The Planning Inspectorate

Appeal Decision

Site visit made on 26 March 2024

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 April 2024

Appeal Ref: APP/T5720/C/22/3297946
The land known as 100 Garth Road, Morden, SM4 4LR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Ms Renata Jagoda against an enforcement notice issued by London Borough of Merton.
- The notice was issued on 28 March 2022.
- The breach of planning control as alleged in the notice is without planning permission and within the past four years the unauthorised erection of a self-contained residential unit on top of the existing garage ("the Unit").
- The requirements of the notice are to:
  1. Permanently cease the use of the Unit
  2. Completely demolish the Unit
     or.
  3. Restore that part of the property to its condition prior to the breach of planning control by complying with approved drawing number E-1672-PJ-03A planning permission 17/P2214.
     and;
  4. Permanently remove from the property all associated materials, fixtures, fittings and debris and take off site.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the ground set out in section 174(2)(a), (b), (c), (f) and (g) 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.

Decision

1. It is directed that the enforcement notice is corrected by:

   - deleting '171(A)(1)(b)' in section 1 and its substitution with '171A(1)(a)';
   - deleting the breach of planning control alleged in section 3 and its substitution with 'Without planning permission the creation of a first floor self-contained residential unit within the existing garage ("the Unit")'.

2. Subject to the correction, the appeal is allowed and the enforcement notice is quashed.

Preliminary Matters

3. Section 1 of the enforcement notice mistakenly refers to s171(A)(1)(b) of the 1990 Act, which is failing to comply with any condition or limitation subject to which planning permission has been granted. It should refer to s171A(1)(a), which is carrying out development without the required planning permission. I am able to make that correction without injustice to any party.

The Appeal on Ground (b)

4. A ground (b) appeal is that the breach of control alleged in the enforcement notice has not occurred as a matter of fact. The onus lies with the appellant to make her case on the balance of probabilities.

5. Planning permission was granted in January 2018 for the erection of a single storey detached garage in the side garden of the residential property at No 100 Garth Road[1].

6. The development as alleged is the erection of a self-contained residential unit on top of the existing garage ("the Unit"). The appellant argues that is factually incorrect as the garage building has been constructed as per the approved drawings in terms of its height and scale and that nothing has been erected on top of it as alleged.

7. Although the Council highlights other differences to that approved, it does not show or argue otherwise. The alleged breach is therefore incorrect, or misleading at best, as it implies something has been physically erected on top of the garage building to create a residential unit.

8. Nevertheless, the Council's dated photographs from 29 September 2021, show the garage to have an upper floor, arranged in an open plan layout with fitted kitchen, a dining table, lounge area with sofa (purportedly a sofa-bed) and a separate bathroom with toilet, shower and washing machine.

9. Those photographs therefore show that prior to issuing the enforcement notice, the upper floor of the garage building contained the facilities required for day-to-day private domestic existence. They also show access via a staircase and lockable doors separating the garage from the upper floor, which I saw are positioned off a small lobby accessed from the side external door to the garden.

10. It is therefore more probable than not, that the upper floor space amounted to a self-contained residential unit. Indeed, the Valuation Office Agency (VOA) has banded it accordingly.

11. In its appeal statement, the Council describe the breach as the unauthorised construction of a first floor self-contained residential unit created above the floor space of the garage. That is not the same as that alleged in the enforcement notice, but is closer to what has likely occurred. That would be more accurately described as the creation of a first floor self-contained residential unit within the existing garage.

12. Correcting the allegation in that manner would essentially clarify where the alleged breach has taken place and would not extend the scope of the notice. I am therefore able to make that correction under the powers afforded to me by s176(1)(a) of the 1990 Act, without causing injustice to either party. I shall also delete the words 'within the last four years', as they are repeated in the reasons for issuing the enforcement notice.

13. To this extent, the appeal on ground (b) succeeds, but this does not, of itself necessitate quashing the notice.

[1] Ref: 17/P2214

The Appeal on Ground (c)

14. An appeal on ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. Again, the onus lies with the appellant to make her case on the balance of probabilities.

15. The appellant explains that the construction of the garage was undertaken in the months following the grant of planning permission, culminating in a final building certificate being issued on 9 December 2019.

16. She states that it was specifically built to garage a valuable classic car that requires careful maintenance and to be kept warm during the colder months. She explains that had the internal space remained as per the approved plans then it would have been impossible to reach a suitably stable temperature to protect the car from condensation. She says that the mezzanine floor was installed to overcome this issue, and to provide a storage area for car parts.

17. I also note that the initiating enforcement complaint that the garage was a two storey building and that the upper floor was being used as a self-contained residential unit, was received by the Council in June 2021. The allegation also refers to 'the existing garage'.

18. That timeline and series/version of events does not therefore point to a garage, with first floor, being built as a single act of development, and not in accordance with the planning permission. Indeed, the notice does not allege that it was. Based on the limited evidence before me, it is likely that the first floor was added after the garage had been constructed.

19. S55(1) of the 1990 Act provides a broad definition of development and includes building operations in, on, over or under land. S55(2)(a) excludes from the definition of development works for the maintenance, improvement, or other alteration of any building which - (i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building.

20. The allegation (as corrected) merely clarifies that the self-contained residential unit has been created inside the garage, rather than it being a physical manifestation on top of it. The works to create the first floor, served by a staircase and internal partitioning, and the fitting out of the resultant space as a self-contained residential unit, only affect the interior of the building so do not amount to development requiring planning permission.

21. Given the above timeline of events, it makes no difference that those aspects were not shown on the approved drawings for a single storey garage. Moreover, there is no condition attached to the planning permission for the same which precludes the provision of such works, or even the conversion of the garage, as commonly occurs.

22. In the case of *Somak Travel*[2] it was held that an enforcement notice could require the removal of such works which do not amount to development but have facilitated an unauthorised material change of use. However, the enforcement notice does not allege that the first floor of the garage is actually used as a self-contained residential unit, or for any other use for that matter.

[2] *Somak Travel v SSE & Brent LBC* [1987] JPL 630

23. Consequently, as the enforcement notice is not issued in respect of a material change of use, there are no facilitating works which would bring those internal works within the realms of *Somak Travel.*

24. The only aspects identified by the Council which affect the external appearance of the building are the roof lights. It was held in *Burroughs Day*[3] that, for works to 'materially affect' external appearance, the changes must be visible from a number of vantage points and material to the appearance of the building as a whole and not a part in isolation.

25. The two rooflights in the garden facing roof pitch are unlikely to be visible from any public vantage points, and are not readily obvious from within the garden given their profile and the available viewing angles. The two in the roadside facing roof pitch cannot be seen from the adjacent footpath due to the viewing angles. They can, however, be clearly seen from the footpath on the opposite side of the road, but that roof pitch/side elevation is largely seen in isolation, save for part of one gable elevation.

26. Therefore, applying the principles established in *Burroughs Day*, I conclude in the particular circumstances of this case, that the roof lights do not materially affect the appearance of the building as a whole and thus are not development under s55(2)(a)(ii) of the 1990 Act.

27. Requirement 5.1 of the enforcement notice does introduce use but because the allegation does not, the former does not square up and follow logically from the latter. In any event, whilst that requirement is to permanently cease the use of the unit, it does not clarify what that use is.

28. The enforcement notice is also confusing in that the allegation refers to a self-contained residential unit and the existing garage ("the Unit"). Interpretation of the requirement to demolish relies on the capitalization of 'Unit', to make the distinction. Even then there is ambiguity as to whether 'the Unit' refers to the whole of the garage building, or the self-contained residential unit. Moreover, the third requirement is to 'restore that part of the property…' without clarifying what that part amounts to.

29. However, it is unnecessary for me to consider whether I am able to further correct the notice without injustice, as I am going to quash it for the reasons I will continue to set out.

30. In that regard, the first floor of the garage was, and remains capable of being used as a self-contained residential unit, in that it contained all the facilities necessary for day-to-day domestic existence. However, just because it has the characteristics of a dwellinghouse, it does not necessarily follow that it is being used as a self-contained residential unit, even if that were alleged.

31. The appellant argues that she and her partner have used the upper floor of the garage as an ancillary space to the main dwelling for their own personal enjoyment, including storage, home gym and office. S55(2)(d) of the 1990 Act provides that the use of land or buildings within the curtilage of the dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such is not development.

[3] *Burroughs Day v Bristol CC* [1996] EGCS 126

32. Considering firstly the issue of curtilage, although one side elevation of the garage is positioned immediately adjacent to the footway along Garth Road, the main footprint of the building is perceived to be within the fenced side garden of No 100. The side facing elevation of the main dwelling is functionally focused on that garden and the rear/side of the garage and has a clear intimate association with the same. I am therefore satisfied that the garage building falls within the curtilage of No 100.

33. The essential feature of an incidental use is that it should have a functional relationship with the primary use, and the relationship should be one that is normally found. It is implicit in the requirement for there to be some functional relationship that an incidental use will not be the same as the primary use.

34. The appellant explains that as a result of her health issues the space created within the garage was turned into an area which she could use for her and her partner's own personal enjoyment and recreation. She says that following the onset of COVID-19, the need for the space became increasingly important as it provides a 'home work area' for them both. That is consistent with the Council's photographs which show paperwork and a laptop set out on the table.

35. A home office is clearly incidental to the ordinary use of a home, particularly post COVID-19, and it is not uncommon for that provision to be made in a garden building.

36. The appellant's partner explains that he is a classic car enthusiast and that the garage is used to keep his 1996 Bentley. That too is clearly an incidental use to the main house and one that is normally found. He says he uses the first floor space as his workshop and for the storage of parts. That is again largely consistent with the Council's photographs which show tools and boxes and other items stored in the space.

37. The appellant also says that the space is convenient for exercising as part of her rehabilitation. Although there is little evidence to that effect, such as the provision of gym equipment or even residual space for exercise, a gym use is again clearly capable of being a use that is incidental to the residential use of the main house.

38. A toilet would usually be comprised within the everyday living facilities of the dwelling, and thus be part of the primary living accommodation. That said, I can see no reason why such a facility should not be regarded as part of such incidental uses if integrated and subservient to them. That is similarly so for a shower as part of a gym use. It could also apply to a sitting area, as well as a small kitchen facility for making coffee and tea, and the cold storage of food and drink.

39. The appellant explains that that her physical and mental abilities are severely limited due to her health issues. The appellant's partner also sets out his own health related issues. The case made is that the space is intended to provide maximum comfort and convenience so that whilst carrying out the above activities and working on car related projects, they have easy access to amenities which provide for their basic needs, namely warmth, access to water, a toilet and hot and chilled food, so as to avoid having to walk back and forth to the main dwelling, climbing up and down stairs, then resuming what they were doing. Given the stated health issues, I understand and sympathise that

would be inconvenient and uncomfortable, particularly during inclement weather.

40. However, the kitchen in this case, although small, is well equipped, with sink, oven (including hob), microwave, fridge freezer and a range of cupboards. On the face of it, such provision, in combination with a bathroom with shower and washing machine, go beyond what can reasonably be regarded as part of the above stated incidental uses. Indeed, all aspects combined, the first floor has the appearance and functionality of a studio flat, albeit one with significant space constraints.

41. Where a building within the curtilage of a dwellinghouse provides all the facilities necessary for independent day-to-day living, that points to a residential use, rather than for a purpose incidental to the enjoyment of the dwellinghouse.

42. In such cases, the residential use of the building may be regarded as part and parcel of (rather than incidental to) the use of the dwellinghouse, even if the building contains the facilities required for use as a self-contained residential unit. However, a material change of use would arise if the main dwelling and garage building (or part of) are sub-divided to form separate planning units. In such cases it is necessary to assess the physical and functional links between the use of the building and main dwelling and consider whether a separate planning unit has been created as a matter of fact and degree.

43. The appellant explains that a door is installed between the garage and the first floor in order to keep the car in an encapsulated, heated and fireproof space, in accordance with the car insurance requirements. The garage has evidently been designed and fitted out to a standard significantly above that which would normally be found, for the purposes of protecting a classic car. As the appellant's partner is a classic car enthusiast, it is very likely that the garage part of the building functionally forms part of the main dwelling.

44. Although the first floor unit can be accessed independently of the garage, via a door in the side elevation, that door is positioned within and faces out onto the garden of No 100. Consequently, access to it can only be achieved by crossing the grassed area from the main dwelling at No 100, or via a gate in the fence.

45. The appellant has not therefore sought to provide access to the first floor unit independently of No 100. Indeed, the facing side elevation of No 100 is functionally focused on the side garden and the door to the garage such that its use by anyone unrelated to her would seriously compromise the enjoyment and privacy she and her partner would enjoy. That arrangement therefore supports the appellant's position that it has never been the intention to create a separate living unit from the main dwelling.

46. In any event, the notice does not refer to it as being a separate self-contained residential unit from the main dwelling at No 100, and no evidence is provided by the Council that it is or was. I note that the VOA has banded the upper floor as a self-contained residential unit, and that the appellant had four weeks to contest that but did not. However, the Council requested the VOA to make the banding so although that confirms its configuration as a self-contained residential unit, it does not demonstrate use on that basis.

47. Despite the first floor of the building duplicating facilities in the main house, I find, on the balance of probabilities, that at the time the enforcement notice was issued, it was likely being used for purposes ancillary to the primary use of the main dwelling at No 100. Even if I am wrong on that point, and the building was in residential use, it is more likely than not that the main dwelling and the self-contained residential unit (and garage) were part of the same planning unit, being functionally occupied as part of a single household. Accordingly, there was no material change of use requiring planning permission.

48. I therefore conclude that the appeal on ground (c) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control.

49. The enforcement notice will be corrected and quashed. In these circumstances, the appeal on grounds (a), (f) and (g) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act do not fall to be considered.

Richard S Jones

INSPECTOR