



Appeal Decision

Site visit made on 8 August 2023

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 October 2023

Appeal A Ref: APP/N5090/C/22/3296688

Land at 95 Sherrards Way, Barnet EN5 2BP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeal is made by Mr Besnik Dedei against an enforcement notice issued by the Council of the London Borough of Barnet.
- The notice, numbered ENF/0712/21, was issued on 3 March 2022.
- The breach of planning control as alleged in the notice is without planning permission, the construction of a rear canopy (as edged in red), the creation of a raised platform (as edged in blue), and associated fencing in the area between the far end of the garage and the extension (including the rear dormer canopy) and construction of an outbuilding at the rear of the garden.
- The requirements of the notice are to:
 - 1 Demolish the rear dormer roof and gable extensions (as edged in purple) and restore the roof to the state in which it was prior to the breach with tiles to match existing.
 - 2 Demolish the rear canopy attached to the rear extension from the rear of the property (as edged in red)
 - 3 Reinstate the land at the rear of the property to its natural land level by:
 - i) Reducing the level of the garden aligned along the boundary with 97 Sherrards Way to a height not exceeding more than 20cm above the corresponding point of the garden at 97
 - ii) Ensuring that no part of the open garden (parts of the garden other than that those [sic] upon which the single storey rear extension and the 'garage' outbuilding have been constructed) is at a height greater than that of the garden at 93 Sherrards Way
 - iii) Ensuring that there is a [sic] even gradient along and across the garden with no steps.
 - 4 Demolish the outbuilding at the rear of the property (as edged in yellow)
 - 5 Reduce the boundary fence (edged in green), to a height not exceeding 2 metres from the natural ground level.
 - 6 Permanently remove all constituent materials resulting from the works in 1,2,3, 4 and 5 above from the property
- The period for compliance with the requirements is: 5 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Act. 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.

Appeal B Ref: APP/N5090/C/22/3297808

Land at 95 Sherrards Way, Barnet EN5 2BP

- The appeal is made under section 174 of the Act. The appeal is made by Mr Besnik Dedei against an enforcement notice issued by the Council of the London Borough of Barnet.
- The notice, numbered ENF/0066/22, was issued on 21 March 2022.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the property into a C4 House of Multiple Occupation (HMO)
- The requirements of the notice are to: Cease the use of the property as a House in Multiple Occupation.
- The period for compliance with the requirement is: 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b) and (e) of the Act.

Decisions:

Appeal A

1. The enforcement notice is quashed.

Appeal B

2. It is directed that the enforcement notice is corrected by:
 - At section 3, the insertion of the word 'material' and the deletion of 'in' so that the allegation says 'Without planning permission, the material change of use of the property to a C4 House of Multiple Occupation (HMO)'
3. Subject to the corrections above, the appeal is dismissed and the enforcement notice is upheld.

Appeal A:

Matters concerning the notice

The dormer and gable roof extensions

4. Section 173(1) of the Act sets out that an enforcement notice shall state (a) the matters which appear to the local planning authority to constitute the breach of planning control. Section 173(2) states that a notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.
5. Roof extensions are mentioned in the reasons for taking enforcement action, however, they are not identified within section 3 of the notice: the matters which appear to constitute the breach of planning control. The requirements also require demolition of a rear dormer and gable extensions. It is clear from the Council's submission that the notice is intended to include the roof extension. I have wide powers of correction, subject to there being no injustice to either the appellant or the local planning authority.
6. Since the requirements should flow from the allegation, I have considered whether it would be possible to correct the notice to refer to the rear dormer roof and gable extension. However, this would expand the allegation. The appellant has indicated that had the allegation included the roof extensions, they would have put forward a case that they benefit from being permitted development but because of the omission of the roof extensions from the allegation, they have not done so. Furthermore, the appellant makes no comment in respect of the merits of the roof extensions under ground (a).
7. Were I to correct the notice so that the allegation to include the roof extension, this would deprive the appellant from making their case under ground (c) and ground (a) in relation to that element and would cause the appellant injustice. Deleting the requirement to demolish the rear dormer roof and gable extensions would address the inconsistency between the allegation and the requirements. Since it would make the requirements less onerous, I consider such a correction would not cause injustice to either party.

The outbuilding

8. Section 173(10) of the Town and Country Planning Act 1990 ('the Act') provides that an enforcement notice must specify such matters as may be

prescribed in regulations. Regulation 4 of The Town and Country Planning (Enforcement Notices and Appeals)(England) Regulations 2002 (ENAR) states that an enforcement notice shall specify the reasons why the local planning authority consider it expedient to issue the notice.

9. The reasons for taking enforcement action against the outbuilding are not included in the enforcement notice. The notice does not, therefore, explain why the Council considered it expedient to take enforcement action in relation to this element of the allegation. It is evident from the appellant's submissions they are unclear as to why the Council has taken action against the outbuilding since their case under ground (a) is advanced on the basis of the effect of the outbuilding on the character and appearance of the area. The Council provided reasons in its Statement of Case, which includes concern that the outbuilding is overbearing, a point which the appellant has not addressed in their statement of case.
10. Significantly, the omission of reasons from the notice cannot be corrected by the submission of reasons during an appeal. It is a prerequisite to taking enforcement action that it should appear expedient to the Council to do so. Complete omission of reasons from the notice constitutes a failure to comply with the requirements of the Act and the ENAR. While such a defect would ordinarily render a notice a nullity, the notice identifies a number of breaches which are distinct to the outbuilding. I consider deleting reference to the outbuilding in the allegation and the requirements would address such an omission without causing injustice to either party.

The canopy and raised platform

11. The enforcement notice makes reference to a rear canopy (as edged in red) and the creation of a raised platform (as edged in blue), however, the plan provided by the appellant simply shows the appeal site edged in black with black hatching. The Council has provided a document to the appeal titled 'Photos' which shows parts of the property edged in different colours. I queried with the parties whether this document was attached to the enforcement notice, however, from the evidence subsequently provided, it appears it was not. I also raised with the parties whether the notice should be corrected to insert the document, which I shall refer to as 'the Photo'.
12. The Photo shows part of the canopy edged in red. The red outline in the Photo is drawn around part of the canopy and includes a brick pillar which appears to support the canopy. The insertion of the Photo would limit the allegation to the section of canopy shown in the Photo. The requirements require the demolition of the rear canopy and refer to the canopy attached to the rear extension from the rear of the property, 'as edged in red', which would be consistent with the allegation. However, it appears from the Council's evidence that it is the entire canopy which the Council is concerned with and which it would like to see removed. Inserting the Photo would therefore cause the Council injustice.
13. The Photo shows part of the raised platform¹ edged in blue. There is no requirement in the notice to remove the raised platform, though there is a requirement to reinstate the land at the rear of the property to its natural land level. Steps (i) to (iii) of requirement 3 set out how this is to be achieved,

¹ Notwithstanding any dispute between the parties as to whether the raised platform would be a 'raised platform' for the purposes of the GPDO.

including by (ii) ensuring that no part of the open garden (parts of the garden other than that [sic] those upon which the single storey rear extension and the garage outbuilding have been constructed) is at a height greater than that of the garden at 93 Sherrards Way.

14. Photographs provided by an interested party show that a single concrete platform was constructed, upon a section of which an outbuilding, which I understand the Council to mean the 'garage' outbuilding, was constructed. The remainder of the concrete platform appears to comprise the raised platform. In my view there is ambiguity as to whether requirement 3(ii) would specifically exclude the concrete platform. Inserting the Photo would not assist in this regard, since there is no specific requirement to remove the raised platform.
15. Requirement 3(iii) requires the recipient of the notice to ensure 'there is a [sic] even gradient along and across the garden with no steps.' However, the notice does not allege the raising of the entire garden and within its statement of case, the Council accepts that the garden did slope 'gently downwards away from the house'. It is therefore not clear that this part of the requirement flows from the allegation.
16. For the reasons given above, I find requirement 3 ambiguous. I consider inserting a requirement to remove the raised platform would make the notice more onerous to comply with and would therefore cause the appellant injustice. Deleting 'the creation of a raised platform' from the allegation would address this. However, although the canopy and the raised platform are identified separately within the allegation, the canopy is supported by a pillar, which is in turn supported by the raised platform. I therefore consider that these elements should be considered together, since removal of the raised platform may have implications for retention of the canopy. Deleting the raised platform from the allegation would therefore cause the appellant injustice.

Fencing

17. The notice alleges 'associated fencing in the area between the far end of the garage and the extension (including the rear dormer canopy)'. I find this description ambiguous, since there is no fencing between the far end of the garage and the extension. The 'garage' outbuilding has been erected adjacent to a similar sized outbuilding at No 93, removing the need to erect a boundary treatment at this point. A brick wall has been erected between the 'garage' outbuilding and the extension.
18. From the evidence, it appears that the fencing being attacked by the notice is the fencing which has been erected between No 95 and No 97 Sherrards Way. I have therefore considered whether it is possible to correct the notice to refer to fencing which has been erected between No 95 and No 97 Sherrards Way. However, this would include a more substantial section of fencing and would therefore make the notice more onerous to comply with, causing the appellant injustice.
19. I have considered whether inserting the Photo would address the potential injustice since the requirement is to reduce the boundary fence (edged in green), to a height not exceeding 2 meters from the natural ground level. However, while a section of fencing is highlighted in green on the Photo, it does not include the full extent of fencing which has been erected and which exceeds

2m in height. From the photographs provided by an interested party, it seems likely that this fencing was *in situ* prior to the service of the notice².

20. The fencing extends beyond the point identified in green on the Photo, both towards the dwelling and towards the bottom of the garden. Were I to uphold the notice, with reference to the Photo, there is a section of fencing which projects beyond the raised platform which would not need to be reduced in height. Furthermore, it is not clear whether the section of fencing between the brick pillar attached to the canopy and the rear extension would need to be reduced in height.
21. Drawing everything together, the breaches of planning control are generally stated and so I do not consider the notice to be a nullity. However, when taken together, I consider the errors and omissions contained within the notice are so significant as to render the notice invalid beyond correction.

Appeal A Conclusion

22. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control or the steps required for compliance. It is not open to me to correct the errors in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed.
23. In these circumstances, the appeal on the grounds set out in section 174(2)(a),(c),(f) and (g) of the 1990 Act as amended do not fall to be considered.

Appeal B

Preliminary Matters

24. The enforcement notice alleges without planning permission, the change of use of the property into a C4 House of Multiple Occupation (HMO). Section 55(1) of the Act sets out the meaning of development, which includes the making of any material change in the use of any buildings or other land. The word 'material' should therefore be inserted into the allegation. I shall also delete 'in', so that it says 'material change of use of the property to'. Since both parties are clear what is being alleged, I consider that these changes would not cause injustice to either party.

Ground (e)

25. An appeal under ground (e) is made on the basis that copies of the enforcement notice were not served as required by section 172 of the Act. Section 172 requires that a copy of an enforcement notice is served on the owner and occupier of the land to which it relates and on any other person having an interest in the land. The main thrust of the appellant's case under ground (e) is that the Council should have served the notice on the individual households within the alleged HMO.
26. The Council served the notice on the appellant and the occupiers of the property. The Council states that it carried out a Land Registry Search and that all interested parties for the appeal site identified through Land Registry checks

² In one of the photographs provided, the fencing appears completed while the canopy still appears incomplete.

were served. Furthermore, the Council states that it served copies of the notice on 'The Occupiers' of the property.

27. In a legal ground of appeal, the burden of proof is on the appellant, on the balance of probabilities. The appellant has provided no evidence to show that the individual households within the alleged HMO were not served with the notice. A local authority does not need to name the individual households, it is sufficient to serve the notice on the occupier of the property. Since a C4 HMO can accommodate up to 6 individuals, the serving of the notice on 6 occupiers would meet the requirements of section 172 of the Act.
28. From the evidence provided, I consider it likely that the enforcement notice was served as required by section 172 of the Act. Moreover, section 176(5) provides that where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve them.
29. The appellant has made a valid appeal and I have no evidence to show that there are additional parties who should have been served and who would have wished to submit an appeal, had they been served with the notice. Even if I had found they were not properly served, it has not been shown that they were substantially prejudiced.
30. Thus, for the reasons given above, the appeal under ground (e) must fail.

Ground (b)

31. An appeal under ground (b) is made on the basis that the matters stated in the notice as constituting the breach of planning control, have not occurred. The onus of proof is firmly on the appellant to show that some or all of the alleged matters had not in fact occurred by the time the notice was issued, on the balance of probabilities.
32. The Council issued an enforcement notice alleging without planning permission, the change of use of the property into a C4 House of Multiple Occupation (HMO). There is no appeal under ground (c) and, although I have not been provided with a copy of the relevant Article 4 Direction, the Council's Residential Design Guidance (2016) confirms that one was made on 29 May 2016 to remove the permitted development right to convert a dwellinghouse into a small HMO.
33. The main thrust of the appellant's case under this ground is that at the time the enforcement notice was served, the property was not being used as a House in Multiple Occupation (HMO). The appellant asserts that the requirements of the notice support this, as it does not require the removal of any facilities. However, while a Council can require the removal of works which have been constructed to facilitate an alleged material change of use, it is not obligated to do so and the fact that it did not, is not an indication that the breach has not occurred.
34. The Council refers to complaints it has received, which allege that several persons are present at the appeal site. Although I have no substantive details of the complaints referred to by the Council, I note an interested party refers to complaints they have previously made regarding the premises being 'turned

into' an HMO. While the complainant may not have been inside the property, the complaints appear to have led to an investigation by the Council into the use of the appeal site.

35. The Council advise that an enforcement officer visited the site on 1 February 2022 and concluded that the property is an HMO. The officer is stated as witnessing several persons in the ground floor kitchen/reception room, none of whom appeared to know each other in the same way as family members. The use of the property by several persons who don't know each other points towards the property being used as an HMO.
36. The appellant asserts that the enforcement officer 'assumed the property was being used as a HMO, even though there was no evidence of occupation' and that what the planning officer saw a property that could be used as either a dwellinghouse or a HMO, as is the case with most dwellinghouses. However, the appellant has not explained who the persons the enforcement officer observed in the ground floor kitchen/reception room were.
37. The Council served a Planning Contravention Notice(PCN) on the appellant and occupiers of the site on 2 February 2022. The Council advise that no response was received. The appellant does not dispute that the PCN was issued, nor have they explained why they did not respond. The Council also advise it sent further correspondence to the owner of the site, inviting a retrospective planning application, but no response was received. In my view, the Council has made a reasonable attempt to ascertain how the property has been used, having used a combination of site visit and PCN as part of its investigation.
38. Following the issue of the enforcement notice, the Council state the enforcement officer was invited by the appellant to carry out an inspection of the appeal site. The Council advise it was the appellant's contention that the appeal site was in use as a single family dwellinghouse and that they lived there with their girlfriend and young family. Photographs of the property have been provided, dated 25 March 2022, which show limited personal belongings present. While this is a number of days after the issue of the enforcement notice, the appellant has not explained why such limited personal belongings were present at this time.
39. From my inspection of the kitchen, there appeared to be no distinction between the items used by different occupants of the property, as is typically found in a HMO. There were also a range of personal effects evident during my visit. However, the wording of ground (b) is that the matters alleged have not occurred rather than the matters are not occurring. The use of locks on internal doors, including to bedrooms and the lounge, in my experience is typical of an HMO use, rather than a C3 use. The inclusion of a bedroom on the ground floor and the provision of ensembles to each bedroom is also more typical of an HMO use. From my inspection of the site, while it was not possible to determine how the property is being, or has been used, the layout in my view is typical of an HMO.
40. The appellant asserts that none of the objections refer to the property as having been or being used as a HMO. However, I find the detail of the objections of limited use in determining how the property has been used. The terminology used by the interested parties varies and it is not clear what is meant by terms such as 'turned into an HMO' or 'converted into an HMO'. Furthermore, as pointed out by the appellant, the complainants are unlikely to

have been inside the property and would therefore have difficulty in determining how the property is used.

41. The appellant has applied for an HMO licence. The application form details that the number of households occupying the property (excluding resident landlord and any family members) as 5. The date of the HMO licence is not shown on the application form, though the appellant identifies that it was obtained on 7 January 2022. While I accept an HMO licence does not show actual use as a HMO, it points towards the appellant's intention to use the property as a HMO. The HMO licence was obtained almost a month before the enforcement officer visited the site on 1 February, and well over two months before the enforcement notice was issued.
42. Significantly, the appellant has provided no details of who was in occupation of the property at various times. This, in my view, is a significant omission. From the evidence provided, it seems likely that works were carried out to the property to facilitate an HMO use, an HMO licence was then obtained, and the property was used as an HMO, albeit for a limited period prior to the service of the enforcement notice.
43. As set out above, the burden of proof in a legal ground of appeal is firmly on the appellant, on the balance of probabilities. For the reasons given above, I find that the appellant has not discharged their burden of proof to show that by the time the notice was issued, on the balance of probabilities, the material change of use of the property to a C4 HMO had not occurred. Consequently, the appeal under ground (b) must fail.

Appeal B Conclusion

44. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections.

M Savage

INSPECTOR