The Planning Inspectorate

Appeal Decision

Inquiry Held on 12 and 13 July 2022
Site visit made on 15 July 2022

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 16 August 2022

Appeal Ref: APP/E5330/C/21/3280791
Land and an outbuilding known as 4 Chapel Farm Road, Eltham, London SE9 3LU ("the 4 Chapel Farm Property") as shown edged in black in the plan attached to the Notice, located to the rear of 35 Hartsmead Road, London SE9 3LU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Richard Leahy against an enforcement notice issued by Royal Borough of Greenwich Council.
- The enforcement notice was issued on 13 July 2021.
- The breach of planning control as alleged in the notice is without planning permission the unauthorised construction of an outbuilding known as 4 Chapel Farm Road, London SE9 3LU for self-contained residential use and use of that property as a large House in Multiple Occupation occupied by 7 or more unrelated persons sharing facilities (Sui Generis use).
- The requirements of the notice are to:
  (i) Cease the use of the unauthorised outbuilding and land at the 4 Chapel Farm Road Property as a House in Multiple Occupation;
  (ii) Completely demolish and dismantle the outbuilding on the 4 Chapel Farm Road Property;
  (iii) Remove all fixtures, fittings and spoils associated with the unauthorised development from the 4 Chapel Farm Road Property to an authorised and regulated place of disposal; and
  (iv) Reinstate and landscape the 4 Chapel Farm Road Property as a residential garden for the occupants of the adjacent property of 35 Hartsmead Road and make good all associated damage to the 4 Chapel Farm Road Property.
- The period for compliance with the requirements is 12 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b) (c) and (f) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Applications for costs

2. Applications for costs were made by Royal Borough of Greenwich Council against Mr Richard Leahy, and by Mr Richard Leahy against Royal Borough of Greenwich Council. These applications are the subject of separate Decisions.

Procedural Matter

3. The appellant states amongst the papers that the notice is a nullity due to reference to 4 Chapel Farm Road. However, I do not agree as that is the

resulting address following a statutory naming and numbering process and, in any case, the notice plan makes clear the land and property which is subject to enforcement.

Ground (b)

4. For an appeal to succeed under this ground, the burden of proof is upon the appellant to demonstrate on the balance of probabilities that the matters stated in the notice have not occurred as a matter of fact.

5. It is stated by the appellant that the outbuilding was not constructed for self-contained residential use and that the use of the outbuilding was not as a larger 'Sui Generis' House as Multiple Occupation (HMO) as alleged.

Construction of the outbuilding

6. It is not disputed by the appellant that the outbuilding has been constructed as a matter of fact. The surrounding matter of contention is essentially whether or not there has been a breach of planning control as a result of it having been allegedly constructed without planning permission for self-contained residential use as opposed to lawfully under Article 3(1) and Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).

7. Therefore, this part of the appellant's case is more appropriately a ground (c) matter rather than one that is successful under ground (b).

Alleged use as a large HMO

8. Neither is it disputed by the appellant that 4 Chapel Farm Road has been in use as an HMO (albeit it is said without his knowledge). Indeed, he has paid a civil penalty for failure to obtain an HMO licence for it under the Housing Act 2004. He says that the Council has failed to evidence that it was in use as a larger HMO, but the burden of proof is on the appellant to show that it was not. He has not provided evidence to that effect. I also note that the evidence collected by the Council through its unannounced early morning inspection of the property under warrant on 16 December 2020 – upon which the accepted civil penalty was based – indicates that 8 people were residing within the HMO.

9. I therefore find that the appellant has not demonstrated on the balance of probabilities that 4 Chapel Farm Road has not been used as a large HMO occupied by 7 or more unrelated persons sharing facilities (Sui Generis use).

10. Accordingly, the ground (b) appeal does not succeed.

Ground (c)

11. For a successful appeal under this ground, the burden of proof is upon the appellant to demonstrate on the balance of probabilities that the matters stated in the notice (if they occurred) do not constitute a breach of planning control.

12. It is the case put forward by the appellant that the outbuilding is lawful by reason of general permission afforded by the GPDO. In particular, that it is development within the curtilage of a dwellinghouse (namely 35 Hartsmead Road – 'No 35') comprising of a building required for a purpose incidental to the enjoyment of that dwellinghouse (Class E of Part 1 to Schedule 2).

13. However, Article 2 of the GPDO provides that the definition of 'dwellinghouse' in respect of Part 1 permitted development rights "…does not include a building containing one or more flats, or a flat contained within such a building". It further defines a 'flat' as "…a separate and self-contained set of premises constructed or adapted for use for the purpose of a dwelling and forming part of a building from some other part of which it is divided horizontally". Therefore, should No 35 have been outside of the definition of 'dwellinghouse' for this reason, the Part 1 rights could not have applied to it and the appellant's ground (c) case must fail.

14. It is the appellant's submission that No 35 has not contained one or more flats at any time since he purchased it in June 2015. He told the inquiry this orally following an affirmation to tell the truth. Such evidence given in these circumstances, and subject to cross-examination and a standard warning against perjury, would ordinarily be afforded significant weight should it otherwise be credible and consistent.

15. However, and significantly, the appellant had formally submitted a plan ("Existing Ground, First and Second Floor Layouts") to the Council with an application he had made on 14 May 2021[1] which clearly and unambiguously showed No 35 to be divided into 2 flats separated by "common access areas" marked by hatching ."Flat 1" is shown to exist within the ground and first floors, with "Flat 2" contained wholly within the 2nd floor (and horizontally divided from the flat below). There is no reasonable way to interpret the plan other than the existing building contained 2 self-contained flats on the date it was drawn (May 2021). I do not think that the 2nd floor accommodation (which I saw to be equipped with kitchen and bathroom facilities on my site visit[2]) would have been shown on the plan in this way were it not a separate self-contained dwelling.

16. Further, the declaration accompanying the above application stated:

    "I/we hereby apply for planning permission/consent as described in this form ***and the accompanying plans/drawings*** [my emphasis] *and additional information. I/we confirm that, to the best of my/our knowledge, any facts stated are* ***true and accurate*** [my emphasis] *and any opinions given are the genuine opinions of the persons(s) giving them."*

17. While the outbuilding was constructed in 2017, and therefore that is the material time as far as No 35's status as a dwellinghouse is concerned, the reliability of the appellant's affirmed evidence that no flats ever existed within that building during his proprietorship is seriously undermined by the above conflicting evidence and as a result I am not convinced that what he told the inquiry was correct. It further calls into question the reliability of his evidence as a whole.

18. While the appellant has submitted tenancy documents apparently relating to No 35, I do not consider these (or the unsigned letter ostensibly sent to him from Mr Sikora dated 10 August 2021) of sufficient probative value in demonstrating that the 2nd floor was not separately used for the purpose of a dwelling. None of the tenants referred to in those papers gave oral evidence at

[1] 21/1840/F
[2] As also seen by Ms Devine of the Council when she had visited in 2017, according to her evidence upon which she was questioned at the inquiry. Enforcement action is discretionary and it is not for me to judge whether or not it was expedient at any time.

the inquiry and I apply limited weight to the tenancy evidence due to the limited opportunity for testing it through cross-examination under oath or affirmation at the inquiry[3]. Further, the appellant submits that the facilities on the 2nd floor were provided for a carer for his disabled son rather than provided for self-contained residential use. However, it is agreed that neither have ever resided in the property and so any such intention has no bearing on actual use.

19. Therefore, taking the appellant's evidence as a whole and also considering it unlikely that a semi-detached property said to have been used as a single family dwellinghouse in 2017 would reasonably require 3 kitchens (agreed to have been present at that time and also seen on my site visit), I am not persuaded on the balance of probabilities that No 35 did not contain one or more flats when the appeal development of the outbuilding was undertaken. It was therefore outside of the definition of 'dwellinghouse' under Article 2 of the GPDO, and accordingly the outbuilding was not lawful under Class E, Part 1.

20. For these reasons ground (c) does not succeed. It is not necessary to consider other matters such as the curtilage of No 35 or the purpose to which the outbuilding was put since Part 1 dwellinghouse permitted development rights did not exist by reason of my above finding.

Ground (f)

21. For success under this ground, I must be satisfied on the balance of probabilities that the requirements of the notice are excessive in achieving its purpose. It is clear from the way the requirements of the notice have been drafted that its purpose is to remedy the breach of planning control rather than injury to amenity. It does this quite properly by ceasing the unauthorised use and restoring the land to its condition before the breach took place.

22. In order to remedy the breach of planning control in respect of the unauthorised outbuilding, I agree with the Council that it is an appropriate requirement to demolish/dismantle it and to remove associated fixtures, fittings and spoils from the site. As per my finding under ground (c), permitted development rights do not apply in the case of this unlawful development and so it is not excessive to require such works. Further, even were I satisfied that the built outbuilding is otherwise in compliance with the requirements of development under Class E, No 35 does not fall within the GPDO definition of a dwellinghouse since in my judgement the 2nd floor of that building constitutes a separate self-contained flat with all the facilities necessary for independent day-to-day living. Accordingly, the *Mansi* principle[4] in respect of the protection of lawful rights does not apply in these circumstances.

23. Therefore the appeal under ground (f) fails.

Conclusion

24. For the reasons given above I consider that the appeal should not succeed.

Andrew Walker

INSPECTOR

[3] I also give limited weight to the evidence of Parminder Kailey and D Comery of the Council for the same reason.
[4] Mansi v Elstree RDC [1964] 16 P&CR 153

APPEARANCES

FOR THE APPELLANT: Simon Bell (Clerksroom)

He called
Richard Leahy
(appellant)

FOR THE LOCAL PLANNING AUTHORITY (LPA): Jack Parker (Cornerstone Barristers)

He called
Jane Devine
(Principal Planning
Enforcement Officer)

INTERESTED PERSONS:

Paul Carpenter (local resident)
Stuart West (local resident)

DOCUMENTS submitted at the inquiry

1 LPA Opening Submissions
2 Emin v Secretary of State for the Environment and Mid-Sussex County Council [1989] 58 P. & C.R. 416
3 Hiley v Secretary of State for Levelling Up, Housing and Communities and East Lindsey District Council [2022] EWHC 1289 (Admin)
5 Appellant's Opening Submissions
6 Appellant's Costs Submissions
7 Check a landlord or agent London City Hall.pdf
8 LPA Closing Submissions
9 LPA Updated Application for Costs
10 Appellant's Closing Submissions
11 LPA Response to the Appellant's Costs Application