



Appeal Decision

Hearing held and site visit made on 31 May 2023

by M Madge Dip TP MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 July 2023

Appeal Ref: APP/G5180/C/22/3291401

Land at 404 Blandford Road, Beckenham BR3 4NN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Ricki Sage against an enforcement notice issued by the Council of the London Borough of Bromley.
- The notice was issued on 20 December 2021.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from a residential dwelling house (Class 3) to a mixed use for residential and gym for the purpose of a personal training business (Class D2).
- The requirement of the notice is to cease the unauthorised use of the outbuilding as a gym for the purpose of a personal training business.
- The period for compliance with the requirement is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b) and (c) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is allowed on ground (a), the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Applications for costs

1. An application for costs was made by Mr Ricki Sage against the Council of the London Borough of Bromley. This application is the subject of a separate Decision.

Matters concerning the enforcement notice

2. In the enforcement notice (the Notice) the allegation incorrectly identifies that the use has changed from '*residential use (Class 3)*'. As a single dwellinghouse the alleged former residential use would fall within Use Class C3. Dwellinghouses. The appellant and Council agree that the property was a single dwellinghouse thereby falling within Class C3 and I see no reason to disagree.
3. The alleged mixed use comprises the uses of '*residential and gym for the purpose of a personal training business (Class D2)*'. Class D2 was revoked before the Notice was issued. A gym used by the public would most likely fall within Use Class e (d). However, there is no need for a use class to be specified as the mixed use is a Sui Generis use and listing the specific uses being undertaken provides greater clarity.
4. Correcting what amounts to a typographical error in respect of Class C3 and the deletion of Class D2 does not fundamentally change the matter alleged and would cause no injustice. I shall proceed on this basis.

Preliminary matter

5. The Council's evidence and the serving of the Notice are based upon the level of personal training business activity that was occurring in approximately May 2019. While a later lawful development certificate application proposed a lower level of personal training business activity, no investigation of the level of activity was undertaken immediately before the Notice was issued. The Council conceded at the Hearing that had further investigation shown that a maximum of 2 clients per day Monday through Friday were using the gym, it most likely would not have considered it to be expedient to take enforcement action. The Notice has not however been withdrawn.

Background

6. The appellant applied for a lawful development certificate (LDC) for "D2 Assembly and Leisure (use of a timber outbuilding as a one-to-one personal training studio)" on 24 February 2018 (the 2018 LDC)¹. The purpose of that application was to determine whether a material change of use from Class C3: Dwellinghouse to a mixed use had occurred. At this time, the Planning Practice Guidance (PPG) advised that planning permission would not normally be required to run a business from home, provided it did not result in a material change of use of a property so that it was no longer a single dwellinghouse. The PPG also advised that issues which might be relevant in deciding whether planning permission is required could include whether home working or a business leads to notable increases in traffic, disturbance to neighbours or abnormal noise. The 2018 LDC was refused and subsequently dismissed on appeal². The Inspector finding that *"the property occupied a reasonably quiet, predominantly residential setting"* and *"due to the number of visitors accessing the property, whether by car, bike or on foot, the studio use is likely to have resulted in a substantial increase in the number and frequency of daily comings and goings. Given the residential setting, this is likely to have caused a noticeable increase in general noise and disturbance in and around the property. Consequently, having regard to the number, frequency and duration of the training sessions the studio use is materially different in character to the use as a home gym by occupiers of the dwelling and it has appreciably changed the manner in which the property is being used."*
7. A subsequent LDC was made for *"the current use of the building is not a material change of use of the planning Unit"* on 28 May 2019 (the 2019 LDC)³. Notwithstanding that the appellant's case sought to address deficiencies in the 2018 LDC, this application was refused and subsequently dismissed on appeal. The Inspector stating that *"I do not consider that the scale of the business related to training sessions, both at the time of the application, and at the reduced level, can reasonably be considered to be either de minimis or incidental to the enjoyment of the dwelling. Accordingly, a mixed use has occurred"*.
8. The appeal decision on the 2019 LDC was challenged in the High Court⁴, the claimant submitting that "visual disturbance" was an immaterial consideration as it did not feature in the non-exhaustive list of "issues" identified in the PPG,

¹ DC/18/00631/ELUD

² APP/G5180/X/18/3204181

³ DC/19/02449/ELUD

⁴ *Sage v SSHCLG & LB of Bromley* [2021] EWHC 2885 (Admin)

which the decision maker may wish to consider in deciding whether there had been a material change of use. The court held that, as a matter of fact and degree, the level of use had gone beyond that which is incidental to a dwellinghouse. Furthermore, the list within the PPG are issues which the decision maker may wish to consider, however they are not mandatory but possible ones. The crucial test is whether there has been change in the character of the use.

9. The guidance in the PPG was found to be too loose to reflect the true focus of the question at issue. Paragraph 14 of the PPG guidance was withdrawn but has now been reinstated with revised wording⁵. This revised wording does not affect the conclusions of the previous Inspectors or the High Court that a material change of use had occurred.

Appeal on ground (b)

10. An appeal on this ground is that the matters alleged have not occurred. It is for the appellant to show, on the balance of probability, that a material change of use to a mixed use of residential and for the purpose of a personal training business has not occurred.
11. The land is occupied by a single dwellinghouse which has a detached outbuilding in its rear garden. The outbuilding is divided into 2 parts, a domestic store and a gym. The gym is used for incidental residential purposes and for the purpose of a personal training business operated by a resident of the dwellinghouse. Having regard to *Burdle*⁶ and the factors relating to this land and its use, I agree with the main appeal parties, and the two previous Inspectors, that the property is a single planning unit.
12. The appellant does not dispute that the gym is used for incidental residential purposes as well as for the purpose of a personal training business. As such the land is being used for the purpose alleged. However, for a change of use to amount to development, it must be material.
13. An enforcement notice may not be issued until sometime after a breach of planning control is detected. In the meantime, the appellant may curtail their activities, as in this case. However, it makes no difference whether the breach has been curtailed or even stopped as s174(2)(b)⁷ is worded in the past tense. The question is whether the breach had occurred by the date of issue of the enforcement notice.
14. There may be some disparity between the wording of the use as set out in the Notice and the two LDCs. The 2018 LDC and the 2019 LDC nevertheless confirm that the use of the outbuilding for the purpose of a personal training business had resulted in a material change in the use of the property to a mixed use. The matter alleged in the Notice had therefore occurred as a matter of fact before the Notice was issued.
15. The appeal on ground (b) fails.

⁵ PPG paragraph: 14 Reference ID: 13-014-20230726

⁶ *Burdle v SSE* [1972] 1 WLR 1207 (Div Court)

⁷ Town and Country Planning Act 1990 as amended

Appeal on ground (c)

16. An appeal on this ground is that if those matters have occurred, they do not constitute a breach of planning control. It is for the appellant to show, on the balance of probability, that the material change of use to a mixed use of residential and gym for the purpose of a personal training business does not constitute a breach of planning control.
17. The appellant does not suggest that this material change of use benefitted from planning permission. Instead, it is the appellant's contention that at the time the Notice was issued the use for the purpose of a personal training business had been curtailed to such a degree that it was *de minimis*, i.e., the activity was too small to be meaningful or taken into consideration. Even if I was to find that the curtailed level of activity was *de minimis* to the use of the dwellinghouse, this would not show that the material change of use that had occurred does not constitute a breach of planning control.
18. A material change of use from Class C3 to a mixed use for residential and gym for the purpose of a personal training business would constitute development as set out in s55(1) of the 1990 Act as amended. Planning permission would be required for that material change of use and such planning permission has not been shown to exist. The appellant has not therefore shown, on the balance of probability, that a breach of planning control has not occurred.
19. The appeal on ground (c) fails.

Appeal on ground (a) and the application for deemed planning permission

20. An appeal on this ground is that planning permission should be granted for the matter alleged, namely the material change of use to a mixed use for residential and gym for the purpose of a personal training business. The **main issues** are the effects on the:
 - Character of the area; and
 - Living conditions of neighbouring residents.

Character of the area

21. The appeal property is a semi-detached two-storey house with a narrow, shared pedestrian footway giving access to its rear garden. It has a small front garden, used for the parking of a single vehicle. Other dwellings on the street have a similar design and layout. The surrounding area has a tight knit design. While there are commercial uses at the western end of the street and along Elmers End Road, they do not detract from the inherently residential character of the appeal property and its immediate area.
22. The personal training business activities are confined to the outbuilding, which is not visible from the street. Given the residential setting, levels of vehicular and pedestrian traffic on the street are likely to fluctuate throughout the day. During my visit, I saw almost continuous vehicular parking along both sides of the street. Given the limited size of the gym facility and the operation of the personal training business on a one-to-one basis, its operation is unlikely to have any significant detrimental impact on the character of the area.

Living conditions of neighbouring residents

23. Visitors can arrive by vehicle, bike or on foot. Given the tight knit design of the dwellings, visitors are likely to pass close to neighbouring properties. Access to the outbuilding is via a narrow-shared footway between dwellings, then through the appellant's rear garden. Training sessions are carried out within the outbuilding, with the doors closed. The building has air conditioning. High close boarded fencing to the boundaries of the rear garden screen the outbuilding and visitors crossing the garden from neighbouring properties. The comings and goings of single visitors is unlikely to have any significant adverse effect on the amenity of occupiers of neighbouring buildings or that of future occupants.

Conditions

24. The unrestricted flow of visitors at all times of the day, evening and at weekends could, cumulatively, introduce a level of noise and disturbance that would significantly reduce the level of amenity enjoyed by neighbouring occupiers. Furthermore, the gym could be operated by someone unconnected to the property or it could be enlarged into other parts of the outbuilding, which could facilitate a greater number of visitors to the property, and thereby increasing the potential for noise and disturbance. Furthermore, a proliferation of signage advertising the personal training business could lead to unnecessary clutter and visual intrusion in the street scene.
25. The imposition of appropriately worded conditions would preserve the amenity of occupiers of neighbouring buildings and those of future occupants, in order to control the level of noise and disturbance associated with the use for the purpose of a personal training business. They would also preserve the residential character of the area. Conditions to control hours of operation, how and where the personal training business can take place, who can operate it, and to prevent signage are therefore necessary, relevant to planning and to the development to be permitted. Conditions that accord with the discussion that took place at the Hearing, including the words 'existing gym located in' being added to condition 2, would be enforceable, precise and reasonable.

Conclusion on ground (a)

26. For these reasons, the development accords with policy 37(e) of the London Borough of Bromley's Local Plan (January 2019), which amongst other things requires development to respect the amenity of occupiers of neighbouring buildings and those of future occupants, ensuring they are not harmed by noise or disturbance. I therefore conclude that the appeal succeeds on ground (a). I shall grant planning permission for the use as described in the notice as corrected.

Formal Decision

27. It is directed that the enforcement notice be corrected by:

In section 3 THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL, the deletion of the words 'Class 3' and substitution of the words 'Class C3' and the deletion of the words '(Class D2)'.

28. Subject to the correction, the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have

been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the mixed use for residential and gym for the purpose of a personal training business on land at 404 Blandford Road, Beckenham BR3 4NN as shown on the plan attached to the notice and subject to the following conditions:

- i) No personal training business activity shall take place outside the hours of 0800 – 1700 Monday to Saturday and not at all on Sundays or Bank Holidays.
- ii) Personal training business activity shall be restricted to the existing gym located in the outbuilding.
- iii) The occupier of the property 404 Blandford Road shall be the only person working in the personal training business in the outbuilding.
- iv) The personal training business activity shall be undertaken by prior appointment only and appointments diaries shall be made available to the local planning authority on request. The number of customers shall be limited to no more than two persons per day of opening.
- v) There shall be no advertisements or signs on the property describing the personal training business.

M Madge

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Nicolas Kingsley Smith	Agent Solicitor
Mr Ricki Sage	Appellant
Ms Caroline Granger	Appellant's partner
Ms Abigail O'Donnell	Resident
Mr & Mrs L Pardey	Residents

FOR THE LOCAL PLANNING AUTHORITY:

Mr David Bord	Principal Planner
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DOCUMENTS

- H1 Statement of Common Ground
- H2 Timetable 2: Use of studio by myself, family and friends
- H3 Appeal decision APP/N1160/C/22/3309917