0AT

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mrs Esther Gurvits and Mr Joseph Gurvits against an enforcement notice issued by the Council of the London Borough of Barnet.
- The enforcement notice was issued on 4 October 2021.
- The breach of planning control as alleged in the notice is the making of a material change of use of the outbuilding to the rear to use as an office and associated storage.
- The requirements of the notice are:
 1. Cease the use of the building as a commercial office and associated storage.
 2. Permanently remove all kitchen units, sinks, cooking facilities and worktops from the outbuilding.
 3. Permanently remove all toilets from the outbuilding.
- The period for compliance with the requirements is 5 months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended. Appeal B is proceeding on the grounds set out in section 174(2) (b), (c), (d) and (f)] of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld.

The Enforcement Notice

1. For clarity and consistency a number of minor variations to the Notice were agreed at the inquiry. The following variations can be made without causing injustice to the main parties:
 - The word "office" in the first line of paragraph 4.1 should be deleted and substituted with "outbuilding"; and
 - The word "commercial" shall be deleted from paragraph 5.1 of the Notice.

Site Description and Background

2. The appeal site is situated on the North side of Hurstwood Road, comprising a pair of semi-detached dwellings and the adjoining semi-detached house. All three properties are currently owned and occupied by one family. The immediate locality is mainly residential with Mutton Brook, part of the Dollis Green Walk and an open space designated as a Site of Local Importance for Nature Conservation situated immediately to the north. Hurstwood Road is a

minor residential street which runs south of and roughly parallel to the A406 North Circular.

3. It is my understanding that before a material change of use to office with associated storage occurred the appeal site was used as three separate outbuildings by the appellants and their family. Each of the component units was constructed under permitted development provisions pursuant to Class E, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO). Each outbuilding was used for purposes incidental to the enjoyment of the associated dwellinghouses Nos 46 to 50 Hurstwood Road.
4. According to the Council's submissions, some time after 2017 the appellant's property business expanded and as a consequence, the outbuildings were connected to form a single larger office with associated storage. Therefore, the office space became no longer incidental to the dwellinghouses, but rather a material change of use had occurred for which planning permission was required.

The appeals on Ground (b)

5. The ground of appeal is that the breach of control alleged in the enforcement notice has not occurred. In order to succeed on this ground it would need to be demonstrated that a material change of the outbuilding to use as an office and associated storage has not occurred as a matter of fact.
6. The appellant's case is quite simply that the matters alleged in the Notice have not occurred as a matter of fact because the constituent parts of the building were all built specifically for either office or storage purposes. In other words, the building the subject of the Notice which has existed in its current form since the completion of the part to the rear of No 50 Hurstwood Road is and has only ever been used as office and storage space.
7. However, it is a fact that the three buildings were built separately. The evidence before me indicates that before 2017 the separate units were used for purposes incidental to the enjoyment of the dwellinghouses, including some work space and storage. Nevertheless they were incidental until the units were subsequently joined together; firstly in 2013 and then again in 2017. Only when they were amalgamated in 2017 can the change to an office and associated storage occur rather than a use for office space and storage space incidental to the enjoyment of the dwellinghouses have occurred.
8. Therefore a change of use of the building as an office and associated storage has occurred as a matter of fact and the appeals on ground (b) do not succeed.

The appeals on ground (c)

9. The ground of appeal is that the matter alleged does not constitute a breach of planning control. The appellant's case is that if the material change of use did occur it does not constitute a breach of planning control because it does not involve development pursuant to s55(2)(d) of the 1990 Act which provides that *"the use of any building or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such"* is not development.

10. The courts have held¹ that in cases such as this there are two key questions to be asked. Firstly, has there been a material change of use and, secondly, if so, was it for a purpose incidental to the use of the dwellinghouse as a dwellinghouse? Not all incidental purposes will involve a material change of use. I have already determined under ground (b) that the making of a material change of use of the outbuilding to the rear to use as an office and associated storage has occurred as a matter of fact and therefore under ground (c) the key question is whether such change amounts to a material change of use for which planning permission is required. The evidence before me points to three key arguments that need to be determined in order to test whether or not a material change of use of the outbuilding has occurred on the premise that the character of its use has materially changed.
11. Firstly, it seems to me that the amalgamation of the component parts of the outbuilding have altered the way the site is used that has resulted in there being a change in the character of the use. The appellant argues that the outbuilding has retained some residential use; namely babysitting and residential storage, for example. Photographic evidence does not clearly show that the outbuilding is regularly used for childcare purposes, but instead it has a wide range of office furniture and equipment and there is little evidence of children's toys, books or other furniture or paraphernalia. Furthermore, there is little physical space for children to do homework or play when the office desks are fully occupied. It may be that children visit the outbuilding but not to the extent that it could be defined as being in any particular use for childcare associated with the dwellinghouses or otherwise.
12. In addition, the space to the rear of No 46 is primarily used for the storage of files and other documents as well as some other items such as mattresses, floor tiles, furniture DVDs and videos. It is not clear whether or not these other items are related to the business or residential dwellinghouses.
13. It is very clear to me that the outbuilding is being used far more intensively that would be expected for a home office, including the number of employees, amount of document storage, office layout with an open plan area as well as individual offices, reception desk, separate male and female toilets and overall levels of activity. There are clearly planning consequences that have arisen from the increased intensity in use of the site as identified in the Notice. The extent to which these consequences accord or otherwise with the development plan is discussed below under the appeal on ground (a).
14. Secondly, the outbuilding now comprises its own planning unit as identified on the plan attached to the enforcement notice and therefore it cannot be said that the use is incidental to the enjoyment of the dwellinghouses which it is separate to from a planning perspective. Nos 46 to 50 Hurstwood Road are not used as a single dwellinghouse, but they form multiple dwellinghouses in separate occupation. Each part of the appeal outbuilding was erected as incidental to the enjoyment of their respective dwellinghouses, but the connection of them has taken the three parts which were comprised within separate dwellinghouses and combined them to form a single new planning unit used for office and storage purposes.

¹ Sage v SSHLGC [2021] EWHC 2885(Admin)

15. The subdivision of a planning unit can itself constitute development. Indeed, the courts have held² that a material change of use does not occur automatically upon subdivision but it may have the effect of changing the character of the use and may have planning consequences which indicate that a material change has occurred. As set out above there are a number of planning consequences arising from the subdivision that has happened in this case. Therefore the use of the outbuilding as alleged in the enforcement notice cannot be ancillary to the dwellinghouses or incidental to the enjoyment of the dwellinghouses because it now forms its own separate planning unit.
16. *Sage* also holds that a material change of use can be made without there being any adverse environmental impact. The crucial test is whether there has been a change in the character of the use and treating impact as a crucial issue in establishing whether a material change of use has occurred, or a purpose is reasonably incidental is not consistent with established planning law. However, environmental impact can be an indicator of whether or not a material change of use has occurred because a use of new character may give rise to environmental impacts.
17. Finally, as set out above the different parts of the outbuilding were constructed separately under Class E, Part 1 of the GPDO which relates to the erection of a building which is "incidental to the enjoyment of a dwellinghouse". Each part of the outbuilding was constructed as incidental to the enjoyment of the different dwellinghouses in whose garden they are situated. The dwellinghouses known as 46, 48 and 50 Hurstwood Road are not in use as a dwellinghouse, by rather multiple dwellinghouses. The joining of the three different parts of the outbuilding to form a single office with storage has taken the development outside the scope of permitted development granted by virtue of the provisions of Class E.
18. The appeals on ground (c) fail.

The appeals on ground (d)

19. The ground of appeal is that at the date when the Notice was issued, no enforcement action could be taken. The appellant argues that there is abundant and unchallenged evidence of continuous use from a structure in the rear of the appeal properties since approximately 1998 whereas the Council's case is that the use is not immune as a consequence of the passage of time because the use is occurring in buildings which have been erected within the past 10 years. There is no dispute that the building structures cannot be enforced against.
20. When determining an appeal on ground (d) if a local planning authority has no evidence to contradict or otherwise make the appellant's version of events less than probable there is no good reason to refuse the application, provide the appellant's evidence alone is sufficiently precise and unambiguous to justify the grant on the balance of probabilities.
21. The appellant holds that the office use in the rear garden of the properties has taken place continuously for a period in excess of 10 years prior to the date of the enforcement notice. There is no dispute with the Council that part of the land to the rear of 48 Hurstwood Road has been used as a home office

² *Payne v SSHCLG* [2021] EWHC 3334 (Admin)

incidental to the enjoyment of the dwellinghouse since before 4 October 2011, but that does not prove that a material change of use of the appeal site as identified in the enforcement notice to a single joined office space with associated storage separate from the dwellinghouses occurred on or before that date.

22. The appellant argues that enforcement action cannot take place against the alleged breach of planning control because the buildings are being used for the same purpose that began in 1998. However, that cannot be the case since the buildings, and therefore the site identified in the enforcement notice, were not all in existence at that time. The alleged breach can only have occurred since the buildings were completed.
23. The appellant has submitted evidence that a single employee was employed by the business from 2007, but there is no documentation to support that evidence. Furthermore, even if that employee did work from the outbuilding before 2011 there is insufficient evidence that the use at that time was beyond what may be described as ancillary to the dwellinghouse or that any severance of the planning unit at No 48 has occurred as a result of the use of the outbuilding.
24. Therefore, the appeals on ground (d) do not succeed.

Appeal A on ground (a)

25. The ground of appeal is that planning permission should be granted. The main issues are:
 - i. Whether the use is appropriate in this location with particular reference to its location outside a Town Centre and the resultant effect on the residential character of the area and viability of town centres; and
 - ii. Whether or not the development represents an over-intensive use of the site with consequent harm to the living conditions of the occupants of neighbouring residential properties with particular reference to car movements, parking and noise and disturbance arising from the comings and goings from the outbuilding.

Location

26. Policy DM14 of Barnet's Local Plan – Development Management Policies September 2012 (the DMP) states that proposals for all new office space should follow a sequential approach which considers town centre sites before edge of centre sites. This approach accords with Policies DS7 and E1 of the London Plan 2021 which advocates a town centres first approach, discouraging out of centre uses with limited exceptions and the sequential test set out in the National Planning Policy Framework (the Framework). The Framework is clear that applications which fail to satisfy the sequential test should be refused.
27. The appellant contends that the sequential test does not apply in this case because the office use is not a town centre use in any meaningful way. However, offices are a town centre use according to the Framework and there is no distinction between office space and office space open to the public. Therefore there is insufficient evidence before me that the existing office space is not a town centre use. It has been suggested that the office is different from other offices in that the family running the business activity does not want

visits from members of the public. However, that is likely to be because the family does not want visitors to their office which is situated immediately to the rear of their residential properties. There is no evidence that this use would not attract visitors in an alternative setting such as a town centre.

28. I acknowledge that the supporting text to Policy DM14 of the LP and Policy E1 D set out the overall objective of the policies to locate new offices in town centres as these are more accessible by public transport and will help contribute to the continued viability of the rest of the town centre. The appellant argues that in this case employees are either resident in the adjacent dwellinghouses or are otherwise very local and a town centre location would generate unnecessary travel. However, that ignores the wider objective of the policies to ensure the vitality and viability of town centres. Therefore, that particular part of the policies is clearly breached.
29. The appeal on ground (a) seeks approval for new office space that has been created on a previously residential site. There are clearly some planning consequences associated with the use, including some footfall with workers attending the site on a regular basis and contractors also visiting the office. There is a reception desk in the office which is situated close to the entrance into the office and is clearly there to receive visitors. To suggest that the reception facilities are there for any other purpose seems to me to be misleading. Policy CS5 of Barnet's Local Plan Core Strategy September 2012 (the CS) seeks to ensure that development respects local context and distinctive local character. Inevitably, an office of this scale will generate levels of activity which conflicts with the relatively quiet character of this primarily residential area.
30. There is no evidence before me that alternative sequentially preferable sites in town centres have been sought whereas the Council's evidence shows that there are town centre office sites available. It has been suggested that conditions could be attached to the grant of a planning permission to limit the use of the outbuilding, but this would not accord with the overall purposes of the development plan and the Framework.
31. Therefore, on this issue I conclude that the development is not appropriate in this location with particular reference to its location outside a Town Centre and the resultant effect on the residential character and viability of Town Centres. As such it conflicts with Policy CS5 of the CS, Policies DM14 of the DMP, Policies DS7 and E1 of the London Plan and the Framework.

Living conditions

32. Policy DM01 of the DMP relates to protecting Barnet's character and amenity, stating that development proposals should be based on an understanding of local characteristics. As well as respecting the visual aspects of the environment, it is clear to me that the policy also seeks to preserve or enhance local character and is relevant to all developments, including the development the subject of this appeal. Policy DM04 of the DMP relates to the environmental considerations for development, including noise.
33. Evidence is that neighbours have experienced noise and disturbance relating to the use of the outbuilding as an office. In particular, noise arises from the movements of staff during office hours which is above those that may be expected from residential properties in this locality.

34. The appellant suggests that complaints from neighbours is related to noise and disturbance arising from building works that have taken place at No 46 Hurstwood Road and that there have been no complaints about noise and disturbance from the appeal site before the neighbours objected to a separate planning application at the site. However, this is not correct because there is evidence of parking stress associated with the office use dating back to July 2021 and relevant emails identify planned development of the dwellinghouses. Therefore, they were written before the building works at No 46 started.
35. Evidence is also specific with respect to disturbance from the comings and goings associated with staff working from the appeal site and the related traffic problems. That evidence is also very clear that the disturbance increased around 2017-2018 which coincides with the time when the use of the outbuilding for office purposes intensified.
36. I am aware that and the Council has not presented specific detailed highways evidence such as traffic surveys or a statement from a highways engineer; however, the Council does not claim that there are specific highways problems, but rather there is noise and disturbance associated with vehicle and other movements. I have no reason to dispute the evidence from local residents.
37. Therefore, on this issue I conclude that the development represents an over-intensive use of the site with consequent harm to the living conditions of the occupants of neighbouring residential properties with particular reference to car movements, parking and noise and disturbance arising from the comings and goings from the outbuilding. As such there is conflict with Policies DM01 and DM04 of the DMP.
38. In this case I have not been presented with further evidence which leads me to conclude that there are other material considerations that indicate that permission should be granted. The appeal on ground (a) fails.

The appeals on ground (f)

39. The ground of appeal is that the steps required by the Notice to be taken exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in s173 of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). Since in this case the Notice requires the complete cessation of the use of the building as an office and associated storage and the permanent removal of items and facilities associated with that use, the purpose is clearly remedy the breach. Allowing any part of the outbuilding to be used as an office with associated storage would not achieve that purpose. In this respect, the appeals on ground (f) must fail.
40. There are kitchen facilities in the office space and also male and female toilets. The appellant argues that their removal exceed what is necessary to remedy the breach. However, it is a well-established legal principle³ that an enforcement notice may require the removal of works that are "*part and parcel*" of a change of use and are "*integral to it*". The toilets and kitchen facilities facilitated the conversion of the outbuildings to a single office with storage space. Consequently, it is appropriate for their removal to be required by the Notice.

³ Kestrel Hydro v SSCLG [2016] EWCA Civ 784, Somak Travel Ltd v SSE [1998] 55 & P. & C.R. 250, Murfitt v SSE and East Cambridgeshire DC [1980] 40 P. & C.R. 254

41. The appellant has also suggested the lesser step of separating the units into their original three parts as a means of remedying the breach of planning control. I agree that the additional requirement to remove the doors linking the three component parts of the outbuilding is another appropriate means of remedying the breach, but only in concert with the other requirements of the Notice. Rather than causing injustice to the appellants this additional requirement would ensure that the outbuilding is not left with a nil-use building. Instead, the existing outbuilding would be returned to its original three lawful outbuildings which could be used lawfully for purposes incidental to the enjoyment of the dwellinghouses.

Conclusion

42. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the deemed application.

Formal Decision

43. It is directed that the enforcement notice be varied by:
- a) the deletion from the first line of paragraph 4.1 of the word "office" and the substitution therefor of the word "outbuilding";
 - b) the deletion of the word "commercial" from paragraph 5.1 of the Notice; and
 - c) adding the words "Permanently remove the internal doors and seal up the existing openings which link the three component buildings" as requirement 5.4 of the Notice.
44. Subject to these variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.

A A Phillips

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Flora Curtis	of Counsel appointed by Mr Alvin Ormonde of Planning and Project Management Services
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She called

Robert Favell	Principal Planning Enforcement Officer, London Borough of Barnet
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FOR THE APPELLANT:

Giles Atkinson	of Counsel appointed by Mr Kelly and Mr Panesar of HB Public Law
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He called

Mrs Esther Gurvits	Appellant
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Mr Alvin Ormonde	PPMS
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