



Appeal Decision

Site visit made on 10 January 2023

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 01 March 2023

Appeal Ref: APP/N1920/C/20/3259714

Land rear of 40 Manor Road, Potters Bar, Hertfordshire EN6 1DQ

- 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 Vivian Watts against an enforcement notice issued by Hertsmere Borough Council.
- The enforcement notice was issued on 25 August 2020.
- The breach of planning control as alleged in the notice is Without planning permission, the material change of use of land from nil use to commercial use as well as the erection of buildings and installation of hard surfacing.
- The requirements of the notice are: A. Permanently cease the unauthorised of the land for commercial purposes; B. Permanently remove the unauthorised pre-fabricated sheds from the land; C. Permanently remove the unauthorised garage from the land; D. Permanently remove the unauthorised office building(s) from the land; E. Permanently remove the unauthorised hard surfacing from the land; F. Reinstatement of the topsoil and vegetative cover of the land where these have been removed; G. Remove all materials, debris, waste and equipment resulting from compliance with the other contents of the notice from the land and its environs.
- The period for compliance with the requirements is Six (6) months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal is brought on ground (a), an application for planning permission is deemed to have been made under s177(5) of the Town and Country Planning Act 1990.

Summary Decision: The enforcement notice is quashed.

Preliminary Matters

1. On the appeal form and in grounds of appeal, the appellant indicated appeals being made under the grounds listed in my banner heading above. However, I have a duty to be alert to 'hidden grounds' of appeal and to deal with these where possible. In my view, part of the appellant's argument made under ground (c) more properly falls under ground (b); the argument is in essence that the appeal site is not in primary commercial use but is 'domestic garden land' which is use for purposes incidental to the enjoyment of the dwellinghouse as such. Since the Council has already had an opportunity to respond to the substance of this argument, I do not consider that any prejudice would arise by my dealing with this as a 'hidden' ground (b) appeal. There remains in any event some overlap between arguments under ground (b) and (c) and so I shall deal with these grounds together.
2. The appellant submitted late new evidence and the Council therefore was given an opportunity to comment upon this.

The appeals on grounds (b) and (c)

3. The appeal on ground (b) is that the matters alleged in the notice have not occurred. The appeal on ground (c) is that the matters alleged (if they occurred) do not represent a breach of planning control. The burden of proof for both of these grounds of appeal is on the appellant, and the relevant standard is on the balance of probabilities.
4. The appellant does not dispute that operational development has taken place on the appeal site. Rather, the appellant's argument as regards ground (b) is that the appeal site is not a separate planning unit in primary commercial use but rather that the use of the appeal site is incidental to residential use.
5. As regards ground (c), the appellant submits that the appeal site falls within the residential curtilage and is used for purposes incidental to the enjoyment of the dwellinghouse as such. On this basis, such use would be excluded from the definition of development that requires planning permission¹ by reason of the operation of s 55(2)(d) of the 1990 Act². Further, the appellant's position is that the operational development referred to in the notice falls within permitted development rights under Schedule 2, Part 1 of the Town and Country Planning (General Permitted Development) (England) Order 2015.
6. I shall firstly therefore consider whether the use of the appeal site is for a purpose incidental to the enjoyment of the dwellinghouse. If it is for an incidental purpose, I will then consider whether the appeal site falls within the curtilage of the dwellinghouse. If not incidental, I will consider whether the use is a primary commercial use as the Council alleges. If a primary commercial use has occurred, I will assess under ground (c) whether or not this represents a MCU. I can then proceed to assess the lawfulness of the operational development alleged.

Background/the site

7. The appeal site is an area of land sitting behind dwellings at Gable End, 40 Manor Road and 41 Manor Road, together with a long strip in between No.s 40 and 41 giving access to the land behind. The appeal site previously formed part of one registered title at the Land Registry along with the plots of No. 40 and Gable End but was severed into three titles. The appellant states that, at the time the operational development alleged in the notice occurred, No 40 and Gable End were owned by the appellant and that Gable End was occupied by the appellant. Currently, the appellant apparently owns and occupies all of the three titles that were severed.
8. From my site visit, I saw that the office outbuilding contained multiple office areas, complete with numerous desks and IT equipment, and that another individual appeared to be at work in one of these office areas. The garage building contained two cars and various personal effects, along with a relatively small quantity of what appeared to be commercial stock storage. The prefabricated sheds contained some domestic storage but also a good deal of what again appeared to be stock storage.

¹ Per s55 Town and Country Planning Act 1990 ('1990 Act')

² Provided that the land is within the curtilage of the dwellinghouse in question

Submissions/evidence

9. The Council's position is that the appeal site has become a physically distinct separate planning unit that is in commercial use which is not incidental to residential use. The Council points out that the appeal site has been registered as a separate land holding at the Land Registry. Site investigations by the Council found the office outbuilding to contain multiple office areas, with three individuals present and 'at work' in the building at the time of the Council's visit. Photographs from that visit also show multiple cars parked on the appeal site.
10. The appellant submits that the use of the appeal site has always been incidental to the residential use of either No 40 and/or Gable End and that it represents 'domestic garden'. The appellant submits that the office building is used as his personal home office and home study, that he does not employ any employees, and there are no regular visits such as to indicate primary commercial use. The appellant explains that registration of a number of businesses to the appeal site address is due to the appellant's role as a real estate and financial business consultant, rather than being indicative of those businesses operating from the appeal site.
11. The appellant draws my attention to the fact that, although the appeal site is fenced off, it is accessible from the garden adjoining the house at Gable End. The appellant has also explained that fencing off the appeal site was due to issues with anti-social behaviour from the former golf club use behind the appeal site. The appellant submits that it is 'unreasonable' to assume that multiple cars parked at the appeal site are related to commercial use rather than the residential use of No 40/Gable End, and comments that multiple cars being parked in this way is not unusual for large families/large properties bearing in mind the possibility of hobby vehicles being kept also. The appellant states that use of the garage building is for the storage of personal vehicles and that the storage sheds are used for incidental residential storage.

Analysis

Whether use is for purposes incidental to the enjoyment of the dwellinghouse as such

12. There is no closed list of uses that may be considered incidental to the enjoyment of a dwellinghouse. An incidental use is though one which is not part and parcel of, but is functionally connected to a primary use, and the functional relationship is one which is normally found. The question of scale does not determine but may be relevant to whether a use is incidental.
13. The appellant outlines the history of the appeal site as residential garden and explains that the appeal site is used for recreation, storage and parking in association with the residential use and that the office outbuilding is used as a home office and study. The appellant submits that visits to the office outbuilding by accountants and clients are infrequent. However, I have no detailed information on the frequency of such visits. Further, whilst it might be the personal choice of the appellant to have an office outbuilding equipped with multiple desks, IT equipment, sofas and office areas, in the absence of some other explanation, this points towards a nature and scale of activity that would not reasonably be considered incidental in connection with the use of a dwellinghouse.

14. Whilst I acknowledge that in principle the parking of multiple cars for personal use can be considered incidental to residential use, the appellant has not submitted sufficient substantive evidence to demonstrate cars have been parked in connection with personal use, rather than being related to the appellant's business interests. The quantity of what seemed to be stock storage within the sheds also points towards a more intensive level of business activity on the appeal site than can reasonably be considered incidental to a residential use. It also seems that visitors to the outbuilding office for business purposes would in all probability use the side access and park on the hard standing meaning that a significant proportion of the appeal site is used, at least partly, for commercial purposes.
15. The appellant draws my attention to appeal decisions³ in support of its case as to incidental residential use of the appeal site. I acknowledge the similarities identified and comments that there is no statutory limitation on 'incidental purposes', and that study space for home working can represent an incidental purpose. However, there is nothing to suggest the same sorts of concerns as to the particular nature of commercial use noted in the present case were identified in these other cases. I have no detailed evidence on use of a nearby outbuilding as a gym so as to make a proper comparison with the appeal development. Finally, although I acknowledge comments that the appellant was incorrectly advised to apply for a use class B1 office use, this does not alter my assessment above.
16. Accordingly, I find that on the evidence before me, and as a matter of fact and degree that the use of the appeal site is not for purposes incidental to the enjoyment of the dwellinghouse as such. The nature and scale of commercial activity on the appeal site is beyond a level which would be reasonably considered incidental to the enjoyment of the dwellinghouse; the commercial use does not have a functional relationship with the residential use that is normally found. It is not therefore necessary for me to consider whether the appeal site falls within the curtilage of the dwellinghouse; it does not fall within the s55(2)(d) exclusion in any event.

Whether primary use of the appeal site for commercial use has occurred

17. The Council alleges that a separate planning unit has been created at the appeal site and that the primary use of that new planning unit is a commercial use.
18. Based on available evidence, it appears that the plots of No 40, Gable End and the appeal site were previously one residential planning unit. These sites were then split into three titles and fenced off. Separation of land into different titles at the Land Registry does not though of itself mean that a separate planning unit has been created. Indeed, these three titles appear to be occupied and used by the appellant and his family. Consequently, on the available evidence, I find as a matter of fact and degree that although the appeal site is a physically distinct area, a separate planning unit has not been created as functional separation has not occurred.
19. As to whether the appeal site is in a primary commercial use, I am mindful that the appellant has submitted and provides some evidence that the appeal site continues to be used in connection with the residential use. My site visit also

³ Ref: APP/R5510/X/18/3212097; APP/P1805/X/18/3205268, APP/P1805/X/18/3205264

revealed domestic storage in both the sheds and that the garage building is primarily in use for storage of personal vehicles. I consider it very likely also that the access and hardstanding would be used for the parking of visitors' vehicles at family gatherings and similar in view of the convenience of this area for this purpose.

20. Thus I find that, whilst the use of the appeal site is not incidental to the residential use, equally, on the evidence before me, it does not seem that commercial use of the appeal site can be considered the only primary use of this land. It seems to me probable the appeal site may be in a mixed use of primary residential and commercial uses. The concept of a mixed use is one of two or more primary uses existing within the same planning unit or unit of occupation. One is not incidental to the other, although there may be incidental uses associated with each primary use, and there may or may not be a degree of physical separation between the different primary uses.
21. On this basis, the appeal on ground (b) succeeds. I have considered whether I could correct the allegation in the notice to address this but have concluded that I could not do so without causing injustice. I do not know what each party's case would be in the face of such a correction and this would significantly impact on the pleading of all other grounds of appeal, as well as upon the assessment of the lawfulness of the operational development which was also included in the allegation.

Conclusion

22. For the reasons given above, I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed. In these circumstances, the appeals on grounds (a), (d), (f) and (g) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act do not fall to be considered.

Formal Decision

23. The enforcement notice is quashed.

V Bond

INSPECTOR