



Appeal Decisions

Site visit made on 21 November 2023

by Graham Wraight BA(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 May 2024

Appeal A Ref: APP/A5840/C/22/3301409

26 Underhill Road, London SE22 0AH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
 - The appeal is made by MTP Real Estate Ltd against an enforcement notice issued by London Borough of Southwark Council.
 - The notice, numbered 22/EN/0028, was issued on 16 May 2022.
 - The breach of planning control as alleged in the notice is Without planning permission, the erection of a building shown for identification purposes in the location hatched blue on the attached plan ("the Unauthorised Development").
 - The requirements of the notice are to:
 - (1) Demolish the Unauthorised Development, which for the avoidance of doubt includes any foundations;
 - (2) Restore the land to its previous condition before the Unauthorised Development took place, which for the avoidance of doubt includes the fence dividing the site; and
 - (3) Remove from the site and properly dispose of all detritus and waste arising from compliance resulting from the carrying out of steps (1) and (2) above.
 - The period for compliance with the requirements is: Six (6) months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (f) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/A5840/W/23/3323517

26 Underhill Road, Southwark, London SE22 0AH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by MTP Real Estate Ltd against the decision of London Borough of Southwark Council.
 - The application Ref is 22/AP/3382.
 - The development proposed is the erection of a single-storey building at the rear of the site for a purpose incidental to the enjoyment of the host dwellinghouse.
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Decision

1. Appeal A: The appeal is dismissed and the enforcement notice is upheld.
2. Appeal B: The appeal is dismissed.

Applications for costs

3. With respect to Appeal A, an application for costs was made by the London Borough of Southwark Council against MTP Real Estate Ltd. This application is the subject of a separate Decision.

The Enforcement Notice

4. Requirement 5.2 of the notice requires the restoration of the land to its previous condition before the unauthorised development took place. The appellant queries whether this means that there would be a requirement to rebuild the original outbuilding once the appeal building was demolished. However, it has not been suggested by the Council that the demolition of the outbuilding was development in itself. Furthermore, the notice targets only the erection of the new building and not the demolition of the previous one. It cannot therefore require the act of operational development that would need to take place in order to rebuild the original building.

Preliminary Matters

5. A new version of the National Planning Policy Framework (the Framework) was published on 19 December 2023 and therefore I have referred to that revised document in my determination of Appeal B. I am satisfied that the parts of the Framework most relevant to this appeal have not substantively changed from the previous iteration.
6. With regard to Appeal B, the description given on the planning application form is the *erection of a single-storey building at the rear of the site for a purpose incidental to the enjoyment of the host dwellinghouse*. I have used that in the banner header of this decision. The Council omitted the wording '*for a purpose incidental to the enjoyment of the host dwellinghouse*' from the description of development it used throughout its determination of the planning application, and this remains an area of contention between the main parties. I shall return to this matter later in my decision.
7. I visited the site on 21 November 2023 with regard to Appeal A. Following that visit, Appeal B was accepted as valid and linked to Appeal A. What I saw and recorded at my visit in November 2023 was comprehensive and I am satisfied that a further visit to the site is not necessary to assess Appeal B. I have proceeded on that basis.

Reasons: Appeal A

Ground (c)

8. The argument is that the matters alleged by the notice do not constitute a breach of planning control. The burden of proof in an appeal on ground (c) falls on the appellant and the standard of proof is the balance of probability. In this case the matter centres around whether the outbuilding subject to the notice was able to have been constructed as permitted development under Schedule 2, Part 1, Class E of The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GDPO). This class allows for the provision within the curtilage of a dwellinghouse of any building required for a purpose incidental to the enjoyment of the dwellinghouse as such subject to certain criteria.
9. There is no apparent dispute between the parties that the property at 26 Underhill Road has, in the past, been in use as a dwellinghouse under Class C3 of The Town and Country Planning (Use Classes) Order 1987 as amended (UCO). Nor is there a dispute that it is now in use as a house in multiple occupation (HMO) under Class C4 of the same order, which permits the use of a dwellinghouse by not more than six residents as an HMO. The parties agree

that in both scenarios, permitted development rights would be available to construct an outbuilding on the terms allowed for by Schedule 2, Part 1, Class E of the GDPO. A lawful development certificate¹ was granted for a similar sized outbuilding to be used as a home office, which confirms that such a development would have been lawful on the date that the application was made, that being 21 August 2021.

10. The enforcement notice is served on the basis that the outbuilding was constructed at a time when the property was being used as a large HMO with up to 8 residents. Such a use falls within the 'sui generis' use class set out within the UCO. There is no case made to show that this was not a material change of use of land and thus was not development. Indeed, the appellant complied with the requirements of a separate enforcement notice and ceased the use of the property as a large HMO. As planning permission was not obtained for that change of use to the larger HMO, it would not have been lawful. Article 3(5) of the GDPO sets out that the permission granted by Schedule 2 does not apply if in the case of permission granted in connection with an existing use, that use is unlawful. The key consideration is therefore whether or not the land was being used unlawfully at the time that the outbuilding was constructed.
11. The appellant's response to the Planning Contravention Notice states that building works to erect the outbuilding commenced on 24 January 2022. Prior to this, an application for an HMO license was submitted on 12 October 2021 and this stated that at that time there were 7 occupiers and 8 bedrooms. Although not dated, an internet advertisement has also been provided which refers to there being 8 bedrooms at the property. The appellant's Statement of Case further advises that when officers visited the site accompanied by their agent on 23 March 2022, the main house was found to be arranged to include 8 bedrooms accommodating 8 unrelated persons. There is, therefore, sufficient evidence that both before and after the date on which works on the outbuilding were commenced, the appeal property was in use as an HMO with up to 8 residents: that use was unauthorised. The appellant is unable to provide evidence to contradict or make less than credible this version of events.
12. Consequently, the evidence presented does not demonstrate that the property was in lawful use when construction of the outbuilding was commenced, which was a necessary prerequisite for the outbuilding to have been erected under permitted development rights. A lack of control over, or knowledge of, the unauthorised use which was instigated by their lessee does not alter the fact that an unauthorised use occurred and that Article 3(5) of the GDPO is engaged.
13. The caselaw cited² does not appear analogous to the circumstances of the appeal case in that respect. It is also not of relevance that the unauthorised use was not in the appellant's view 'long-lasting'. In conclusion, I am satisfied that on the balance of probability, that the construction of the outbuilding was a breach of planning control, owing to the provisions of Article 3(5) of the Act.
14. The appeal on ground (c) therefore fails.

¹ 21/APP/2987

² R(Orange PCS) v Islington LBC [2006] EWCA Civ 157.

Ground (f)

15. Section 173(4) of the Town and Country Planning Act 1990 (as amended) (The Act) sets out that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173(4)(a)) is to remedy the breach of planning control which has occurred. The second (s173(4)(b)) is to remedy any injury to amenity which has been caused by the breach. In this case, the notice requires the removal of the unauthorised development in its entirety. This is consistent with the purpose of remedying the breach of planning control in accordance with s173(4)(a).
16. The essential argument is that the notice's requirements are excessive. The case is that if the outbuilding were to be demolished, a building of the same, or very similar, dimensions and design could potentially be built again. This is because 26 Underhill Road is now in a lawful use and as a result it once again benefits from permitted development rights. Whilst the Council has reservations that such a building would be incidental in use, the previous granting of a lawful development certificate for a similar outbuilding lends weight to the possibility that, under certain circumstances, such a building might be able to be constructed as permitted development.
17. The suggestion is that there is a fallback position. However, varying the requirements in this way would result in the lesser step of the building as erected remaining in place which would not remedy the breach and achieve the purpose behind the notice. In any event, varying the notice so that the building is retained would result in under-enforcement. Given the potential effect of s173(11) of The Act, the building's use would not be limited to an incidental use.
18. Whilst the appellant refers to the possibility that they may be able to exercise permitted development rights and erect an outbuilding under Class E for an incidental purpose, the enforced building was not constructed under permitted development rights and only total compliance with the requirements of the notice would remedy the breach of planning control.
19. I have had regard to the caselaw³ and appeal decision⁴ provided by the appellant which collectively advocate a pragmatic approach to enforcement. However, for the reasons I have set out, the under-enforcement sought would not remedy the breach of planning control and achieve the notice's purpose. The appeal decision refers to a fence which was required to be reduced in height to that which could be constructed using permitted development rights. That scenario is not therefore the same as that in this appeal, where the effect of allowing an appeal on ground (f) would be to allow the retention of the outbuilding on an unrestricted basis.
20. Accordingly, the steps required are not excessive and the appeal on ground (f) fails.

Conclusion – Appeal A

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

³ Tapeccrown Ltd v First Secretary of State & Anr [2006] EWCA 1744 & Garland v MHLG [1968] 20 P&CR 93

⁴ APP/G2245/C/10/2123244

Reasons: Appeal B

22. The main issues are the effect of the development on (i) the character and appearance of the area and (ii) the living conditions of the occupants of 24 Underhill Road with regard to outlook, the living conditions of the occupants of the appeal property with regard to outdoor amenity space and the living conditions of the occupants of nearby dwellings with regard to noise and disturbance.

Character and appearance

23. The appeal property is a semi-detached dwelling located close to the junction of Underhill Road with Melford Road. Whilst the building subject to the appeal is in the rear garden, the presence of a communal parking area serving another residential property in the area creates a gap in the Melford Road street scene. The building is clearly visible in this gap, standing taller than the wall that is located on the boundary. It is a substantially sized, flat roofed building rendered in a dark grey colour which is not characteristic of the prevailing external facing materials in the locality. Owing to its scale, design and appearance it is an incongruous feature within the street scene, visibly at odds with other built development in the vicinity. This has resulted in significant harm to the character and appearance of the area.
24. The appellant suggests that the appearance of the building could be modified to incorporate trellising and/or a green roof, a sedum roof or solar panels and have provided amended drawings to that effect. Alternatively, the building could be painted white. Whilst these works would have some benefit in softening the appearance of the building, it would still appear visibly at odds with other built form in the area and would remain as a large and visually dominant building. A green screen mounted on and/or behind the wall may serve to conceal the building, but its success in doing so would be dependent on it remaining 'green' and there are no firm details before me as to how that could be achieved in practice. Therefore, even if any of the proposed works were secured, they would not overcome the harm caused by the presence of the building.
25. The appellant considers that the development meets with the guidance in the 2015 Technical Update to the Residential Design Standards Supplementary Planning Document 2011 (SPD) in a number of respects. However, the fundamental purpose of the SPD is to set out the standard of design expected from new residential development in Southwark. I find that the development fails to achieve this aim in terms of its design and visual impact. That the development does not affect any listed building, is not in a Conservation Area and that the host dwelling has no identified special interests does not justify a harmful development.
26. For these reasons I conclude that the development has caused significant harm to the character and appearance of the area. Consequently, it fails to accord with Policies P13 and P14 of the Southwark Plan 2022 (SP), where they seek to protect character and appearance and promote a high standard of design. It also fails to meet the aims of the SPD in the same respect.

Living conditions

27. Although large in size, the building is located towards the end of the garden and thus not immediately adjacent to the dwelling at 24 Underhill Road. It is single storey in height and set off the boundary, on which there is fencing with vegetation above. Because of these factors, it does not have an adverse impact on the outlook from the adjacent dwelling or its rear garden area. Although it has reduced the area of garden available to its host dwelling, there is still a sizeable amount of garden available, adequate in size for people to sit out and to hang washing. Furthermore, it is intended that the building would provide extra internal space for the occupants of the property, which would provide some compensation for the reduction in the external space.
28. However, the appellant sets out that the intended use of the building is in part to provide a physically separate space where a single occupant of the HMO can entertain their guests without disturbing the other five occupants. This may include the hosting of a party, a games night or to watch a sports match. The building would provide a 'loud space'. Given the close proximity to adjacent dwellings such a use would be likely to cause significant noise levels resulting in disturbance to the residents of adjacent dwellings. The potential for this impact to occur is corroborated in representations made by the occupants of nearby dwellings.
29. In conclusion, whilst the development has not caused harm to the living conditions of the occupants of No 24 in terms of outlook or to those who occupy the host property in terms of outdoor amenity space, the intended use of the building would be likely to cause significant harm to the living conditions of nearby occupants from noise and disturbance. For that reason, the development fails to accord with Policy P56 of the SP where it seeks to safeguard living conditions.

Other Matters

30. Turning to the fallback position argued by the appellant. In order to establish whether a fallback position is a material consideration, the courts have set out there should be a greater than a theoretical possibility that the alternative development might take place, or in other terms a real prospect of the fallback being implemented. The Council does not dispute that the property, which is currently in use as a house in multiple occupancy within Class C4 of the UCO, benefits from permitted development for outbuildings or that the building that exists is, size and location wise the same, or at least very similar, to one that could in principle be erected as permitted development. I have no reason to disagree with that position.
31. Under the provisions of Schedule 2, Part 1, Class A of the GDPO it is permissible, subject to the relevant limitations, to erect such an outbuilding for a purpose incidental to the enjoyment of the dwellinghouse. The appellant states that the purpose of the appeal outbuilding is that which I have set out above, namely to provide an area for entertaining which could include the hosting of a party, a games night or to watch a sports match. A gym/exercise room would also be provided within a separate room in the building. It is said that the toilet and shower that have been installed in the building are to be used in connection with those uses.

32. The Government's *Permitted development for householders - Technical Guidance September 2019* assists in the interpretation of the GPDO. In relation to Class E it advises that the rules allow a wide range of buildings as long as they can properly be described as having a purpose incidental to the enjoyment of the house. It states that *'examples could include common buildings such as garden sheds, other storage buildings, garages, and garden decking as long as they can be properly described as having a purpose incidental to the enjoyment of the house. A purpose incidental to a house would not, however, cover normal residential uses, such as separate self-contained accommodation or the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen'*.
33. In this instance, the purpose of at least part of the outbuilding would be to provide an extension to the existing primary living accommodation that is available to the occupants of the HMO. Given the generous size of the area that would be available and that, as the appellant points out, it would be preferable to have any noise generating activities further away from the main property where it may disturb other occupants, the use of the outbuilding in effect as a lounge would be likely to be both an attractive and well-frequented proposition. Whilst the gym element could be incidental to the main use of the dwelling, the other room for socialising would not be. As the whole of the building would not be used incidentally, it would not be permitted development. Consequently, a fallback position to rebuild the building for the proposed purposes does not exist and this consideration therefore carries only limited weight.
34. The appellant also suggests that a planning condition could be imposed requiring the building to be used for an incidental purpose. However, given the use that they have set out would not be incidental, I am not persuaded that it would be reasonable to do so. Therefore, imposing such a condition would not meet with the tests set out in paragraph 56 of the Framework.
35. As a further alternative, the appellant considers that they could revert the main dwelling to a C3 residential use, which would not require planning permission. They consider that they could then construct the same or a similar building using permitted development rights and use it for a home office as per the lawful development certificate that has been granted. However, to be in a position to do so they would need to have evicted the tenants from the HMO, carried out any conversion works to allow occupation as a C3 dwelling and then occupy it on a basis that would fall under the C3 use class. There is nothing substantive before me to suggest that it would be an attractive or credible proposition for them to change the use of the main building in such a way in order to be able to rebuild an outbuilding of a similar size to that which exists.
36. Changing the use of the main building to C3 would therefore require a significant chain of events. On the basis of the information that I have before me I do not consider that there is any real prospect of that series of events occurring, and therefore this does not represent a viable fallback position. But, in any event, an office building would not have the same or similar effect as the appeal building in terms of noise and disturbance. Therefore, the possibility that an outbuilding in that use could be built does not justify, and is not comparable, to the harm that would be caused by my permitting of the retention of the existing outbuilding and the intended use of it as a 'loud space'.

37. I am invited by the appellant to impose a planning condition to require a change of the main building to a C3 use and to require the outbuilding to be used as a home office. However, I do not consider that this either would meet the test of reasonableness set out by the Framework. It would likely require the eviction of the existing tenants and would force a change of use of the main building. The appellant further suggests that a much bigger building could be erected under Class E if the current building was demolished. However, such a building would still be required to be incidental in use, and I have no details before me as to what size of building might be proposed and to what use it would be put. This consideration therefore does not weigh in support of the appeal development.
38. The appellant refers to the development plan and to a policy within it that refers to the climate emergency. They also state that there would be disruption during the demolition of the building. However, these considerations carry only limited weight in favour of the retention of the outbuilding.

Planning Balance and Conclusion – Appeal B

39. I have found that the development has not resulted in harm to the living conditions of the occupants of the adjacent dwelling at 24 Underhill Road in terms of outlook or to the occupants of the host dwelling. However, I have found that significant harm has been caused to the character and appearance of the area and that harm would be caused to living conditions as a result of noise and disturbance. This means that the development fails to accord with the development plan taken as a whole. I find that the other considerations in this case, including those relating to potential fallback and imposing conditions, do not indicate that a determination should be made otherwise than in accordance with the development plan. Accordingly, the appeal should be dismissed.

Graham Wraight

INSPECTOR