



Appeal Decision

Site visit made on 16 May 2023

by R Satheesan BSc PGCert MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 May 2023

Appeal Ref: APP/A2280/C/21/3283099

43 Wilmington Way, Twydall, Gillingham, Kent ME8 6JB

- 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 Saffet Saffet against an enforcement notice issued by The Medway Council.
 - The enforcement notice was issued on 13 August 2021.
 - The breach of planning control as alleged in the notice is "Without the benefit of planning permission the erection of a single storey dwelling house within the side curtilage of the property."
 - The requirements of the notice are:
 - i) Demolish the unauthorised single storey dwelling house within the side curtilage of the Property in its entirety;
 - ii) Remove all resultant debris and associated materials from the Property.
 - The period for compliance with the requirements is 2 calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b) and (f) 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.
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Decision

1. The appeal is dismissed, and the enforcement notice is upheld.

The appeal on Ground (b)

2. This ground of appeal is that the matter stated in the notice which may give rise to the breach of planning control, has not occurred. The burden of proof lies with the appellant, the relevant test of the evidence being the balance of probability.
3. The appellant states that it was never their intention to create a separate dwelling, and that the building is an annex used in connection with the main dwelling at 43 Wilmington Way. In support of this he states that the annex could be accessed from the kitchen of No 43, and that it is not unusual for a dwelling to have multiple bathrooms, reception rooms and bedrooms.
4. Case law has established that a material change of use is a single event, it is not a gradual process or a continuing state of affairs. A material change of use may take place when physical works are carried out for the proposed use in advance of the activity which constitutes the proposed use occurring. Therefore, a change of use could take place as a result of the physical works, but it is necessary to look at the matter in the round and to ask what use the

building has or of what use it is. The physical state of these premises is very important, but it is not decisive. Actual or intended or attempted use is important but not decisive. It is a matter of fact and degree as to when the change of use occurs.

5. Given that the notice alleges the erection of a single storey dwellinghouse, it is necessary to consider what constitutes a 'dwellinghouse.' Whilst there is no definition of a dwellinghouse within the Act, case law has established that the distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence.
6. The main building at 43 Wilmington Way is a two-storey semi-detached dwelling, which constitutes a single planning unit. The new single storey building to the side of the main dwelling is a flat-roofed structure. The appellant states that the building was always intended to be used as an annex. However, the Council's own evidence contradicts this. A planning application for the conversion of the existing double garages and games room to create a 1 bed dwelling was refused on 21 May 2019 (Council ref: MC/19/0815).
7. Subsequently the appellant applied to convert the existing garage into annex accommodation (Council ref: MC/19/2318). This was also refused on 8 November 2019 as it was considered that the proposal, by virtue of its self-contained nature, entirely independent accessibility, size in terms of footprint and lack of shared facilities with the main dwelling, along with no justification provided for the requirement for annex accommodation to the main dwelling, which appears to be unoccupied, would not constitute annex accommodation, or indicate a reliance on the main dwelling and would therefore represent a new dwelling. The Council also stated there was no reference that the annex would share private amenity space, postal address, or utilities with the main dwellinghouse.
8. Following these refusals, during an Officer site visit on 28 January 2020, the Council found that the pre-existing side extension had been demolished and replaced with a new dwelling built on the same footprint. Furthermore, photographs submitted illustrate that the internal access between the main dwelling and the new building had been blocked up with breeze blocks, and works had begun to subdivide the rear garden with new fence posts erected (and close boarded fence panels ready to be installed). The Council considered that the self-contained layout of the site was similar to that refused in planning application ref: MC/19/0815 for the 'conversion of the existing double garages and games room to create a 1 bed dwelling'.
9. Photographs taken by the Council also show that a new front door had been installed providing separate access from the front of the building and independent from the main house. No clear explanation has been provided of why the internal access to the main dwelling had been blocked up. Photographs of the outside of the site show that the new building was secure and watertight with the installation of the external windows and doors.
10. In a later site visit on the 20 May 2021, the Council Officer noted that the internal doorway connecting the main property to the new building had been re-created and that the property was occupied. Nevertheless, the Officer noted that the new building had its own separate gas and electric meters, which has not been disputed. In addition, the building contained its own bedroom, living room, kitchen, shower room. The photographs submitted of this site visit show

cooking, sleeping, and washing facilities within the building. Furthermore, the fence that was under construction during the Council's earlier visit had been installed providing a separate private rear garden for the new single storey building.

11. Indeed, I also observed similar layout and facilities as above during my site inspection and noted that the single storey building had a separate washroom containing toilet, shower and sink, a small utility room containing water tank and dryer, a separate bedroom, and open plan living room and kitchen. The kitchen contained kitchen cupboards, worktops, sink, washing machine, cooker with extractor fan, microwave, and fridge freezer. There are no specific details as to why these facilities were necessary or required in the new building when there is already a kitchen located in the main dwelling at ground floor level.
12. The building also contained its own entrance door from the street and therefore access through the main house was not essential. A timber fence has been erected creating a separate private rear garden for the new building which further gives the impression that a separate self-contained residential unit has been created. Therefore, despite the re-insertion of the internal access between the two buildings, there remains some degree of physical disconnection between the main dwelling and the new because of the fence and its own front entrance door.
13. Although the appellant claims that it was never their intention to create a separate dwelling, limited evidence has been submitted to demonstrate this. The planning statement submitted fails to provide any conclusive evidence that the breach has not occurred. For example, the photographs from the Council tax bill 2021/22, letter from Southern Water and Deposit protection certificate, letter from Arc Estates dated 12 February 2020 and the Standard Assured Tenancy Agreement, do not provide a corresponding plan for the site, and therefore do not provide clear evidence that these relate to the new building or simply the original dwelling at No 43.
14. The copy of the promotional advertisement from Arc Estates Agents advertising large three bedroom extended semi-detached house and Inventory Report in itself does not provide sufficiently precise and unambiguous evidence that the building has been built and occupied as an annex in connection with the main dwelling. Indeed, the promotional advertisement is undated and does not clearly state when and how the long property was marketed as such. Furthermore, the inventory report states that there was no access inside the (side) extension as the decorator has the key. As such only limited weight can be given to these documents.
15. Taking all the above points together, and as a matter of fact and degree, the building appears to be more than an annex to the main house. Indeed, given the layout of the building, the facilities provided within the building for day-to-day living (which include cooking, sleeping, and washing facilities and its own rear garden), it would constitute a self-contained dwelling within a separate and distinct planning unit. Despite being built on the same footprint as the former extension, the operations involved in the erection of the dwelling require planning permission.
16. I note that a further planning application was submitted in April 2021 for 'the reconstruction of the single storey element' which remains undecided. It is open to the appellant to liaise with the Council regarding this.

17. Therefore, based upon all the evidence before me, the appellant has not demonstrated, on the balance of probability, that the development as alleged has not occurred. There has therefore been a breach of planning control and the limited evidence put forward in support of the contention that the breach has not occurred falls well short of discharging the burden of proof.

18. Accordingly, the appeal on ground (b) must fail.

The appeal on Ground (f)

19. The appeal on this ground 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 (i.e. the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach".

20. The enforcement notice requires the demolition of the unauthorised single storey dwellinghouse. Therefore, the purpose of the notice is to remedy the breach of planning control rather than only remedy any injury to amenity. It is not therefore excessive to require the unauthorised development to be demolished.

21. The appellant states that development could be granted planning permission with a condition to restrict the use of the building as an annex. However, that is an entirely different development than the one before me and therefore I cannot consider this alternative development under ground (f). It would also not achieve the purpose of the notice which is to remedy the breach.

22. Furthermore, since there is no appeal on ground (a), there is no deemed planning application. Therefore, the planning merits of the development, such as whether the development complies with planning policy and the effect of the development on the character and appearance of the area can play no part in my decision. Whilst a planning application has been submitted to the Council for 'the reconstruction of the single storey element,' based on the evidence before this has not been determined. As such, there is currently no planning permission for the unauthorised development.

23. The notice has been issued to remedy the breach of planning control. That would not be achieved by the steps outlined by the appellant, as it would not remedy the breach of planning control, which is the purpose of the notice and planning permission would still be required.

24. Therefore, the appeal on ground (f) fails.

Conclusion

25. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

R Satheesan

INSPECTOR