
Appeal Decision

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 23 May 2023

Appeal Ref: APP/Y2620/C/22/3303635

1 Millfield Road, North Walsham NR28 0EB

- 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 Robert Scammell against an enforcement notice issued by North Norfolk District Council.
- The enforcement notice, numbered ENF/21/0146, was issued on 29 June 2022.
- The breach of planning control as alleged in the notice is *Without planning permission: (i) operational development on the Land consisting of the erection of a detached single storey building for independent residential purposes. (ii) the material change of use of the Land by the creation and occupation of a separate residential unit.*
- The requirements of the notice are to (i) demolish the detached single storey building. (ii) remove all materials arising from the removal activities under (i) above from the Land. (iii) restore the garden on the Land to its condition before the breach took place.
- The periods for compliance with the requirements are respectively six, seven and eight months.
- The appeal is proceeding on the ground set out in section 174(2)(b) of the Town and Country Planning Act 1990 as amended ('the 1990 Act').

Summary Decision: the appeal is dismissed.

Preliminary Matter

1. It appeared to me upon reviewing the appeal documents that the appeal was capable of determination without a site observation. Whilst there is disagreement between the parties as to the use to which the building has been put, there is no stated dispute about the facilities available to and to be found inside the building. There is no appeal on the planning merits requiring me to assess the impact of the building in relation to the Council's reasons for issuing the notice.
2. Comments from the parties were invited and, there being no dissent, I have accordingly not visited the site. I have had regard to all the documents and submissions made by both parties to the appeal as well as to the comments of an interested party.

Main Issue

3. The question arising on the ground (b) appeal is whether the matters alleged in the notice as constituting the breach of planning control have occurred. The dispute between the parties concerns the nature and use of a building that has been constructed at 1 Millfield Road in North Walsham.

Reasons

4. This appeal concerns the second enforcement notice issued in respect of the building in question. In September 2021, a notice was issued alleging unauthorised operational development in the form of a single storey garden annexe building. An appeal was brought against that notice on a single ground, seeking planning permission for the development then alleged.
5. The Inspector determining that appeal did not decide whether or not to grant planning permission for it, because she quashed the notice after finding, on the basis of the information presented to her and having had the benefit of a site visit, that the allegation in the notice was wrong, that the breach of planning control that had occurred consisted instead of the erection of a dwelling, and furthermore that the notice was incapable of correction without causing injustice to one or other of the parties. She did not expressly say that she found the notice to be invalid, but that is the obvious implication.
6. Therefore the first question confronting me here is the nature of the decision made by the previous Inspector, and whether and to what extent I am free to depart from it. I have not had the benefit of all the information put before the previous Inspector, but only that supplied to me in the course of the present appeal.
7. The previous Inspector found as a fact that the building contained all the facilities for day to day living. A fence had been erected parallel to the building (although apparently since the previous notice had been issued) which appeared to the Inspector to have separated the building from the main house and created a separate planning unit.
8. The Inspector concluded that the matter constituting the breach of planning control was the erection of a single storey detached dwellinghouse. Because of this, she concluded that the allegation required correction, but this she was unable to do, because different arguments or grounds of appeal may have been raised thus potentially resulting in injustice if she did so.
9. The Council do not suggest here that an issue estoppel arises, but I have given careful consideration to whether or not it does. Issue estoppel, or *res judicata*, operates so as to prevent a person from re-opening a question that has formerly been the subject of a binding legal determination. This may include a determination by a previous Inspector of the same issue between the same parties and without any material change in circumstances having arisen.
10. Whilst the previous Inspector's finding that the relevant breach of planning control in fact amounted to the construction of a dwellinghouse is central to the main issue arising in this appeal, I am mindful that the actual ground of appeal in that case was to seek planning permission for the development on the basis alleged by the Council. The Inspector in her decision refers to having sought views from the parties on the nature of the allegation, but the extent to which the whole matter was fairly and squarely before her and the subject of argument by the parties is not entirely clear. The Inspector's primary concern will have been to ascertain whether the breach of control alleged by the Council was or was not correct, rather than what the correct breach of control to be alleged actually was.

11. The crucial aspect of her determination was that the breach identified by the Council was incorrect, and incapable of correction without causing injustice. It was left to the Council to determine whether to issue a subsequent notice, and on what terms. In fact the Council do not now allege the erection of the 'dwelling' identified by the previous Inspector, but instead the erection of 'a detached single storey building for independent residential purposes', together with a separate allegation concerning the separate residential use of the allegedly subdivided planning unit.
12. Incidentally, the requirements of the present notice do not involve the cessation of that use, which could potentially be carried on in ways not involving associated operational development, but I have no reason to think that the Council are not aware of the provisions of section 173(11) of the 1990 Act. The stated reasons for issuing the notice concern only the impacts of the building itself. These are consistent with the requirements that aim to remedy only the first allegation in the notice.
13. The Council do not explain the significance, if any, of the distinction, if any, between the present allegation and the characterisation of the breach by the previous Inspector, but nor do they suggest to me that an issue estoppel arises. In the round, therefore, I do not find that the appellant is prevented from raising the present ground of appeal by reason of the previous Inspector's determination.
14. Therefore I turn to what the parties each contend for in this appeal. As the appeal raises a factual issue for determination, namely whether the alleged matters have occurred, the onus of proof lies upon the appellant to demonstrate, to the standard of probability, that those matters have not occurred.
15. The notice recites that the new building is separated from the main property by a fence and has all the facilities to be self-contained, such as a kitchen, bathroom, lounge and bedroom. The Council's appeal statement refers to a wooden fence having been erected to separate the outbuilding from the main property. The outbuilding is said to benefit from its own access, parking space and private garden.
16. The appellant denies that the building is an independent residential unit. It has the same postal address as the existing residential premises. It has no separately metered utilities. The appellant is claiming a Council Tax rebate on the basis of a residential annexe. The building is occupied as an annexe by a family member and not separately or independently. It meets a number of the criteria in the Council's design guidance to qualify as an annexe. The title plan for the property has not been subdivided. The appellant is committed to removing the dividing fence. Other planning authorities have considered similar circumstances to involve an annexe and not an independent and separate dwelling.
17. The burden of proof resting with the appellant to demonstrate why the Council's allegation is wrong, I would expect significantly more detail about these matters in order for that burden to be discharged. A bare assertion that the building is being used as an annexe and not independently is simply insufficient. No explanation as to the family's living arrangements and the extent of any interdependence is given.

18. Although utilities are said not to be metered separately, nothing is said about if or how any contributions, whether to utility costs or rent generally, are or are not made. I do not find the position as to the undivided Land Registry title to be persuasive, because any new title would be created only in respect of freehold or long leasehold interests capable of registration, whereas there are other forms of tenure involving exclusive possession of land that, although not registrable, might equally apply.
19. The factors put forward in support of the claim for the Council Tax rebate are not set out. How any post is forwarded to the occupant of the building is not explained. Although committed to removing the dividing fence, it is not denied that the fence was there at the time the (present) notice was issued or that it has the effect of creating a separate private garden area, as contended for by the Council. The parking arrangements are not discussed at all. The design guidance referred to is not supplied, and nor are any decisions by other local planning authorities.

Conclusion

20. For these reasons I conclude that the appellant has not discharged the necessary burden of proof to demonstrate, on the balance of probabilities, that the matters alleged in the notice have not occurred. There being no other grounds of appeal, it follows that the appeal will be dismissed and the notice upheld.

Formal Decision

21. The appeal is dismissed.

Laura Renaudon

INSPECTOR