LONDON BOROUGH OF BARNET

TOWN AND COUNTRY PLANNING ACT 1990
(as amended)

A Section 174 joint Appeal

By Mr Alessandro Comi and Mrs Fationa Kiorri against an enforcement notice issued against the use of the outbuilding in the rear garden as two self-contained dwellinghouses.

Site Address:
53 Ridge Hill, LONDON, NW11 8PR

Written Representations

This appeal is made under Grounds C, F and G.

INSPECTORATE REFERENCES:

APP/N5090/C/20/3262430 – C, F, G

APP/N5090/C/20/3262429 – C, G

LPA'S REF: ENF/1047/20

1.0 Preliminary Matters

2.0 In grounds of appeal the appellant's cite grounds, C, F ang G. However, in statements of case and in correspondence there is some suggestion of a 'hidden' ground E appeal.

3.0 This statement concerns itself with the main grounds of appeal and also with the additional issue.

4.0 As these 'ground E' concerns arose only in statements of case it would not have been possible for them to be addressed by the council at an earlier state.

4.00 Note on the burden of proof

4.18 the burden of proof in an enforcement appeal lies with the appellant. There are no grounds on which this is switched to the LPA.

6.0 GROUND (C)

6.1 Both of the occupier-appellants' ground C appeals appear to be concerned largely with development next door. This should properly be considered through alternative investigations

6.2 That permission is required for the use of the outbuildings at 53 Ridge Hill as dwellinghouses is beyond doubt. As is the absence of such a permission.

6.3 In *Wakelin v SoS for the Environment [1978] JPL 769* the Court of Appeal was asked to consider whether or not planning permission was required for the conversion of outbuildings at a property into self-contained dwellings. According to Lord Denning MR that such a change was material was beyond question. Browne LJ agreed that permission would be required where 'planning considerations' were raised by the change. This approach finds a more modern form in *Richmond upon Thames LBC v SoS for the Environment, Transport and the regions [2001] JPL 84*, albeit this latter case was concerned with amalgamation of dwellinghouses and not the sub-division of the planning unit. There can be no doubt that legitimate considerations are raised by the uses now in question.

5.0 GROUND (E)

5.1 **"Copies of the enforcement notices were not served as required by section 172 T&CPA"**

5.2 The appellants' ground (E) appeals are in two parts. The first part is that made by the landlord. This argument is one of the exercise of delegated powers and validity. It is not an appeal under ground (E) at all and is dealt with in statements concerning that appeal. The second part is that made in the statement of case of one of the occupiers of flat 7, Fationa Kiorri. These comments deal with that issue.

5.3 The occupier's argument is that her flat mate, Olti Doko, was not served with a personal copy of the notice and has therefore been deprived of his right of appeal, and is, presumably, substantially prejudiced by this failure. Olti Doko has made a submission of his own where this claim is repeated.

5.4 The power of correction

5.5 It is pertinent at this point to note that although there is a single notice it relates to two entirely distinct planning units. The Council does not invite the inspector to make such a correction but would nevertheless observe that if a flaw were identified in regard to one of the two dwellings the notice could, and should, be corrected so that it relates only to the remaining flat (6), where no failure of service has been alleged.

5.6 Prior investigations and service

5.7 The council went to extraordinary lengths to ensure that all interested parties were served with a copy of the notice. To this end a planning contravention notice was issued on the owners and occupiers of the property. A substantive reply was not received until 25 September 2020, well after the statutory respond deadline had expired and only after much further prompting from the council. By the time a response had been received the notice had already been issued. The owner was the only recipient to respond.

5.8 The notice was served on four named occupiers (names previously provided to the council) and with additional 'the occupier' copies provided to the two dwellings. In total six copies were left at the flats, three at each. We are now told that there are in total five adult occupiers of the outbuilding in question. That is to say, a 'spare' notice was served. Additional copies of the 'the occupiers' notices were served by post of 2 November 2020 at the request of the case officer (who was seemingly unaware of the additional named occupier). These copies would have arrived in time for the recipients to meet the deadline for appeal of 6 November 2020. Postage of the additional copies is confirmed in emails contained within the appendix.

5.9 The occupier-appellant, Mrs Kiorri, now claims that the council has failed to meet its duties in not providing a personal copy to Mr Doko (who was named

as an occupier in the PCN reply when it eventually arrived). Had Mrs Kiorri or Mr Doko replied to the PCN as required and provided details as stipulated Mr Doko may well have received a personal copy of the Enforcement Notice. To put it in an alternative form, if there were a requirement for personal service the defect would be one largely resulting from the omissions of those now relying on such a defect.

5.10 The statutory requirements.

5.11 S.172 (2) (a) requires that "a copy of an enforcement notice shall be served on the owner and the occupier of the land to which it relates". Occupier is in the singular, and thus it is doubtful that all occupiers are entitled to individual copies of the notice, this doubt must be extended on occasions where occupiers form a single household, as is the case here. Furthermore, S.172 does not place a duty on the LPA to serve personalised notices. The ability of the LPA to serve notices according to a description is reiterated in S.329(2)(a) which states that:"… the notice or document shall be taken to be duly served if…it is addressed to him either by name or by description of 'the owner" or, as the case may be, "the occupier" of the premises…"

5.12 The occupier-appellant has confirmed that three adults are present at the dwelling in question. Three, clearly addressed, copies of the notice were hand delivered to the site. There can therefore be no question that service of the notice has been effective.

5.12 What happens to copies of notices after service is not a matter for statute. It might be that a single owner or occupier of a development picks up every single copy of a notice and hides them from other interested parties. There is no good reason whatsoever to believe that anyone has deliberately sought to exclude Mr Doko from the process by such means, but even if that did indeed happen the deception would not render service invalid or otherwise indicate that a ground (E) appeal should succeed.

5.13 Substantial prejudice

5.14 The above notwithstanding it is clear that the Act adopts a 'forgiving' approach to statutory provisions relating to service and that technical flaws should be disregarded. S.176(5) states that: "Where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him." Prejudice or inconvenience are not the legal test. Substantial prejudice must arise from any failure in service.

5.15 It is clear from litigation on matters of service from *Skinner & King (1978)*, through *May v SoS for Wales (1989) JPL 848* etc to *Newham LBC v Miah (2016)* that the bar for substantial prejudice is high and that considerable latitude is afforded to inspectors before a finding of fault is to be made. Indeed,

it is perhaps indicative of something that it is rather difficult to find court judgments where an accepted failure of service *was* found to give rise to substantial prejudice.

5.16 Knowledge of the notice

5.17 The occupier appellant informs us that although she and 'Andi' had received copies of the notice they did not discuss its contents with their flat mate. Mr Doko, in turn says only that he was "never served". Mr Doko does not claim that he did not know of the notice or that he was not given sight of the contents. Neither Mr Doko nor Ms Kiorri describe what happened to the third or fourth copies of the notice.

5.18 The Council believe it highly likely that Mr Doko received a copy of the notice at the time of service and thus was fully aware of its existence and his right of appeal. The LPA suggest that it is noteworthy that Mr Doko does not suggest otherwise. The Council believe it likely that Mr Doko is using the phrase "never served" as shorthand for "was not given a personalised notification" as opposed to "the first I knew about this notice was when I overheard my flat mates discussing it sometime after the appeals had been made."

5.19 The council does not accept it as remotely likely that Mr Doko was entirely unaware of the Notice or its general provisions until questionnaires were received.

5.0 The Grounds of appeal raised by the two occupier tenants are very similar and the two appeal forms were submitted at almost identical times. It is a matter for the inspector if this is a matter of pure coincidence or if there was an element of, understandable, discussion between interested parties prior to submission. If there were discussion between parties they may wish to consider if one of the tenants really was excluded.

5.20 No Substantial prejudice

5.21 What is clear from the email of 8 February is that Mr Doko was aware of the notice by this date at the very latest and that he had a right to make representations as he felt appropriate. Despite being clearly invited to comment on any or all grounds of appeal, he has chosen to comment only on matter pertaining to Ground (E). If a party is invited to comment but declines the opportunity, he cannot later claim prejudice resulting from his own omission, let alone substantial prejudice.

5.22 The appeal has now been provided with a copy of an appeal consultation letter that was sent to Mr Doko. Mr Doko did not try himself to contact the Council to discuss planning applications as invited and nor did he request a copy of the notice.

5.23 As nothing further was heard from him and in order to ensure maximum fairness the Council contacted Mr Doko by email a month after the consultation letter was posted and received. Within this email Mr Doko was provided with a full set of documents and a further invite to engage with the planning process.

5.24 Although there has been some limited email communication during March Mr Doko has not explained why he has not been in closer and quicker correspondence with the Council given the level of prejudice he implies he feels.

5.25 No substantial prejudice arising from ground (a)

5.26 Parties to the appeal might claim that the substantial prejudice arises not from grounds currently under consideration (grounds C, E, F and G) but from those that are missing. A Ground B or D appeal would clearly be without merit (and may therefore be fairly disregard per *Dyer v Secretary of SoS for the environment and Purbeck DC [1996] JPL 740*) and can be disregarded, but what of ground (A)? The Council reiterate that the legal test is one of substantial prejudice. It is doubtful that exclusion from an invitation to appeal on ground (A) could ever meet the legal test given that a perfectly valid alternative route exists in the form of S.73A.

5.27 In this case Mr Doko makes no mention of an intent or the means to appeal under ground (A) and has not, despite the claims he made on 8 February, actively pursued the matter. It has taken emails from the Council to begin a very limited conversation.

5.28 In making their own assessment of 'frustrated intent' the inspector may wish to consider the, rather prosaic, likelihood of Mr Doko, or indeed any tenant, paying the appeal fee of £1848 in an attempt to secure planning permission in effect for another and from which there is no certainty that he, on a short-term tenancy, will benefit. Without a real intent that has been frustrated there can be no question of prejudice, let alone substantial prejudice.

5.29 The fee for a S.73A application made to the council would be a quarter of the appeal fee. No application has as yet been made to the Council but if one were to be received in a timely fashion there is little doubt that it can and would be determined long before the end of the compliance period set out in the notice and in sufficient time that options in the event of a refusal could be pursued.

5.30 The LPA invite the inspector to agree with its analysis that Mr Doko has no real intention of applying for planning permission and would not have done so through ground (A) had he received a personal copy of the notice.

5.31 The council has commented on the owner-appellant's engagement with tenants on previous occasions and on his apparent desire to frustrate and delay the enforcement process above.

5.32 Ground (E) Conclusions

- No failure of service as regards flat 6 has been alleged
- The notice was served on all interested parties in accordance with the terms of the Town and Country Planning Act.
- There is no requirement in law that all occupiers receive a named copy of the notice
- Whilst Mr Doko did not receive a copy of the notice in his name that 'oversight' is a result of the council's lack of knowledge of his occupation at the time the notice was issued.
- It is not disputed that the Council made more than reasonable investigations as to the identity of interested parties. It is also beyond dispute that the notice was served on everyone known by the council to have an interest in the land at the time of issue. It is also not disputed that additional copies went out as a contingency.
- Mr Doko likely did receive a copy of the notice at or around the time it was served in September and thus was able to lodge his own appeal in a timely manner, but declined or omitted to do so. It is likely he also received and read the additional copy posted to the occupiers on 2 November 2020.
- Regardless of his state of knowledge at the time of service it is clear from correspondence that Mr Doko is now aware of the appeal and that he accepts that he has been invited to comment on the appeal
- No substantial prejudice can arise in relation to ground (A) and no substantial prejudice can arise where an interested party has been invited to make comment but has declined to do so.

5.32 Concluding Remark

5.33 Above all other considerations it remains undisputed that three occupiers are present at flat 7 and that three copies of the notice were delivered to the property. An additional copy arriving by post some time later but still prior to the deadline for the appeal.

7.0 Ground (F)

7.1 The steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections.

7.3 The purpose of the notice is to secure cessation of the uses complained of and have restored the land to its condition before the breach took place (s173(4)(a). The appellant may choose to advance any argument that he wishes as to a need for a kitchen but no matter how persuasive these arguments it does not change the fact that the test is whether or not the requirements go beyond that which is necessary to return the land to its previous state. The appellants do not claim that a kitchen was in existence prior to the breach and therefore the council respectfully submits that the appeal on ground (f) must fail. This precise matter was the subject of a High Court challenge in the case of 42 Clifton Gardens. The challenge is summarised in appeal decision letter APP/5090/C/17/31905

7.4 That a notice may require the removal of works incidental to the making of a change of is well-established and no great elaboration is required (*Kestrel Hydro*, *Somak Travel*, *Murfitt*).

7.6 In the council's view the kitchens and/or bathrooms are integral to and part and parcel of the making of the material change of use and should be removed to prevent the unauthorised use from continuing.

7.7 There is little good reason to believe that an outbuilding should be equipped with more than bathroom or that if it contains a bathroom, kitchen and accommodation it is anything other than a dwellinghouse.

7.8 Given the above the council would request that the inspector dismiss the appeal under ground F.

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8.0 Ground 'G' - The time given to comply with the notice is too short.

8.1 The appellants have stated that all the tenants in the property are on assured tenancy agreements. Their argument is that tenants cannot be evicted before the expiry of their tenancy agreement. In addition, their agreement allows them to further extend their tenancy for another year. Due to this, the Inspector should consider and allow for an extension of the compliance period by 12 months, instead of the 6 months indicated in the notice.

8.2 The Appellant argues that Assured Shorthold Tenancies (AST) have been granted for the flats and the can only terminate the lettings in accordance with the terms of the letting agreements. The tenants under the AST's have an option to renew their lettings. The AST for flat 6 runs from 26/6/2020 for a year

with the option for the tenant to renew this in March 20201 for another year. The AST for flat 7 runs from 12/0/2020 to 12/07/2021 with an option to renew in April 2021.

8.3 The tenants were aware of the previous enforcement action against the use of the outbuilding as two self-contained flats (Appeal ref: APP/N5090/C/19/3242178) against use of the outbuilding was allowed under ground E and the notice quashed on 12th June 2020. The council subsequently served a PCN on the owner and tenants which stated the alleged breach of planning control and the council's consideration of enforcement action against the unauthorised residential use of the outbuilding as self-contained dwellings. An enforcement notice was subsequently issued in September 2020.

8.4 The Inspector is requested to give little weight to the appellants argument that the tenants have the option to renew in the AST for another year from March and April 2021 respectively for another year. The appellant and the tenants were aware of the ongoing enforcement threat from the council and therefore it is hard to understand and sympathise with the parties for signing a 12 -month tenancy agreement instead of the normal 6-month standard.

8.6 The LPA are content that a period of 6 months is usually more than adequate to secure compliance with the notice. The LPA understands that the current Covid situation may present some difficulties for landlord and tenants alike and are prepared to work with parties if they are willing to co-operate.

8.8 All of the above notwithstanding at the time of writing certain limitations are placed upon landlords by Covid -19 Regulations. As a concession to these Regulations (if indeed they still exist at the time of a decision) the council would not object to a modest extension of the notice to, say, 7 or 8 months.