



Appeal Decision

Site visit made on 21 January 2025

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 March 2025

Appeal Ref: APP/N5090/C/21/3288164

Land Rear Of 45 Page Street, London NW7 2EL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mrs Sau Hing Poon against an enforcement notice issued by the Council of the London Borough of Barnet.
 - The notice was issued on 25 October 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the making of a material change of use of the land to use as a dwellinghouse and the construction of an outbuilding (shown edged in red on attached Aerial Image) incidental to making of the change of the use.
 - The requirements of the notice are to:
 1. Restore the land to its condition before the breach took place by ceasing its use as a dwelling and demolishing the outbuilding,
 2. Permanently remove all constituent materials resulting from the works in 1. above from the land.
 - The period for compliance with the requirements is: 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) and (f) of the Town and Country Planning Act 1990 (as amended).
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Decision

1. It is directed that the enforcement notice is varied by:
 - the deletion of the words "Restore the land to its condition before the breach took place by ceasing its use as a dwelling and demolishing the outbuilding" and the substitution of the words "Cease the use of the outbuilding as a dwelling" in section 5 of the notice;
 - the deletion of the words "Permanently remove all constituent materials resulting from the works in 1. above from the land." In section 5 of the notice.
2. Subject to the variations above, the appeal is dismissed and the enforcement notice is upheld.

Ground (d)

3. An appeal under ground (d) is made on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of the breach of planning control. In an appeal under ground (d), issues of planning merit are not relevant. The burden of proof is firmly on the appellant to make their case, on the balance of probabilities.
4. Section 171B of the Act provides that development becomes immune from enforcement action if no action is taken: within 4 years of substantial completion for a breach of planning control consisting of operational development where substantial completion took place before 25 April 2024; within 4 years for an unauthorised change of use to a single dwellinghouse where the change of use

took place before 25 April 2024; within 10 years for any other breach of planning control.

5. The appellant's case is made on the basis that the appeal outbuilding was lawfully constructed in June 2013 under a lawful development certificate¹ and was used for incidental use by the appellant. After around 3 months in September 2013, it is stated that there was a change in the use of the building, when the first tenant moved in. I have been provided with the plans for the LDC, which show the building would be laid out as a play room / office, with a shower room. No kitchen is shown on the plans.
6. While the immunity period for the material change of use of a building to a single dwellinghouse is 4 years, it was established in *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15; [2011] JPL 1183 that in cases where the building was constructed unlawfully and used as a single dwellinghouse from the outset, there will have been no change of use and section 171B(2) is therefore disapplied. Within its reasons for issuing the notice, the Council states that it appears that the breach of planning control has occurred within the last ten years.
7. The appeal building comprises a shower room, kitchenette and living/sleeping areas and therefore has all the facilities required for day to day living. The occupier of No 43 Page Street has provided a letter, stated to be an affidavit, which states the single store outbuilding was built in June 2013. The letter is dated November 2021, which is some time after the outbuilding was built. It is not clear how the neighbour remembers the date the outbuilding was built. Nevertheless, the Council confirms that, based on aerial imagery, it does not dispute the appellant's claim that the outbuilding was constructed in June 2013.
8. However, the Council points out that the appellant, in response to a Planning Contravention Notice (PCN) stated that construction of the outbuilding was complete in January 2011. The appellant goes on to state that the kitchen and bathroom were installed in February 2011. This is inconsistent with the appellant's appeal statement and inconsistent with the evidence of their neighbour. It is suggested that the PCN response was prepared by the appellant's daughter and that the dates are simply a mistake. However, the appellant has given their name at the end of the response, rather than their daughter's.
9. The building, it is asserted, was used for incidental use by the appellant as a playroom/home office in June 2013 and the change of use occurred circa 3 months later in September 2013, when the first tenant moved in. The appellant suggests that the decision to convert the outbuilding for self-contained purposes was only considered and decided upon in July 2013 and that there was a reasonable timeframe (circa 2 months) in which to install a simple small [sic] kitchenette. However, the appellant has not given precise dates and provides no documentary evidence to show when the kitchenette was installed.
10. It seems unlikely the appellant would construct a building, complete it, use it for a period of less than 1 month and then install a kitchen. It seems more likely that the outbuilding was constructed with the kitchen and shower room at the outset. Even if I am wrong in this regard, the appellant has provided no substantive evidence to show how they used the outbuilding, except to say they used it as 'playroom/home

¹ Granted by the Council in January 2013

office (i.e. in-line [sic] with the LDC] in June 2013 when the structure was constructed.

11. I note the appellant's neighbour also suggests the outbuilding was used incidentally by the appellant and her family over the summer of 2013. However, this is ambiguous. Even if the appellant used the outbuilding in association with the main dwelling in some way prior to letting it to tenants, this is likely to have been *de minimis* while the appellant was waiting for tenants.
12. The appellant has drawn my attention to an appeal decision, reference APP/N5090/C/16/3142539, which concerned 'the construction of an outbuilding for use as a separate residential unit within the last 10 years'. The Inspector in that case quashed the notice on the basis that the Inspector could not correct the immunity period within the notice, which was identified as 10 years. While I have had regard to that decision, it is not comparable to the appeal before me as it concerned operational development rather than a material change of use, which is what the notice before me alleges.
13. In my view, on the basis of the evidence before me, it seems likely that the appeal building was constructed as a dwelling from the outset and so there has been no material change of use of the building. As a consequence, I find the immunity period in this case is 10 years. For the appeal to succeed under ground (d), therefore, the appellant would need to show, on the balance of probabilities, that the material change of use occurred on or before 25 October 2011² and, that it continued without significant interruption for at least 10 years thereafter.
14. Since the evidence shows that the building was not constructed until June 2013, it is not possible for the material change of use to have become lawful through the passage of time. Consequently, the appeal under ground (d) must fail.

Ground (f)

15. An appeal under ground (f) is made on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by the matters stated in the notice, or... to remedy any injury to amenity which has been caused by any such breach. It is clear from the wording of the notice that its purpose is to remedy the breach of planning control by ceasing the use, demolishing the building and removing resultant debris.
16. Although the notice specifically identifies 'the construction of an outbuilding incidental to making of the change of the use', it is clear from the wording and from the reasons for taking enforcement action, that the Council is not alleging the operational development in its own right.
17. The Council is seeking the removal of the building on the basis that a notice alleging a material change of use of land to a separate self-contained residential unit can require the removal of the building, in addition to requiring the use to cease. The appellant suggests that requiring the removal of the building is excessive, as the building has been there for more than 4 years, and it is only the use which the Council is arguing is unlawful.

² Namely 10 years prior to the issue of the enforcement notice.

18. I accept a notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or immune from enforcement, as established in *Murfitt v SSE* [1980] JPL 598. However, the *Murfitt* principle does not apply in circumstances where the operational development is itself the source of or fundamental to the relevant change of use.
19. In this case, the appellant has constructed a substantial building on their land and, having done so, proceeded to allow it to be used as a dwellinghouse. The building is visible from the public domain and can clearly be seen from neighbouring properties. Although the construction of the building clearly facilitates the unauthorised use, the building which has been erected in this case is a substantial structure which represents obvious and permanent operational development.
20. I note the Inspector, in respect of appeal decision APP/N5090/C/18/3194477 upheld a notice that required demolition of a building. However, I am not ultimately bound by previous appeal decisions and must reach my own view. I respectfully take a different view to the Inspector in that case and consider that the operational development in this case should have been dealt with within a period of four years, rather than treated as operational development which serves an ancillary purpose.
21. Section 173(4)(a) sets out that the breach may be remedied 'by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place'. The appellant suggests lesser steps of removing the kitchenette. However, the kitchen facilities form part of the building and so would also be immune under the four year rule. Requiring the appellant to discontinue the use of the land would, in my view, remedy the breach.
22. Given the above, I find that the requirements to demolish the outbuilding and to remove all constituent materials resulting from the works are excessive. I shall delete the requirement to demolish the outbuilding and remove all constituent materials resulting from the works.
23. Thus, the appeal under ground (f) succeeds and I shall vary the notice accordingly.

Conclusion

24. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that extent.

M Savage

INSPECTOR