The Planning Inspectorate

Appeal Decision

Site visit made on 11 October 2023

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 3 November 2023

Appeal Ref: APP/N5090/X/23/3315985
Lower Flat 394 Watford Way, Hendon, Barnet, London NW4 4XE

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Massoud Tahmassebi against the decision of London Borough of Barnet.
- The application ref: 22/3342/191, dated 23 June 2022, was refused by notice dated 2 September 2022.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is described as 'a side extension self contain was developed and being used as a family annex.'

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of development set out in the heading above, for which the Lawful Development Certificate (LDC) is sought, is taken from the application form. However, the 'amended description' used by the Council in its decision notice is 'Use of side extension as one bedroom self-contained dwelling', which is similar to that used by the appellant in his statement[1]. I consider this to be a clearer description and have determined the appeal on this basis. I am satisfied that, in doing so, no injustice would be caused to the parties.

3. The building which is the subject of the appeal is referred to by the parties in a variety of ways including rear-side extension, rear-side annexe, annexe flat, garden flat and side extension. For the avoidance of doubt, throughout my decision, I have used the reference stated in the application form and decision notice, namely, 'side extension'.

4. As part of the appeal the appellant submitted additional documents which were not before the Council when it considered and determined the application[2]. The Encyclopaedia of Planning Law and Practice sets out that appeals under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended) 'are invariably treated as de novo appeals…the parties and interested persons may submit additional evidence to the Secretary of State which was not before the authority at the time of its decision'[3]. Consequently, I have had regard to the additional

[1] Use of the rear-side extension at Lower Flat, 394 Watford Way, London, NW4 4XE as one bedroom self-contained dwelling.
[2] Statutory Declarations; HMRC Tax Returns; and Lodger Agreements.
[3] Encyclopaedia of Planning Law and Practice P195.03.

documents in my determination of the appeal. Given that the Council has had the opportunity to comment on the documents as part of the appeal, I am satisfied that its interests are not prejudiced by this approach.

5. Under section 191(4) of the 1990 Act as amended, the relevant date for ascertaining whether the existing use is lawful, is the date of the LDC application. The date on the application form is 23 June 2022. However, the application was not registered by the Council until 27 June 2022, and this is the date which is stated and accepted by both parties in their evidence as the date of the application. Therefore, for the avoidance of doubt, in determining the appeal, I have used the 27 June 2022 as the date of the application and the relevant date against which to determine the appeal.

6. In the submitted evidence the appellant states that the side extension was constructed in 2014 under application ref: H/04537/13 which was then further extended by 32m² in 2015. The site's planning history included in the Council's officer report and statement only cite application ref: H/00268/10[4]. However, the same officer report acknowledges 'that the side extension was constructed under application ref: H/04537/13.'

7. Given that the LDC concerns the 'use' of the side extension as a self-contained dwelling rather than its construction as operational development, and that neither the appellant or Council has referenced and/or questioned the lawfulness or otherwise of the side extension as built, I have not pursued this matter further with the parties. This approach will not fetter the ability of the Council to take enforcement action in the future concerning this matter if it considers it expedient to do so.

Main Issue

8. The main issue is whether the Council's refusal to grant the LDC was well-founded. This will turn on whether the appellant has demonstrated on the balance of probabilities that the use of the side extension as a one bedroom self-contained dwelling commenced on or before 27 June 2018 and then continued without significant interruption for four years after the change.

Reasons

9. Section 191(2) of the 1990 Act as amended, states that for the purposes of this Act, uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

10. Section 171B(2) of the 1990 Act as amended states that 'Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.' As such, to be lawful, the use of the side extension must have begun on or before 27 June 2018 and continued without significant interruption for four years after the change.

[4] Application ref: H/00268/10 Retention of extension to existing garage.

11. In this appeal, the onus is on the appellant to make out their case to the standard of the balance of probabilities. As highlighted by the appellant, it is held in settled caselaw that evidence should not be rejected simply because it is uncorroborated. If there is no evidence to contradict the appellant's version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted[5]. It is necessary to consider whether, on the facts of the case and relevant planning law, the specific matter for which a certificate is sought would be lawful. Planning merits are not relevant at any stage in this particular appeal process.

12. The appellant owns the ground floor apartment to No 394 Watford Way (No 394) and the adjoining side extension. He submits that the ground floor apartment has been let for over four years, and during that time he has used the side extension for his own self-contained accommodation. It is on this basis that he seeks to confirm that the side extension has been in continuous independent residential use as a single dwellinghouse for a continuous period of four years or more prior to 27 June 2022.

13. From the submitted plans and my observations on site, the side extension is a single-storey, flat-roof, rectangular structure which abuts and sits to the side and rear of the ground floor apartment to No 394. It is constructed of brick with a mineral felt roof and uPVC fenestration and is accessed via its own entrance from Watford Way. Internally, it comprises a sitting area, kitchen, one bedroom, two toilet/shower units and storage space. The ground floor apartment to No 394 includes three bedrooms, a kitchen and a bathroom.

14. There is no definition of the term 'dwellinghouse' in the 1990 Act as amended, but it is held in settled case-law[6] 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.

15. At the time of my site visit, as a matter of fact and degree, I consider that the side extension met the 'Gravesham' tests as a dwellinghouse. Nonetheless, for the appeal to succeed, the appellant must demonstrate that, on the balance of probabilities, the change of use began from, or prior to, 27 June 2018 and continued without significant interruption for a period of four years thereafter.

16. The appellant submits that the side extension became a fully self-contained flat in 2015 and has been used for residential purposes since that time[7], although no specific date during this year is provided and I note an earlier date of 15 June 2014 is given in the application form. Supporting evidence submitted with the application and on which the Council made its decision comprised letters signed by neighbours[8]; a council tax bill dated 15 March 2022; and a witnessed affidavit dated 8 August 2022 by a previous occupant of the ground floor apartment[9]. Additional evidence submitted as part of the appeal includes Statutory Declarations[10]; HMRC Tax Returns[11]; and Lodger Agreements[12].

[5] *Gabbitas v SSE & Newham BC* [1985] JPL 630.
[6] *Gravesham BC v SSE & O'Brien* [1983] JPL 306.
[7] Planning Statement submitted with the application.
[8] Neighbours at 392 Watford Way and 396 Watford Way lower flat – signed and dated September 2021. Person at NW4 4XE no address provided. Signed but not dated.
[9] Previous occupant of the lower flat for over 5 years, witnessed by a solicitor.
[10] Neighbour at 392 Watford Way; Son-in-Law of neighbour at 396 Watford Way, Previous Occupant; and Appellant.
[11] HMRC Tax Returns between April 2018 – April 2022.
[12] Lodger Agreements between January 2013 and December 2022.

17. The evidence submitted with the application is very limited in its coverage and quite vague. The Council tax bill references the 'Flat Ground Floor Rear Left'. However, it dates from 2022 and does not demonstrate the side extension's use as a self-contained dwelling before that date. I also note the Council's assertion that a Valuation Office Agency's Council Tax Band Search does not suggest that any self-contained units exist at the appeal site as references to other addresses at the property have been removed.

18. The neighbours' letters signed and dated September 2021 confirm their agreement that the appellant has been living in the side extension 'for over past five years.' Additionally, the witnessed affidavit dated 8 August 2022 by a previous occupant of the ground floor apartment, who appears to be the same person as the third undated neighbour letter, confirms their agreement that the appellant has lived in the side extension 'for past over five years' and 'had no access or use any of the facilities in the main property (No 394).'

19. However, these 'agreements' are not written by the signatories and only one is witnessed by a solicitor. Moreover, they are fairly ambiguous in not specifying any date, even approximate, of the commencement of the use, or that it has been continuous during the stated period. These factors limit the weight they carry in support of the appeal.

20. The evidence submitted with the appeal is slightly more comprehensive. Formal statements made under the provisions of the Statutory Declarations Act 1835, from a neighbour, a relative of a neighbour, a previous tenant, and the appellant, have been submitted. These have been witnessed by and signed in the presence of a solicitor, although I note one is not dated, and include the form of words set out in the Schedule to the 1835 Act[13]. On this basis, I have treated them as sworn first-hand evidence.

21. Nevertheless, I am conscious that the 'declarations' contained within them are vague in their wording. Similar to the signed letters, they do not detail a date, even approximate, of the commencement of the use, and instead use terms such as 'for many years – more than four' or 'for over 4 years'. Moreover, the references to seeing the appellant 'in and around garden home' from their upstairs room, or when they visited their relative 'several times each week' do not demonstrate that the alleged use has, more likely than not, been continuous without significant interruption during a four year (or more) period.

22. Whilst on the face of it, these formal statements verify that the use of the side extension as a self-contained dwelling commenced prior to 27 June 2018, their deficiency in detail and precision, combined with their lack of consistency with the signed letters previously submitted in terms of the number of years that the appellant has lived in the side extension, reduces their weight in the determination of the appeal.

23. A large part of the appellant's case to demonstrate that they have lived in the side extension as a self-contained dwelling for more than four years, is based on evidence that the ground floor apartment to No 394 has been rented to tenants, as confirmed by the HMRC Tax Returns and Lodger Agreements.

[13] I --. do solemnly and sincerely declare, that and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the year of the reign of his present Majesty, intituled [the 1835 Act].

24. I note the declared 'property income' that the appellant has received from the ground floor apartment to No 394, which is stated to be the only property the appellant owns. This covers the four year period between April 2018-April 2022 and is from, what is described by the appellant as, 'a series' of tenants occupying three furnished rooms in the main house. Accompanying the Tax Returns are nine Lodger Agreements spanning a period between January 2013 and December 2022[14].

25. However, the Lodger Agreements are very patchy in their coverage of the time period between January 2013 and December 2022, and are not consistent in terms of the information they provide, particularly in relation to the 'term' of tenancy.

26. One, possibly two, of the Lodger Agreements date from before the appellant has stated that the change of use had occurred. Additionally, of the others, there are significant gaps in the tenancies. These 'gaps' are also revealed in the fluctuating 'property income' declared by the appellant in his Tax Returns.

27. In my judgement, as a matter of fact and degree, this evidence does not adequately demonstrate that the ground floor apartment to No 394 has been fully and/or consistently occupied by tenants over any four year period. The appellant does not explain these inconsistencies and omissions. Consequently, I cannot be certain that the appellant did not live in the ground floor apartment to No 394 during periods when there have been no tenants present, or even when there have been tenants present, at any point after 2015 when they state that they commenced living in the side extension as a self-contained dwelling.

28. I am mindful that the Council has not provided any substantive evidence of its own to directly contradict the appellant's version of events or make them less than probable. Nonetheless, the onus remains squarely on the appellant to provide evidence in support of their case which is 'sufficiently precise and unambiguous.'

29. Taken together, I acknowledge that the appellant's evidence does make a case for him having lived in the side extension as a self-contained dwelling for some time. However, the disparities and deficiencies in the information provided, undermine his case in terms of the length and continuity of the use.

30. On this basis and mindful of the *Gabbitas* principle, whilst I do not reject the appellant's evidence, I consider that it is not sufficiently precise or unambiguous to demonstrate the use of the side extension as a one bedroom self-contained dwelling without significant interruption for four years prior to 27 June 2022. As such, the use of the outbuilding as a dwellinghouse has not been 'affirmatively established' over a four year period.

31. Accordingly, I find that the appellant has not demonstrated on the balance of probabilities that the use of the side extension as a one bedroom self-contained dwelling commenced on or before 27 June 2018 and then continued without significant interruption for four years after the change.

[14] Lodger Agreements dated: January 2013 – no 'term' provided; June 2015 – no 'term' provided; January 2019 – no 'term' provided; August 2020 – 2 week 'term'; June 2021 – 12 weeks or months 'term'; September 2021 – 420 months 'term'; January 2022 – 12 months 'term'; April 2022 – 260 weeks 'term'; and December 2022 – 6 weeks or months 'term'.

Conclusion

32. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the 'Use of side extension as one bedroom self-contained dwelling' was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

F Cullen

INSPECTOR