The Planning Inspectorate

Appeal Decision

Inquiry held on 15 March 2011
Site visit made on 15 March 2011

by David Murray BA (Hons) DMS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 31 March 2011

Appeal Ref: APP/T5150/C/10/2129405
30 and adjacent land, Rowley Close, Wembley, HA0 4HE.

- 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 H S Roopra against an enforcement notice issued by the Council of the London Borough of Brent.
- The Council's reference is E/09/0266.
- The notice was issued on 15 April 2010.
- The breach of planning control as alleged in the notice is "Without planning permission, the erection of a building in the rear garden of the premises and the material change of use of the premises from residential to a mixed use as residential and the storage of building materials".
- The requirements of the notice are to demolish the building in the rear garden of the premises and cease the use of the premises for the storage of building materials; and remove all debris, materials and items associated with the unauthorised development from the premises.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended must also be considered.

Summary of Decision: the appeal under ground (b) is allowed and the part of the notice related to the mixed use including the use for the storage of building materials is corrected, however, the substantive appeal under grounds (c) (a) and (g) is dismissed, the corrected notice is upheld, and planning permission is refused on the deemed application.

Application for costs

1. At the Inquiry an application for costs was made by the Council against Mr Roopra. This application is the subject of a separate Decision.

Procedural matters

2. At the opening of the inquiry, Mr Keen on behalf of Mr Roopra, voiced his concerns, previously put in writing, that the proof of evidence prepared by Mrs Ashton for the Council contained references to other appeal decisions which had not been referred to in the Council's Statement of Case, as required by the Regulations. He said if these matters were considered at the inquiry, it would disadvantage his client and an adjournment would be requested or an alternative procedure suggested whereby other cases in the appellant's favour could be raised. I advised that I had

not read the appeal cases referred to but was aware of the case of *Townsley*[1] as established legal authority. In the circumstances, the Council decided to withdraw the reference to the other appeal decisions from their case and these were not discussed at the inquiry nor have I had regard to them in my decision. For the avoidance of doubt, these cases refer to land at 22 Wembley Park Drive, Wembley; 34 Oxenpark Gardens, Wembley; and 34 Birchen Grove, Kingsbury.

3. All oral evidence at the inquiry was given on oath.

The appeal site and background

4. The Statement of Common Ground (SCG) indicates that planning permission was granted in October 2003 for the erection of a three-bedroom semi-detached house adjacent to 30 Rowley Road under ref. 03/2610. Further, evidence presented at the inquiry from Building Control records indicates that the construction of the additional property started in late Sept. 2008 and was substantially completed about early January 2010. This new property is now occupied and is called no. 32 Rowley Close.

5. The enforcement notice relates to the construction and use of a building within an area defined on the plan accompanying the notice as the original curtilage of no. 30, described as "the premises" (i.e. it includes the curtilage of what is now no. 32 as well). I shall from now on refer to the building as the 'outbuilding' to distinguish it from the new dwelling. The SCG includes the dimensions of the outbuilding as 8.213m by 8.220m with a maximum height to the ridge of the roof of 3.97m and a height to eaves of 2.3m. The outbuilding is constructed in brick under a tiled pitched roof.

6. The appellant does not contest the Council's evidence that the construction of the outbuilding was first brought to the Council's attention by a neighbour in April 2009 with an officer site visit made in May 2009 where photographs of the largely completed fabric of the outbuilding were taken. Mr Keen understands that the main structure of the outbuilding was virtually complete about April 2009 although the building had not been finished off internally by that time. The notice relates to the premises as at the time of issue on the 15 April 2010.

The appeal on ground (b)

7. This ground is that as a matter of fact the matters alleged in the notice have not taken place. Further, the appellant has stated that this ground only applies to the allegation that the premises have been used in part for the storage of building materials.

8. Evidence of the allegation as presented by the Council is in two parts; firstly Mrs Ashton said on oath that the appellant, Mr Roopra, had advised her during a telephone conversation with her on the 5 March 2010 that the outbuilding had been let to builders and was in use as a store, and it transpired later in the same conversation that it was his commercial building firm that was using the store. Secondly, Mrs Ashton produced photographs of the inside of the outbuilding taken on the 17 February 2010.

9. As a witness for the appellant, Mr Robinson, (who acts as a type of accommodation manager working between property owners and companies requiring accommodation for their workers) said he was aware of the new property (no. 32) from about September 2009 and that he had arranged for the let of the property to

[1] *R (oao Townsley) v SSLG HC [2009] EWHC 3522 (Admin)*

5 tenants. He had seen the outbuilding and felt that this ancillary building would be beneficial to the tenants for their recreation as there was only one communal room in the main property. He had visited the property on average every 2 weeks, but had not seen the outbuilding used as a commercial builder's store. He had, however, used the outbuilding for about 2 or 3 weeks in total to store surplus furniture and 'white goods' gathered from or going to other properties. That aside, he has only known a few pots of paint in the outbuilding and never any storage of builders materials that could be described as a commercial use.

10. Mr Rojohn, a nearby resident said that he had lived in the area for many years and had visited the site 40 or 50 times, to chat with the builders when the new house was being built and subsequently with the new occupiers, but had never known the outbuilding be used for storage of building materials.

11. In assessing the evidence on the alleged mixed use as at the 15 April 2010, and especially the use for the storage of building materials, the burden of proof to establish that this has not happened lies with the appellant. Mr Keen casts doubt over the recollection of Mrs Ashton of her conversation with Mr Roopra, on the basis that it was not recorded, nor transcipted, nor did she caution Mr Roopra. Nevertheless Mr Roopra was not called to give evidence on his own behalf, even though he attended the inquiry all day and appeared to understand the proceedings.

12. Further, I have to bear in mind that the construction of the new dwelling now forming no. 32 had only been substantially completed a few months earlier and it would not have been unusual for some quantity of remnant and unused materials to still remain on site. Nevertheless, no such materials were recalled by Mr Robinson or Mr Rojohn around or within the outbuilding around February 2010. Further, the photographs taken by Mrs Ashton on the 17 February 2010 do not show to me clear evidence of the presence of building materials in any of the three rooms in the outbuilding, given that the photographs were taken for that purpose. There is evidence of a large volume of chairs, mattresses and assorted, mainly householder, 'jumble', some of which may have been stored by Mr Robinson at that time. This evidence does not demonstrate a mixed use involving storage of building material as alleged in the notice or by a commercial building firm as alleged to have been said by Mr Roopra.

13. Overall, I consider on the balance of probability on the evidence presented that the premises were not being used for a mixed use involving the storage of building materials at the time the notice was issued. The part of the appeal related to this ground therefore succeeds.

The appeal on ground (c)

14. This ground of appeal is that there has not been a breach of planning control. The appellant says that the work carried out in the erection of the outbuilding was work permitted under the Town and Country Planning (General Permitted Development) Order 1995 (GPDO), as amended (with the recent amendments coming into force on the 1 October 2008). It was said on behalf of the appellant that the erection of the outbuilding fell with the provisions of Schedule 2, Part 1, Class E of the GPDO in respect of development within the curtilage of a dwellinghouse.

GPDO rights in principle

15. It is established law, as for example held in the *Townsley* case mentioned earlier, that before Schedule 2, Part 1, GPDO rights can be exercised there must be a

dwelling house in existence. It appears to me that when the outbuilding was started, the dwelling now known as no. 32 was still under construction and was therefore not a dwellinghouse. The outbuilding was sited in the original large curtilage of no. 30, but this was in the process of being sub-divided into two separate planning units and the outbuilding is clearly not sited in the much smaller residual curtilage to that property. The principle of benefiting from the GPDO therefore did not arise at the time when the construction of the outbuilding was commenced.

16. It was said by Mr Keen on behalf of Mr Roopra that the correct time to assess whether a specific building operation is 'permitted development' is at the time of completion. In this case the new house of no. 32 was substantially complete by the time that the outbuilding was completed. However, such argument has no foundation in planning law. Planning permission, either express or by a development order, is a pre-requisite for the carrying out of any development of land as set out in s57 of the Act. It is therefore unlawful to carryout development without planning permission as applies in this case of the erection of the outbuilding.

GPDO rights in Class E

17. Notwithstanding the above assessment of the principle of 'permitted development', for GPDO rights to apply to the new dwelling, the planning permission would have had to have been implemented in full. In this case, the approved plans with permission 03/2610 indicate that the original curtilage would be subdivided with distinct curtilages created for both the old and new properties of roughly similar proportions. Each rear garden was delineated by a boundary fence between the two plots. A similar approach was taken with the detailed plans submitted and approved pursuant to the requirements of conditions 3 and 4 regarding landscaping and fencing. However, Mr Keen stated in answer to my question that he was not aware that the required boundary fence between the two plots had ever been erected in accordance with either of the approved plans. As the new house is occupied there is therefore a breach of the terms of condition 4. This breach, even though it may be of a technical nature, results in the GPDO not now having effect by virtue of section 3 part (4) and (5) of the Order.

18. Further, I noted at my site visit that the majority of the land of the original garden of no. 30 has been included within the curtilage of no. 32 together with some land previously in the rear gardens of the adjacent houses nos. 29, 31 and 33 Marquis Close, which are also said to be in Mr Roopra's ownership. This arrangement accords with the layout shown on drawing no. RCB33/ rev.B as submitted in evidence by Mr Keen.

19. While a landowner may swap around different parcels of garden land, without being subject to planning control, I agree with the Council there is a clear expectation that the land indicated to be part of the curtilage of a new dwelling, and the residual curtilage of the existing dwelling, within a planning application submission, should be put in place prior to the completion of that permission, and retained for a reasonable period thereafter, prior to any further land exchange. On that basis, the siting of the outbuilding lies over at least two of the boundaries of the lawful curtilage of no. 32. This means that the erection of the outbuilding with a height over 2.5m is not permitted development by virtue of the lack of compliance with E.1 (d)(ii).

20. Finally, there is the issue over who can exercise the rights given in Class E to erect a building or enclosure required for a propose incidental to the enjoyment of the

dwelling house. In this case, I agree with the Council that it is not reasonable for the builder/developer to anticipate the requirements of the subsequent occupiers of the new dwelling by designing and starting construction of the outbuilding some 9/10 months before the occupiers of the house took up residence.

21. For all or any of the reasons given above I find that the erection of the outbuilding did not fall within the provisions of Class E of the GPDO. The outbuilding is unauthorised development and there has therefore been a breach of planning control. This ground of appeal therefore fails.

The appeal on ground (a) and the deemed planning application

22. The main issue in the planning merits of the case is the effect of the outbuilding on the character and appearance of the area.

23. The appeal site lies at the end of a cul-de-sac of mainly terraced properties which are two normal stories in height although some of the properties have accommodation in the roof with attic conversions. The adjoining street to the south–east, Marquis Close lies parallel to Rowley Close and has a similar form. To the north-east of the site lies operational railway land. The properties that front Rowley Close and Marquis Close have rear gardens of a modest size which back on to a rear un-surfaced track. This access way provides rear-access to the properties, including the appeal site, and some of the properties have simple garages and/or single storey outbuildings. The appeal site does not have any special designation or classification.

24. The character of development around the site is therefore quite plain with the area of rear gardens between the groups of terraced houses being mainly open and with any ancillary building being small in scale. Although the outbuilding on the appeal site is of single storey form, and constructed in brick and tile generally to match the adjacent houses, I find that the overall proportions of the building to be large in scale, with a footprint of about 64 sq. m.. I consider that the bulk, massing and siting of the building to be out of scale with its surroundings. It is visually imposing and its physical presence harms the character and appearance of the area. It therefore does not accord with saved policies BE 2, BE 9 and STR 11 of the Brent Unitary Development Plan 2004 which require new development to be designed with regard to its local context and be of an appropriate scale and massing for its setting, and not have a harmful impact on the local environment.

25. Mr Keen on behalf of the appellant, stressed that the decision on the planning merits of the case must take into account the appellant's fallback position where the owners/occupiers of the new house of no. 32 would now be able to exercise their GPDO rights. This could lead to the construction of new outbuildings not exceeding 50% of the total area of the curtilage, even if the present outbuilding was demolished in accordance with the notice. Whilst the general provisions of the GDPO which apply nationally are acknowledged, there was no specific evidence from the occupiers of no. 32 presented at the inquiry as to what their 'requirements' may actually be and whether such development would be likely to happen. Accordingly, I attach little weight to the fallback position and I do not consider that it outweighs the local harm that arises with the outbuilding that I have already identified.

26. This ground of appeal therefore fails and I will not grant planning permission on the deemed application.

The appeal on ground (g)

27. This ground of appeal is that the time given to comply with the notice (3 months) is too short and that a longer period would be more reasonable. Mr Keen suggests 9 months in order that alternative proposals, possibly involving some modification to the outbuilding, could be put forward to the Council. That may involve a formal application and if necessary an appeal. However, Mr Keen agreed that the outbuilding could be demolished, in its simplest meaning, in a couple of days or dismantled within a month.

28. Whilst I appreciate that Mr Roopra does not want to demolish the outbuilding and waste the materials and resources already spent, I have found that the erection of the outbuilding is unauthorised development and therefore is in breach of planning control. I am satisfied that three months is a reasonable period in which to undertake its demolition in accordance with the requirements of the notice. This ground of appeal therefore fails.

Conclusions

29. The appeal on ground (b) succeeds in relation to the alleged material change of use. Normally when an appeal succeeds on this ground it is appropriate to quash the notice. However, that is not possible here because the appeals are dismissed in respect of the other grounds (c) (a) and (g) and I will uphold the notice in relation to the operational development of the erection of the building and refuse to grant planning permission on the deemed application for this development. Accordingly, it is appropriate that I correct the notice by deleting the reference in schedule 2 to the making of a material change of use to a mixed use involving storage of building materials. I also need to make consequential changes to the requirements specified in schedule 4. I can make this correction under s176 (1) (a) of the Act as I am satisfied that the correction will not cause injustice to the appellant or the LPA because the notice, as upheld, requires the demolition of the building in any event.

Decision

30. I direct that the notice be corrected in so far as the allegation refers to the mixed use including the storage of building materials and the words "and the material change of use of the premises from residential to a mixed use as residential and the storage of building materials" be deleted from the allegation in schedule 2. Consequently, the words "and cease the use of the premises for the storage of building materials." shall be deleted from the steps required as specified in schedule 4.

31. Subject to this correction to the notice, I dismiss the appeal and uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

David Murray

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr A Keen, BA, MSc, Dip. Phil, MRICS, MRTPI.	Advocate and witness,
He called	Mr R Robinson, Director, Solet Ltd.,

FOR THE LOCAL PLANNING AUTHORITY:

Mr N Wicks, MRTPI.	Enforcement Services Ltd., acting for the London Borough of Brent Council.
He called	
Mrs S Ashton, BA, MA	Planning Officer, London Borough of Brent Council.

INTERESTED PERSONS:

Mr S Rojohn	Local Resident.

Documents handed in at the inquiry

1 Copy of Councils letter of notification of the inquiry and list of persons notified (NW)
2 Statement of Common Ground – final version (NW)