



Appeal Decisions

Site visit made on 16 January 2024

by **Stephen Hawkins MA, MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 2 February 2024

Appeal A Ref: APP/E3335/C/23/3328871

Appeal B Ref: APP/E3335/C/23/3328872

10 Victoria Avenue, Chard TA20 1HE

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. The appeals are made by Mr David Pape (Appeal A) and Mrs Mon Pape (Appeal B) against an enforcement notice issued by Somerset Council.
 - The notice was issued on 3 August 2023.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of an independent dwelling.
 - The requirements of the notice are: (i) Demolish the unauthorised independent dwelling and; (ii) Remove from the land all blockwork, roofing tiles, doors, windows and other materials which have been used to construct and in the construction of the unauthorised dwelling and; (iii) Remove from the land all utilities and services associated with the unauthorised dwelling and; (iv) Remove from the land all domestic paraphernalia and all other materials associated with the construction of the unauthorised dwelling. (v) Restore the land to the condition it was prior to the construction of the unauthorised dwelling.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) & (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
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Decisions

1. The appeals are dismissed and the enforcement notice is upheld.

Application for costs

2. An application for costs in relation to Appeal A was made by Mr David Pape against Somerset Council. This application is the subject of a separate Decision.

Preliminary Matter

3. Since there is no deemed planning application arising from an appeal on ground (a) and the appropriate fee has not been paid, planning merits considerations are not relevant to my deliberations. This means that matters concerned with the reasons for issuing the enforcement notice, including whether there is accordance with the policies in the Development Plan and any perceived similarity between the unauthorised development and other developments in the locality, are not before me in these appeals. Furthermore, the Council's investigation which led up to the notice being issued and its investigations in relation to other suspected breaches of planning control in the locality are not matters which I can consider.

Ground (c) appeals

4. The ground of appeal is that the matter alleged in the notice does not constitute a breach of planning control. It is for the appellants to show why their appeals should succeed on this ground, the relevant test of the evidence being on the balance of probability.
5. The appeal property contains a two-storey, semi-detached dwelling. The dwelling has a back garden of ample proportions which widens out towards the rear boundary to partly wrap around the rear garden of an adjoining dwelling. The notice attacks the erection of a freestanding single storey building, described as a dwelling, in the part of the back garden further from the appellants' dwelling. During my visit, I observed that around a third of the floorspace in the structure is used by the appellants as a garage for motor vehicles and as a workshop. The remaining floorspace is taken up by residential living accommodation which includes a living area, kitchen and utility room together with two bedrooms and a bathroom. At the time of my visit, the living accommodation was vacant.
6. The erection of a building involves the undertaking of building operations, falling within the definition of development in s55 (1) of the 1990 Act. Planning permission is required for the carrying out of any development of land, having regard to s57 (1) of the 1990 Act. Planning permission is granted in Article 3, Schedule 2, Part 1 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) for certain development within the 'curtilage' of a dwelling. This includes at Class E the provision of a building or enclosure, swimming or other pool 'required for a purpose incidental to the enjoyment of the dwelling as such', where the size and locational limitations in paragraphs E.1 to E.3 are satisfied.
7. To be within the curtilage, land should serve the purpose of a dwelling in a reasonably necessary or useful manner. Although some of the land on which the building is located previously formed part of the back garden of an adjoining residential property, it is not necessarily excluded from now being in the curtilage of the appellants' dwelling. What amounts to the curtilage is not fixed and may alter over time. The land in question now forms part of the appellants' back garden. It is not physically separate from and is part and parcel of one enclosure with the rest of the land attached to the appellants' dwelling. I am given to understand that the land in question has been in the appellants' ownership for several years. Having previously been used for residential purposes incidental to a dwellinghouse use, the function of the land is unchanged. Therefore, as a matter of fact and degree, in my view the building is wholly located within the curtilage of the appellants' dwelling.
8. The garage and workshop elements of the building might reasonably be regarded as uses that are incidental to the enjoyment of the use of the appellants' dwelling. However, the presence of living, sleeping, kitchen and bathroom facilities means that the building contains the facilities required for independent day-to-day living, this being the defining characteristic of a dwellinghouse for planning purposes. I appreciate that the appellant did not set out to create a separate residential planning unit, as it was originally intended that an elderly relative would have occupied the living accommodation. Nevertheless, development cannot fall within Class E if all or part of the building is itself a dwelling or its use is for the provision of primary

dwellinghouse purposes. The Government's Technical Guidance¹ makes it clear that in terms of erecting a building under Class E, a purpose incidental to a dwelling would not cover normal residential uses, such as separate self-contained accommodation or the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen.

9. The distinction however between primary and incidental uses for the purposes of Class E relates only to the justification for erecting a building in the first place and does not govern subsequent changes of use. An existing building within the curtilage of a dwelling may be put to any use which is part and parcel of, or incidental to, the dwellinghouse use, including a use as ancillary living accommodation. The facts and circumstances in this appeal thus differ significantly from those in established case law referred to² as well as in the recent appeal decisions referenced³, which relate to the conversion of existing lawful ancillary outbuildings to residential annexes, not the erection of a new building.
10. Consequently, even if all the relevant size and locational limitations in paragraphs E.1 to E.3 of Class E had otherwise been satisfied, including those relating to the height of the building and the distance from the curtilage boundary at paragraph E.1 (d), what has been erected at the property is a dwelling for planning purposes and so cannot benefit from the planning permission granted by the GPDO. Erection of a dwelling does not fall within the scope of the development granted planning permission by Class E. No grant of express planning permission for erecting a dwelling at the property was drawn to my attention. The definition in s171A (1) of the 1990 Act of a breach of planning control includes the carrying out of development without the required planning permission.
11. Therefore, the appellants have been unable to show that the matter alleged in the notice does not constitute a breach of planning control; the available evidence shows otherwise and the ground (c) appeals fail.

Ground (f) appeals

12. The ground of appeal is that the requirements of the notice are excessive.
13. An enforcement notice can have the purpose of remedying the breach of planning control, including by seeking the restoration of the affected land to its condition before the breach took place, or it can seek to remedy any injury to amenity caused by the breach. The notice did not state which of those purposes that it sought to achieve. Nevertheless, by requiring nothing short of the demolition of the dwelling the purpose of the notice must be to remedy the breach. Complying with the notice requirements would restore the property to its condition before the breach took place.
14. I am acutely mindful of the likely adverse consequences of upholding the notice with the stated requirements in relation to the appellants' personal circumstances. However, in the context set out above varying the notice so that the requirements fell short of demolishing the dwelling in its entirety, for example to only require removal of facilities such as the kitchen and bathroom,

¹ Permitted development rights for householders: Technical Guidance MHCLG 2019.

² *Uttlesford DC v SSE & White* [1992] JPL 171.

³ Appeal Refs: APP/R5510/X/18/3206551 & APP/W0340/W/22/3291473.

would result in the breach or elements of it being sustained. Since in that eventuality the property would not be restored to its condition prior to the unauthorised development taking place, the purpose of the notice would not be achieved. Moreover, as there are no planning considerations arising in the absence of a ground (a) appeal the notice cannot be varied to attack its substance. Given that nothing would fall short of demolishing the dwelling whilst still remedying the breach, there is no obvious alternative to the notice requirements.

15. Therefore, in my view the notice requirements are not excessive, they represent a proportionate remedy being the minimum steps necessary to restore the property to its condition prior to the breach taking place. The ground (f) appeals also fail.

Conclusions

16. For the reasons given above I consider that the appeals should not succeed.

Stephen Hawkins

INSPECTOR