



Appeal Decisions

Site visit made on 22 November 2023

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 January 2024

Appeal A: APP/A5270/C/22/3305618

Premises known as 9 Carlisle Avenue, Acton, London, W3 7NG

- Appeal A is made by Alexander Milcic under section 174 of the Town and Country Planning Act 1990 against an enforcement notice (ref: 20EN1239) issued by the Council of the London Borough of Ealing on 18 July 2022.
- The breach of planning control as alleged in the notice is: 'without planning permission, the material change of use of the land at the rear of the property to self-contained separate residential use.'
- The requirements of the notice are to:
 1. Cease the use of the land at the rear of the property for self-contained separate residential use;
 2. Remove the kitchen and WC facilities; and
 3. Remove all resultant debris.
- The period for compliance with the requirements is three (3) months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990.

Summary Decision: Appeal A is dismissed, and the enforcement notice is upheld with correction and variations as set out in the Formal Decisions.

Appeal B: APP/A5270/X/22/3305620

Annexe, 9 Carlisle Avenue, Acton, Ealing, W3 7NG

- Appeal B is made by Mr Alexander Milcic under section 195 of the Town and Country Planning Act 1990 against the decision of the Council of the London Borough of Ealing to refuse to grant a certificate of lawful use or development (LDC).
- The LDC application (ref: 221654CPE) was dated 15 April 2022 and refused by notice dated 16 August 2022.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 and the existing use for which an LDC is sought is 'use of [the] existing single storey building located in the rear garden...as a self-contained residential unit...'

Summary Decision: Appeal B is dismissed.

PRELIMINARY MATTERS

Costs Application

1. The appellant made an application, in his appeals statement of case, for an award of costs against the Council; this is subject to a separate decision letter.

The 'Appeal(s) Site', 'Main House' and 'Appeal Building'

2. The land subject to the enforcement notice and Appeal A, as shown edged in black on the plan attached to the notice, is the same as the site edged in red on the location plan (GA-SITE-00/A) that is subject to the lawful development certificate (LDC) application and Appeal B.

3. The 'appeal site' comprises the entire property at 9 Carlisle Avenue, meaning that it includes a forecourt and rear garden as well as what I shall describe as the 'main house', a two-storey end-terraced dwellinghouse.
4. These appeals concern a single storey building which is located at the far end of the back garden and referred to by the appellant as the 'outbuilding' or '9a Carlisle Avenue'. The erection of the ['appeal building'] was granted planning permission (ref: PP/2012/1970) on 16 July 2012. 'Non-material amendments' (ref: P/2015/0796) to the '2012 permission' were approved on 5 June 2015.
5. The 2012 permission was subject to conditions including no. 4 that the building 'shall only be used for purposes incidental and ancillary to the use of...9 Carlisle Road...as a single dwelling and shall not be used as a separate unit of residential or commercial accommodation...' To my knowledge, no application was ever made to 'vary' or 'remove' condition 4.
6. The appellant initially applied for an LDC (ref: 217006CPE) on 14 December 2021 to ascertain that the existing use of the building as a separate dwellinghouse is lawful. The Council refused the '2021 LDC application' and that decision was not appealed. Appeal B concerns the second or 2022 LDC application. I shall sometimes refer to Appeals A and B as the 'enforcement' and 'LDC' appeals respectively.

Matters Outside of the Notice

7. While originally used as a single 'C3' dwelling, the main house is now said to be used as a house in multiple occupation (HMO) by no more than six people, otherwise known as a 'C4 HMO'¹. The appellant says that he 'began to rent' the main house as a C4 HMO soon after he bought the property in December 2014. Two HMO tenants, who I shall refer to as SG and QJ, show that they moved into the main house in March 2015². I shall take then or thereabouts as the time of the change of use of the main house.
8. Neither the enforcement notice nor LDC application refers to the C4 HMO use of the main house. That is unsurprising because, during the period December 2014 to March 2015, the change of use of a building from use as a C3 dwellinghouse to a C4 HMO use was 'permitted development' under Article 3(1) and Schedule 2, Part 3, Class I of the Town and Country Planning (General Permitted Development) Order 1995 (the GPDO 1995)³.
9. In this situation and given my findings below, I do not read the notice as attacking the C4 HMO use of the main house. I shall assume for the purposes of this decision letter that C4 HMO use is the lawful and existing use of the main house. The Council has questioned the actual number of HMO occupiers but that is outside of my remit.
10. Likewise, the lawfulness of the operations to construct the appeal building is not subject to Appeal A or B. The works were begun by the previous owner within the three-year period specified by condition 1 imposed on the 2012

¹ Schedule 1 of the Town and Country Planning (Use Classes) Order 1987 defines use class C3 as 'use as a dwellinghouse' by a single person or people to be regarded as forming a single household...and use class C4 as 'use of a dwellinghouse by not more than six residents as a "house in multiple occupation"'.

² The appellant was later granted an HMO licence allowing the main house to be occupied by up to five people.

³ Now superseded by the Town and Country Planning (General Permitted Development) (England) Order 2015 which also permits a change of use from C3 to C4.

permission. The appellant resumed operations in June 2015, presumably upon gaining approval for the non-material amendment.

11. I shall assume, again strictly for the purposes of this decision letter, that the building was constructed in accordance with the 2012 permission and non-material amendment, and it is lawful for that reason. I have no remit in any event to decide when the time for taking enforcement action against the operations would have expired⁴. I shall accept the appellant's evidence that the building was 'completed' in October 2015, but that should not be construed as a finding as to when the building was 'substantially completed'.

APPEAL A ON GROUNDS (B), (C) AND (D) AND APPEAL B

12. Both appeals are strictly concerned with the use of the appeal building – or the land that it sits upon – as a self-contained residential unit (or dwellinghouse)⁵. Under s191(2) of the Town and Country Planning Act 1990 (TCPA90), an existing use is lawful 'at any time' if no enforcement action may then be taken in respect of it, perhaps because it did not involve development or require planning permission, or the time for taking enforcement action had expired⁶.
13. The appellant's case for Appeal B is simply that the use of the building as a self-contained residential unit was lawful on the date of the LDC application because, under s171B(2), no enforcement action may be taken in respect of a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse after the end of the period of four years beginning with the date of that breach. The appellant is emphatic that he moved into the building on 7 December 2015 and the 'four-year rule' applies.
14. However, the Council contests both appeals on the basis that the building was not used for anything else before the self-contained residential use began, and s171B(2) cannot apply⁷. They say there was a material change of use of the land and the time for taking enforcement action would expire at the end of the period of **ten** years beginning with the date of the breach under s171B(3). Thus, the appellant made three 'legal' grounds of appeal against the notice:
- The alleged change of use of 'land' has not occurred – ground (b).
 - The alleged change of use is not in breach of planning control because the 'land' or site as a whole has a lawful residential use already – ground (c).
 - The time for taking enforcement action has expired under s171B(2) – ground (d), mirroring the case for Appeal B.
15. The onus is on the appellant to make his case for the enforcement grounds (b), (c) and (d) and for the LDC appeal on the balance of probabilities. His evidence should be accepted if it is sufficiently precise and unambiguous, and there is no evidence to contradict his version of events or make it less than probable. The merits of the use are irrelevant to both appeals.

⁴ For the purposes of s171B(1) of the Town and Country Planning Act 1990

⁵ The building contains all the 'facilities required for day-to-day private domestic existence' in accordance with the court judgment in *Gravesend Borough Council v Secretary of State for the Environment* (1984) 47P&CR 142.

⁶ S191(2) also provides that an existing use is lawful where it does not constitute a contravention of any requirements of any enforcement notice then in force. The appealed notice had not been issued on the date of the LDC application, and it has not even now come into force. It does not prevent the grant of an LDC.

⁷ It makes no difference to the outcome of these appeals that the Council applied the four-year rule when considering the 2021 LDC application.

Appeal A on Ground (b)

16. If only in academic terms, the notice is not incorrect for alleging that there has been a material change of use of 'land'. That word is defined under s336 of the TCPA90 as meaning 'any corporeal hereditament, including a building'.
17. Paragraph 2 of the notice and the attached plan are clear that the 'land affected' comprises the 'premises known as 9 Carlisle Avenue...shown edged bold black' where 'the approximate position of the unauthorised development [is] marked with an 'X'. That cross is in the exact same position as the appeal building identified on the LDC site location plan.
18. Likewise, the allegation and requirements set out in the notice refer to 'the land at the rear of the property', just as the LDC application refers to the 'rear garden'. With the notice not being aimed at the C4 HMO use, the word 'separate' in the allegation has to be read as meaning that the self-contained residential use at the rear is separate from the use of the main house.
19. Since the appellant lived in the building before letting it out to a friend, he must understand that and where the alleged residential use occurred. The wording of the notice is not so different from that of the LDC application to confuse him or his agent. I conclude that what is alleged by the notice has probably occurred. Appeal A fails on ground (b).

Appeal A on Ground (c)

20. As noted above, the appellant claims that the 'land' subject to the notice has a lawful residential use already, namely C4 HMO use. While I have found that the notice does not attack the use of the main house, and before I consider when and how the alleged change of use took place, I shall look further at the relationship between the lawful and alleged residential uses.
21. The first step in considering the nature and materiality of any change of use to ascertain the correct 'planning unit' and its past and present 'primary' and 'incidental' uses on this basis:
 - The planning unit is usually the unit of occupation, unless a smaller area can be identified which is physically separate and distinct, and occupied for different and unrelated purposes.
 - An incidental use must take place within the same planning unit as the primary use that it is incidental to. And it must be different to but also functionally related to the primary use in a way that is normally found.
22. When the main house was used as a single dwellinghouse, the whole property was probably a single planning unit with a single primary use. The rest of the land around the main house was probably used only for purposes considered reasonably incidental to the residential use. For example, the forecourt might have been used for parking a family car, and the back garden for recreation and storing outdoor domestic paraphernalia.
23. Notwithstanding the question mark over the number of occupiers, a change of use of the main house to C4 HMO use, with the benefit of planning permission granted by the GPDO 1995, should have caused the site to remain one planning unit with one primary use. The use of land around the main house could still be lawfully used for purposes reasonably incidental to the C4 HMO,

and that would apply to the use of the appeal building, not least because of condition 4 on the 2012 permission.

24. However, the appeal building contains, like the main house, primary living accommodation. The appellant accepts that the building is in self-contained residential use; he does not claim that it is used for purposes incidental to the C4 HMO use or indeed as any kind of extension to the HMO. Beyond his objection to the reference to the 'land' in the notice, he does not dispute that the creation of a separate self-contained residential unit in the back garden of the HMO caused a material change to the character of the activities taking place across the whole property as a matter of fact and degree.
25. Where there is a material change of use because a self-contained residence is created in the same planning unit as an existing dwellinghouse or HMO, the planning unit will either be subdivided or put into a mixed use with two separate primary residential uses. In this case, the property remains entirely in the appellant's ownership and physically integrated. The occupiers of the HMO and the appeal building probably share use of the open land on the site, if only insofar as both must use the forecourt to approach and leave their homes⁸.
26. However, the residential use of the appeal building is not functionally related to the C4 HMO use of the main house. When the appellant moved into the site, he told his HMO tenants that he would be on hand if they needed assistance. But he makes no claim that it is necessary for the landlord or any caretaker to live in a separate dwelling on the same site as the HMO. On the balance of probabilities, then, there was a material change of use which resulted in the planning unit being put into a mixed use comprising a C4 HMO use and a separate self-contained residential use.
27. I shall address below whether the notice can be corrected to refer to a mixed use without causing injustice to the Council or the appellant. Either way, the latter has not shown that, on the balance of probabilities, the change of use did not require or already had planning permission. Appeal A fails on ground (c).

Appeal A on Ground (d) and Appeal B

28. As noted above, the four-year rule set out under s171B(2) only applies where there has been a change of use of a building to use as a dwelling. The appellant claims that, upon 'completion' in October 2015, the appeal building was used for purposes incidental to the use of the C4 HMO in accordance with condition 4 on the 2012 permission, and then there was a change of use when the self-contained residential use began on 7 December 2015.
29. The appellant made no mention of any original incidental use in his response to the Council's Planning Contravention Notice or submissions for either LDC application. However, I would not dismiss Appeals A or B simply on the basis that the appellant has now raised a 'new story'⁹. The statement of case submitted by his agent says precisely and unambiguously that:

⁸ I have not been provided with copies of the 'additional notes regarding garden' mentioned in SG and QJ's tenancy agreements, but they in any event predate the appellant's works to the appeal building as well as the start of the alleged use. I saw that the site includes a gate at the side of the main house, meaning that one can walk between the street and appeal building without walking through the HMO.

⁹ I agree with the Inspector who decided appeals refs: APP/X0360/X/21/3271863 and APP/X0360/C/21/3271861 that differences between earlier and later evidence, and similarities in the formatting or content of sworn declarations, do not necessarily undermine the credibility of the witnesses.

'...the 'building was...used as an ancillary outbuilding before its use was in fact changed to a single dwellinghouse...[it] was built to be an ancillary outbuilding and was utilised as one by the tenants of [the C4 HMO] following its construction in early October 2015'.¹⁰

30. In his sworn declaration, the appellant also states that the appeal building was to be used by occupiers of the HMO as an incidental gym. However, he does not describe any actual use or fitting out of the building as a gym:

'I decided to continue with the construction of the outbuilding in order to create a gym at the rear of the garden for ancillary purposes to the main dwelling...the construction [work] commenced in June 2015 and was completed early October 2015...I decided to change the use of the outbuilding in mid-November 2015 and requested additional construction work to be undertaken in order to create a separate self-contained living accommodation. This additional work was completed in early December 2015.'

31. SG and QJ swore that they were notified in advance that, from June 2015, the appeal building would be constructed and fitted out as a 'gym/fitness workout area'. They were notified again, in October 2015, that they could use the gym. However, neither of these tenants describes actually using the building for that purpose, or seeing it being so used.
32. NR, the appellant's main contractor, swore that he completed a project in October 2015 to create 'an outbuilding to accommodate a gym...ancillary...to the main dwelling', and the work 'did not include the installation of a fully functioning kitchen' or the erection of 'internal walls...other than...to create a bathroom'. He was contacted by the appellant again in November 2015 and then instructed to carry out work including the installation of kitchen appliances and furniture 'to create separate self-contained living accommodation'.
33. That NR has been disqualified from acting as a company director is not, in itself, reason to question the truth of his evidence here. However, that finding does not help the appellant because, again, NR does not mention seeing any fitness equipment or use of the building.
34. The appellant obtained a quote in July 2015 for a 'domestic' electricity supply to the appeal building; I accept that such would be appropriate whether the use was to be 'incidental' or 'separate residential'. It is understandable that the 'new electricity connection' was installed as early as August 2015, to spare the builders from having to seek access to the main house for electricity, and so the appellant could distinguish between tenant/HMO and contractor/building electricity use.
35. However, the appellant does not refer to other electrical works after August 2015. It is therefore striking that the electrical installation certificate obtained in November 2015 shows that the circuit included a 'general house ring socket', 'kitchen ring socket' and cooker, as well as electric heaters, immersion heaters and bath/sitting room lights. Even if NR did not install a 'fully functioning kitchen' until November 2015, it appears that the building may have been wired in August with a view to facilitating self-contained residential use.
36. But even if that assessment is wrong, none of the evidence before me includes any positive illustration of the appeal building being used or even equipped for

¹⁰ Paragraphs 7.8 and 7.20 of the appellant's statement of case for the Enforcement and LDC appeals.

use as a gym/fitness area, or for any other use that might be described as reasonably incidental to the use of the main house as a C4 HMO. I attach significant weight to all of the sworn statements but none of them includes any claim that the appeal building was in fact so used or fitted out.

37. Other evidence does not weigh for or against these appeals. Electricity bills could not tell me what activities were carried out in the building. That no telephone line was installed until November 2015 does not indicate or preclude use of the building as a gym in October. The appellant would not have registered the building for Council Tax until after he moved in on 7 December; his parents and friends could not have given evidence on the period before then either. I make no inference from the fact that the appellant provided photographs of his residential use but not of the gym.
38. It follows, however, that the appellant can only rely on what are assertions of gym use in the statement prepared by his agent, and they are undermined by the sworn declarations. The appellant, his tenant witnesses and his builder do not say that plans to use the appeal building as an incidental gym came to fruition. There is nothing to show that any HMO tenant entered the building.
39. The appellant refers to the 'Welwyn' judgment where the Supreme Court held that s171B(2) 'is simply not apt to encompass the use of a newly built house as a dwelling...' – and I find that is probably what occurred here¹¹. It does not matter that some two months may have passed between the 'completion' of the building and start of the residential use, whereas the equivalent time in the Welwyn was a mere 'period of days'. It also does not matter that the appellant did not 'deliberately conceal' the residential use. It is crucial, though, that the appellant has not shown that the use of the building was changed.

Conclusion on Appeal A on Ground (d) and Appeal B

40. The Council stated that they could not 'conclude with any certainty' that the building was put to an incidental use before it was used as a dwelling. There is no 'certainty' test in law and an appellant does not need to provide evidence to that standard.
41. On the balance of probabilities, however, I find that there was no change of use which would be subject to the four-year rule set out under s171B(2) of the TCPA90. The Council did not 'contrive' to avoid referring to a change of use of a building when they drafted the notice. Rather there was probably a material change of use of the land, so as to put the planning unit into a mixed use comprising the use of the main house as a C4 HMO and the use of a newly built house – the appeal building – as a separate self-contained residential unit.
42. S171B(3) applies and the use would not be immune from enforcement action until the end of the period of ten years beginning with the date of the breach. Since the appellant moved into the appeal building on 7 December 2015, the ten-year period had not expired on the dates of the LDC application or the issue of the enforcement notice.
43. I do not need to consider whether the residential use was carried out on a continuous basis – without significant interruption – for the ten-year period by the appellant and subsequent occupier of the building. I make no comment on the appellant's use of his parents' address for purposes such as HMO licencing.

¹¹ Secretary of State for Communities and Local Government v Welwyn Hatfield BC [2011] UKSC 15

44. On the date of the LDC application, it was probably not too late for the Council to take enforcement action against 'the use of the existing single storey building located in the rear garden of 9 Carlisle Avenue...as a self-contained residential unit'. The Council's decision to refuse to grant an LDC was well-founded, and Appeal B must fail. I will exercise accordingly the powers transferred to me in s195(3) of the TCPA90.
45. Likewise, on the date that the enforcement notice was issued, it was probably not too late for the Council to take enforcement action against the material change of use of the land at the rear of the property to self-contained separate residential use. Appeal A fails on ground (d).
46. However, I can and shall correct the notice so that it alleges that there has been a material change of use of the land to a mixed use for use as a C4 HMO and separate self-contained residential use. The correction will make the notice more precise but cause no injustice to the Council or appellant because it will be no more onerous to comply with. The requirements should include cessation of the mixed use but not attack the appellant's lawful use rights to use the main house as a C4 HMO.

APPEAL A ON GROUND (F)

47. Ground (f) is that the requirements of the notice exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by the breach.
48. Before I look at the appellant's detailed case against the requirements, I note his headline request that all are deleted and 'permission should be granted'. I could only have addressed any case for planning permission had the appellant pleaded ground (a) and paid the deemed planning application fee. He did not do so.
49. Turning to the notice itself, the appellant argues not that the requirements are excessive, but rather that they are unclear when the notice relates to the 'land'. As indicated, however, the notice as issued made no mention of the C4 HMO use, and correcting the notice to describe the whole mixed use will not mean the C4 HMO use has to cease.
50. Moreover, the notice is unambiguous as to where the self-contained separate residential use takes place. The cross on the plan shows the position of the unauthorised development. The requirements cannot be construed as demanding the physical removal of the appeal building, the cessation of the C4 HMO use, or the removal of a WC and kitchen from the main house.
51. I am satisfied that the requirement to cease the unauthorised use is not only clear, but also necessary and not excessive to remedy the breach. The same is normally true, in cases such as this, of requirements to remove internal fixtures or fittings that facilitated the unauthorised change of use.
52. However, it appears in this case that the appeal building was approved on the basis that it would contain a WC, basin and shower, plus a sink and row of cupboards or cabinets. The approved floor plan does not illustrate anything that could be construed as a kitchen appliance, or the actual number of kitchen

cupboards as shown in the photographs. Even so, it would be excessive for the notice to require the removal of the WC and such fittings that are approved¹².

53. I conclude that the notice should be varied to allow for retention of the approved WC, sink and cupboards in the appeal building, but otherwise the requirements are not excessive to remedy the breach of planning control that has occurred. To that extent, Appeal A succeeds on ground (f).

APPEAL A ON GROUND (G)

54. Ground (g) is that the period for compliance with the notice falls short of what is reasonable. I agree with the appellant that the notice should give six, rather than three months for compliance. It is reasonable and proportionate that the existing occupier is given time to look for another place to live before the use must be ceased and the appellant must carry out the remedial works. Appeal A succeeds on ground (g).

FORMAL DECISIONS

Appeal A: APP/A5270/C/22/3305618

55. It is directed that the enforcement notice is corrected and varied by:

- Deleting paragraph 3 and substituting: 'Without planning permission, the material change of use of the land to a mixed use comprising the use of the original dwellinghouse as a house in multiple occupation (C4) and the use of the land at the rear for separate self-contained residential use'.
- Deleting sub-paragraph 5.1 and substituting: '1. Cease the unauthorised mixed use of the property by ceasing the use of the land at the rear for separate self-contained residential use'.
- Deleting sub-paragraph 5.2 and substituting: '2. Remove all kitchen appliances, fixtures and fittings except for the sink and cupboards installed in accordance with the planning permission ref: PP/2012/1970 granted on 16 July 2012 and the non-material amendment ref: P/2015/0796 approved on 5 June 2015.
- Deleting three (3) months and substituting six (6) months as the time for compliance with the notice.

56. Subject to the corrections and variations, Appeal A is dismissed, and the enforcement notice is upheld.

Appeal B: APP/A5270/X/22/3305620

57. Appeal B is dismissed.

Jean Russell

INSPECTOR

¹² See the Design and Access Statement submitted with the non-material amendment application.