



Appeal Decision

Site visit made on 4 November 2024

by Peter White BA(Hons) MA DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 January 2025

Appeal Ref: APP/A5270/C/24/3349064

464 Whitton Avenue West, Greenford UB6 0EG

- 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 Daljit Dhami against an enforcement notice issued by the Council of the London Borough of Ealing ("the Council").
- The notice was issued on 19 June 2024.
- The breach of planning control as alleged in the notice is described as: without planning permission: the material change of use the rear outbuilding to a self-contained residential unit.
- The requirement of the notice is: cease the use of the outbuilding as a self-contained residential unit.
- The period for compliance with the requirement is: three months.
- The appeal is proceeding on the grounds set out in section 174(2)(d) and (g) of the Town and Country Planning Act 1990 (as amended).

Summary of decision: The appeal is dismissed, and the enforcement notice is upheld with a correction, in the terms set out below in the Formal Decision.

Preliminary Matters

1. The enforcement notice ("the Notice") followed the refusal of an application for a lawful development certificate for continuous use of a single storey outbuilding as a self-contained flat (Council's reference: LDC 241782CPE). That is not a matter before me, and I have considered this appeal on its own merits considering the evidence.
2. In the reasons for issuing the Notice, the Council stated that the breach of planning control had occurred within the last 10 years, but they also stated that, "It is accepted that transitional provisions will apply". Those transitional provisions¹ mean that where a material change of use to a single dwellinghouse took place before 25 April 2024, the time period for taking enforcement action is 4 years. In this case, the residential use commenced before that date and the appellant has correctly considered a 4 year period. No injustice has therefore occurred to the appellant in terms of his ability to make his case in relation to the appeal on ground (d).
3. The breach of planning control alleged in Section 3 of the Notice omits the word "of" after 'the material change of use' and before 'the rear outbuilding'. For clarity I will correct the Notice. No injustice occurs to the appellant or the Council in doing so.

¹ Regulation 5 of The Planning Act 2008 (Commencement No. 8) and Levelling-up and Regeneration Act 2023 (Commencement No. 4 and Transitional Provisions) Regulations 2024, [SI 2024/452]

The appeal on ground (d)

4. Appeals on ground (d) are made on the basis that, at the time the Notice was issued, no enforcement action could be taken against the matters constituted by the breach of planning control.
5. The development alleged is the material change of use of the outbuilding to a self-contained residential unit. The evidential burden is on the appellant, and in order to succeed on ground (d) he must demonstrate, on the balance of probabilities, that the material change of use of the outbuilding to a residential unit took place on or before 19 June 2020 and continued thereafter for four years.
6. In relation to a breach of planning control consisting of a change of use of any building to use as a single dwellinghouse occurring before 25 April 2024, no enforcement action may be taken after the end of the period of 4 years beginning with the date of the breach².
7. It is common ground between the parties that the building marked with an 'X' on the enforcement notice plan was constructed as an outbuilding ancillary to 464 Whitton Avenue West ("No 464"). It is located at the rear of the plot, with doors both into No 464's garden and to the vehicular access track at the rear of the terrace of four dwellings.
8. The Council visited the outbuilding in 2009, when it was used incidentally to No 464, and noted the presence of the kitchen (containing an oven, fridge and hob) and bathroom/WC. The appellant's evidence includes photographs from 2008 and 2009 which show the building contained a fully fitted kitchen, a bed, and gym equipment at a time when the parties agree it was used as an incidental or ancillary part of No 464, rather than an independent dwelling. That is supported by evidence in the statutory declarations that the building was in use as a home office and gym and for visiting guests of the family during that period. In terms of *Gravesham*³, the outbuilding therefore contained all the facilities required for day-to-day private domestic existence long before it was used as an independent dwelling.
9. The appellant claims the outbuilding was first let as an independent dwelling in March 2019, and that the use continued until, and beyond, 19 June 2024 when the Notice was issued.
10. The Council does not dispute that on the balance of probabilities use as an independent dwelling occurred from 16 December 2020 until the date the Notice was issued (19 June 2024). The Council also agrees that there is some evidence of independent use between March 2019 and 27 July 2020.
11. Most importantly, the parties agree that the outbuilding was not occupied as an independent dwelling between 27 July 2020 and 16 December 2020 ("the unoccupied period").
12. It is clear that use as an independent dwelling prior to the unoccupied period did not amount to a continuous period of 4 years. Neither did it after the unoccupied period up to the time the Notice was issued. But were the unoccupied period included, more than 4 years would have occurred. The key

² Section 171B.(2) of the Act, subject to transitional provision specified in SI 2024/452 reg.5

³ *Gravesham BC v Secretary of State for Environment* (1984) 47 P & CR 142

- consideration is therefore whether the unoccupied period may be included in the period of 4 years beginning with the date of the breach.
13. At its simplest, the appellant's case is that the outbuilding was still a residential unit throughout the gap between tenancies, and that the unoccupied period did not amount to a break in the independent residential use which had occurred.
 14. Both parties have quoted extensively from judgements of the courts. Applying the approach set out in *Maxwell Estates*⁴, including its support for the principles established in *Thurrock*⁵ and *Swale*⁶, a use can only become lawful if it continues throughout the 4 year period, such that the Council could have taken enforcement action at any time.
 15. Where a use has not achieved lawfulness, any period greater than one deemed to be *de minimis*, during which the Council could not have enforced against the use, is a period where the use was not continuous. There is therefore a distinction between a lawful dwelling, which may be left vacant for periods of time without losing its lawful use, and one which has not achieved lawfulness.
 16. I do not accept the appellant's claim that the findings in *Maxwell* are of limited application to the present case. In *Maxwell* the flat was not visible from the public realm and had been gutted for renovations, such that it would not have been clear what its use was. However, Mrs Justice Lang was careful to make clear that whether or not the statutory test⁷ was satisfied would depend on the factual findings in the particular case.
 17. In the case before me, like that in *Maxwell*, the interior of the outbuilding is not visible from the public realm, as there is no window onto the access track and no glass in the door. More importantly, the fixtures and fittings of the kitchen, bathroom and bed were present before independent residential use occurred, and were known to the Council.
 18. All the facilities required for independent living were therefore present in the building from the outset, even at times the building was not used as an independent dwelling. Considering matters in the round, the Council therefore could not have distinguished between incidental/ancillary use and independent residential use unless there was actual residential occupation. In these circumstances, it would not have been possible for the Council to take enforcement action against independent residential use during the unoccupied period.
 19. The appellant has referenced an appeal decision from 2016⁸. The approach taken by the Inspector in that decision preceded, and differs from, the *Maxwell Estates* judgement in relation to the matter of continuity, and I attribute only very limited weight to it. The more recent appeal decision provided by the Council⁹ more closely reflects the current approach, and I agree with that Inspector that the critical question is whether the use was continuous, not whether the building was continuously fitted out or intended for residential use.

⁴ *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)

⁵ *Thurrock Borough Council v Secretary of State for the Environment* [2002] EWCA Civ 226, [2002] JPL 1278

⁶ *Swale v Borough Council v Secretary of State for the Environment* [2005] EWCA Civ 1568, [2006] JPL 886

⁷ Under section 171B(2) TCPA 1990: whether the enforcement action had been "taken after the end of the period of four years beginning with the date of the breach".

⁸ APP/A5270/X/15/3130877 and APP/A5270/X/15/3130884

⁹ APP/A5270/C/22/3305864

20. I have no reason to doubt that the appellant's intention throughout the unoccupied period was to continue to let the building, or that the (then) prospective new tenants were delayed in their occupation by their previous tenancy. But neither changes the fact that, as a matter of fact and degree, the unoccupied period extended over four and a half months, which is not an insignificant period, and is not *de minimis*.
21. During the unoccupied period the Council would not have been able to take enforcement action, and the unoccupied period between July and December 2020 amounts to a break in the period of continuous use of the outbuilding as an independent dwelling. Therefore, when the building was occupied in December 2020 a fresh material change of use occurred.
22. In conclusion, the appellant has not demonstrated that, on the balance of probabilities, the material change of use of the outbuilding to a residential unit took place on or before 19 June 2020 and continued thereafter for four years. Enforcement action could therefore be taken against the matters constituted by the breach of planning control, and the appeal on ground (d) therefore fails.

The appeal on ground (g)

23. Appeals on ground (g) are made on the basis that the period specified for compliance with the requirements of the Notice falls short of what should reasonably be allowed.
24. The Notice requires the cessation of use of the building as a self-contained residential unit within three months, and the appellant's case is that additional time would be required to re-house the existing tenant.
25. However, by the time of my site visit, the tenant had moved out and the building was not occupied residentially. The appellant's justification for additional time therefore falls away, and the appeal on ground (g) fails.

Conclusion

26. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction.

Decision

27. It is directed that Section 3 of the enforcement notice is corrected by the insertion of the word "of" after the words 'material change of use'.
28. Subject to the correction, the appeal is dismissed, and the enforcement notice is upheld.

Peter White

INSPECTOR