



Appeal Decision

Site visit made on 29 January 2018

by **Pete Drew BSc (Hons) DipTP (Dist) MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 1 February 2018

Appeal Ref: APP/T5720/C/16/3161540

Land and property at 18 Morton Road, Morden SM4 6EF ["the Land"]

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Mitsuo Kato, trading as MK Property (London) Ltd, against an enforcement notice issued by the Council of the London Borough of Merton.
 - The enforcement notice was issued on 3 October 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission, a material change of use of the outbuilding on the Land as a residential unit ("the Outbuilding").
 - The requirements of the notice are: (a) completely and permanently cease the use of the Outbuilding as a self-contained residential unit; (b) remove from the Land and lawfully dispose of all cooking facilities, kitchen units, sinks and appliances, fixtures and fittings facilitating the use of the Outbuilding as a self-contained residential unit.
 - The period for compliance with the requirements is: Three calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b) of the Act.
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Decision

1. I direct that the enforcement notice be corrected by the deletion of the words in paragraph 3 of the notice and their replacement with the words: "*Without planning permission, a material change of use of the outbuilding on the Land ("the Outbuilding", shown as the built structure to the rear of No 18 on the plan attached to this notice) as a residential unit*". Subject to this correction, the appeal is dismissed and the enforcement notice is upheld.

Preliminary matters

2. The Planning Inspectorate [PINS] wrote to the Appellant on 26 October 2017, which was copied to the Council, with regard to: i) a potential correction to the notice; and ii) the prospect of an application for costs. The Appellant's Agent replied by email dated 13 November 2017, the Council then made comments in an email dated 17 November 2017 and the Appellant then had a final right of reply in an email dated 29 November 2017. I have taken account of all of this correspondence in reaching my decision and the associated costs decision.
3. The enforcement notice refers to "*the Outbuilding*" [singular] but the second paragraph on page 2 of the Council's appeal statement says: "*There are two outbuildings in the rear garden*". My site inspection confirmed that there is more than one outbuilding in existence at the property. However the third paragraph on page 2 of the Council's statement says the outbuilding at issue: "*...is located at the end of the driveway on the south side of the property and is positioned close to the boundary with its neighbour, No 20 Morton Road*". This also accords with what I observed during the course of my site inspection.
4. Although there might be said to be a degree of ambiguity within the text of the notice, when read with the plan attached to the notice I consider that any

ambiguity is resolved. This is because there is only one outbuilding shown on the plan within the land edged red. Accordingly I invited comments on the prospect of making a correction to paragraph 3 of the notice. The Appellant's Agent confirmed: "...we have no objections as the concerned outbuilding is the one which is located next to the driveway"¹. The Council made no observations. In the light of this, having regard to section 176 of the Act, I consider that there would be no injustice to either main party from making this correction.

5. As already noted, an application for an award of costs has been made by Mr Mitsuo Kato, trading as MK Property (London) Ltd, against the Council of the London Borough of Merton and this is the subject of a separate decision.

Background and observations on the claim of an abuse of power

6. The Appellant's statement sets out the relevant planning history, including by reference to the Council's letter dated 18 September 2014, which records the outbuilding at issue in this appeal was approximately 2.5 m in height. It also says: "...the use that the builder said that the building was going to be used for would be incidental to the use of the dwellinghouse", but it is not recorded what that use was. However on 5 March 2015 a second Officer inspected the outbuilding at issue and found that it was over 2.5 m in height. The Appellant says this change is due to landscaping in the rear garden, which increased the height of the outbuilding or, possibly, reduced the surrounding ground level.
7. The resulting planning application [Ref 15/P1232] was refused on 9 June 2015. The delegated report records the stated purpose to be: "...a gym and an office", but it continues by making reference to the: "...existence of the full bathroom and separate sink and bench top, and the existing office in the other [rear] outbuilding"². However a subsequent appeal [Ref APP/T5720/W/15/3131444] was allowed in a decision dated 22 December 2015. Paragraphs 5 and 16 of that decision allude to the possibility the outbuilding was used for: "...separate bed and breakfast accommodation", with the Inspector observing that if such use had occurred it: "...would almost certainly require planning permission"³.
8. The Appellant says the planning application was made under duress and that the outbuilding was permitted development. Given that the enforcement notice is directed to the use of the outbuilding, rather than its construction, I would be exceeding my jurisdiction if I were to express a view. The bottom line is that the outbuilding benefits from the grant of express planning permission and so there can be no question that the structure is lawful for planning purposes.
9. In the context of that history it is now said: "...the Council is now attempting to harass the Applicant by issuing an Enforcement Notice, despite the fact that they have no evidence for the same"⁴. I shall consider the evidence under the ground (b). However it is wrong to characterise it by saying: "The only ground for their suspicion is that the Outbuilding contains a sink, work top and unit"⁵, and so I detect no basis for the claim that there has been an abuse of power.
10. It is also claimed that sending a copy of the notice to the Appellant's lender is another form of harassment, but that is patently wrong. The Council has to serve a copy of the notice on persons having an interest in the land which, in the opinion of the Council, is materially affected by the notice⁶. The mortgagee

¹ Source of quote: email to PINS dated 13 November 2017.

² Source of quotes: section 6 of the delegated report on application No 15/P1232.

³ Source of quotes: paragraph 5 of the appeal decision dated 22 December 2015.

⁴ Source of quote: page 3 of the supporting statement.

⁵ Source of quote: page 3 of the supporting statement.

⁶ See section 172(2)(b) of the Act.

would normally, in my experience, fall within this category. Indeed, one of the grounds of appeal, (e), is that the notice was not properly served on everyone with an interest in the land. I have experience of dealing with appeals brought on this ground on the basis that a mortgagee has not been served with a copy. As such this too provides no basis to support the claim of harassment.

11. I note the Appellant's personal circumstances, which I have no reason to set down in a public document, but that is not a basis for saying that a Council is unable to issue an enforcement notice. The test of expediency is not a matter on which I intend to comment, but I do note that section 172 of the Act says that a Council "*may*" issue a notice "*where it appears to them...that there has been a breach of planning control*". The bar is therefore set relatively low and so, for all of these reasons, I reject the claim that there has been harassment. It is also not in my gift that the: "*...Council should be prevented from further continuing to harass the Applicant*"⁷, which I deliberately put in quotes because I do not wish to endorse the suggestion that that there has been harassment.

Ground (b)

12. Under this ground of appeal the Appellant needs to show that: "*...the breach of control alleged in the enforcement notice has not occurred as a matter of fact*" [as per section E. (b) of the appeal form]. The Planning Practice Guidance [hereinafter "*the Guidance*"] says⁸ in enforcement appeals the onus of proof in respect of matters of fact is on an Appellant.

Observations during the course of my site inspection

13. At the time of my site inspection I was able to gain access to the outbuilding at issue in this appeal through a side entrance, without entering the main dwellinghouse. The front entrance door to the outbuilding obtains access to what is labelled as a lobby on drawing No MR/04/15/1, which has a sink and cupboards. To the rear of this area is a bathroom, with a shower, w.c. and sink. To the left of the entrance door was a bedroom with a double bed and items of furniture, such as wardrobes. To the right of the entrance door was an office, including a desk, shelving and what I shall call a coffee table with chairs. However it is material to note that my site inspection took place over 15 months after the date on which the enforcement notice was issued and that is the key date on which to assess what has occurred as a matter of fact.

The Appellant's case

14. The Appellant's statement provides no sworn or photographic evidence, but it: "*...contends that the Outbuilding is being used as an office or games room and a gym in accordance to the planning permission given*"⁹. I hope it is not unfair or partial to say that is the only substantive argument made in the statement.
15. At final comments stage it is said: "*...that the current use of the concerned outbuilding is for office and staff*"¹⁰. This appears to be different from what is quoted above. Appended to the final comments is a statement made by the Appellant and a "*Sworn Statement*" of Mr Lee, which say: "*I confirm the above is true to the best of my knowledge*". There is also a "*Sworn Statement*" made by Mrs Tapping, which says: "*I have read my statement above, and to the best of my knowledge and belief, it is true and correct*". Whilst all 3 are signed and dated, none have been witnessed and there is no reference on their face to the

⁷ Source of quote: page 3 of the supporting statement.

⁸ See for example paragraph: 053, Reference ID: 16-053-20140306.

⁹ Source of quote: page 2 of the supporting statement.

¹⁰ Source of quote: final comments appended to email to PINS dated 11 September 2017.

- Statutory Declarations Act 1835. In the circumstances I attach the Appellant's statement and both so-called sworn statements limited weight because there is no evidence that the oath has been administered and so there would be no remedy if their contents were not true. For the avoidance of doubt I am not saying their contents is untrue, but merely that the weight to be given to statements that are not made under oath must be significantly reduced.
16. The Appellant's statement dated 25 August 2017 says he and his wife reside on the first floor of the property and that he sublets the ground floor rooms on a long and short term basis. He says that he hired Mrs Tapping, from Dorset, as a "*general manager for MK Property (London) on 5th June 2017*". Paragraph 4 of the statement says Mrs Tapping works 3 days a week and paragraph 5 says that due to the travel distance: "*at present, she stays for two nights in the out building...which is located at the end of the driveway on the south side of the property*". Paragraph 6 then says: "*One of the rooms in the outbuilding is used for Mrs Tapping to stay and other room is used as an office*". So, to the extent that the final comments refer to "*staff*", this appears to be an admission that a member of staff, Mrs Tapping, resides overnight in the outbuilding at issue.
 17. Mrs Tapping's statement dated 22 August 2017 says: "*I work for MK Property (London) Ltd at 18 Morton Road, Morden SM4 6EF as general manager three days per week, and I stay during my work in the outbuilding located at the end of the driveway on the south side of the property as this workplace is not within commuting distance*". This appears to be consistent with the Appellant's statement dated 25 August 2017 and the final comments. It continues by saying: "*On 14 August 2017 around 11:50 AM, while I was working in the office in the outbuilding, I saw a man who appeared to be from the local council, entering the outbuilding and taking pictures...*". The sentence does not say which office or in which outbuilding Mrs Tapping was working. It does not say, by way of example, the Council Officer burst into my office, but there appears to be a level of detachment as if she is witnessing events from afar.
 18. There is also a statement from Mr Lee of Seoul, South Korea. It describes his relationship with the Appellant and the circumstances of the Council's visit on 14 August 2017. It then says: "*He [the Council Officer], then, spoke to my employee, Mrs Tapping*". The inference appears to be that Mr Lee is a partner or associate of MK Property (London) Ltd as Mrs Tapping is also his employee.
 19. The final comments say the: "*...Appellant has stated that there is a room with a bed used for their employee as she lives in Poole and finds it too far to travel. She therefore sleeps in the outbuilding when she works there. We would argue that as the building is used for an employee, the use is incidental...*"¹¹. I accept the Appellant has said this, but only at final comments stage, and the contrast to what was said in the statement submitted with the appeal form [*"games room and a gym"*] is striking. Given the allegation [use "*as a residential unit*"] and the onus of proof, which falls on the Appellant for a reason, the Appellant's clear change of position during the course of this appeal is of note. However, given the date in the Appellant's statement [*"5th June 2017"*] it is conceivable that the use of one of the rooms has changed since the appeal was lodged.
 20. In correspondence dated 29 November 2017, which was supposed to be confined to observations on a possible correction to the notice and the matter of costs, it is said for the Appellant: "*...that in July 2017 the outbuilding was used for letting in an emergency as the booking had been confirmed in error*

¹¹ Source of quote: final comments appended to email to PINS dated 11 September 2017.

when there was no room available. However, the outbuilding has always been used as a gym, office and for the Appellant's employees". I comment below.

The Council's case

21. The Memorandum to the Head of Legal Services dated "02/06/16", which was submitted with the Council's questionnaire, says: "*The outbuilding is currently in use as a gym and an office with its own kitchen and bathroom*". However it continues by saying that there: "*...have been indications that this regularly rented as a self-contained unit*" [sic]. This is 4 months before the date of issue.
22. Appended to the Council's statement are a number of photographs that are timed and dated as having been taken just after midday on "14/08/2017". One of the photographs shows the driveway, one shows the lobby area, one shows the entrance to the bathroom and the other shows one bedroom. All of this accords with what I observed. It is noticeable that there is no photograph of the second room that was in use as an office at the time of my inspection.
23. The text of the Council's statement asserts that: "*...each room contains one double bed*", it describes the area labelled as lobby as: "*...a kitchen area*" and it asserts that it was confirmed during the course of the inspection on 14 August 2017 that the outbuilding was: "*...in residential use on a short term let basis (5 days)*". The statement continues by asserting: "*An unannounced visit made on 14th August 2017 found double beds in each room, the occupiers (two adults and one child) stated that they were staying there for five nights*". However, given the absence of a photograph of the second room and the fact that the content of the statement is anonymous and unsworn, I am only able to attach these claims limited weight. The Council's evidence is not unambiguous and it should have either provided a sworn statement or photographs of each room.
24. The Council's statement says that local residents have complained that the outbuilding has been constantly occupied by short term residential lets and that it has been advertised on the internet as "*Kato London Haus*". Excerpts are then appended, which are from <https://www.tripadvisor.co.uk> obtained on "14/08/2017". One entry says: "*Stayed here with my partner and mum, booked due to a wedding close by, upon arrival we were shown to our room which was in the garden separate to the house, as they noticed we had booked under the same surname they put us together...*"¹². It must follow from this review that the couple and the author's mother must have stayed in different rooms in the outbuilding. The review is said to have been made "*2 weeks ago*" which, by reference to the date of the excerpt, would be the end of July 2017.

The case put by local residents

25. A letter from the closest neighbour dated 15 August 2017 says the outbuildings [plural] have been used for B&B guests since December 2015. The letter refers to guests wheeling their luggage through the side entrance at unsocial hours. It refers to noises that one might associate with use of a bed and to witnessing guests in various stages of undress because of openings in what are described as 2 guest bedrooms. However because the letter itself is unsworn and even unsigned I am only able to attach limited weight to its contents.
26. Attached to the letter are excerpts from the website <https://www.airbnb.co.uk> for "*Bed & Breakfasts for Rent in Morden, Surrey*". The entry "*Hosted by Mitsuo*" who describe themselves as "*...a Japanese and Korean couple*" who

¹² Note: this is the full extent of the review given in the excerpt attached to the Council's statement and it is not appropriate to go online and press on the "More" link because I must focus on the evidence placed before me.

"are especially catered for a week or longer stay" [sic] relates to a property known as *"Kato London Haus"*. The reviews include one from *"Jennifer"* dated June 2015 that says: *"We stayed in a spacious outhouse which had its own kitchen and bathroom..."*. The review otherwise refers to *"Mr Mitsuo"* and another entry, dated November 2015, refers to *"Matsuo"*, which appears, on the balance of probability, to be the Appellant. On the balance of probability the review dated June 2015 relates to the outbuilding at issue in this appeal.

27. The letter refers to the B&B being run from the house and the outbuilding, and evidence is attached in the form of excerpts from <https://www.booking.com>. The entry provided says: *"...our room which was in the garden separate to the house, as they noticed we had booked under the same surname they put us together which was lovely. It was like we had our own bungalow! Two bedrooms with a bathroom in between, hob, sink and microwave which was great and not expected to have this to ourselves!"* It continues: *"came back from the wedding around midnight and could come through the side entrance which was great as we didn't feel guilty for having to wake anyone!"* This is below a date of 26 July 2017, which appears to be the review's date. Although on a different website this appears to be the same as the Trip Advisor review.
28. Correspondence from 4 other local residents refer to a bed and breakfast being run from No 18 and, specifically, to the disturbance caused by coming and going, including car parking. However that correspondence does not greatly assist me because it refers to No 18, generically, rather than the outbuilding.

Analysis

29. There is conflicting evidence as to what the outbuilding has been used for, and it might well be that its use has fluctuated over time. However there is clear evidence that the outbuilding at issue has been used for short-term residential lettings by a number of persons who appear to be unrelated to the Appellant. The review dated June 2015 is clear and impartial evidence that the outbuilding was used to stay in well before the date of issue of the notice. The reviews dated July 2017 are clear evidence that show that 2 bedrooms have been let out in the outbuilding and this evidence also demonstrates that a microwave and hob have been placed in the outbuilding in association with that use. Taken together there is clear evidence that the outbuilding has been used as alleged in the enforcement notice on either side of the date on which it was issued.
30. The Appellant has had a full and fair opportunity to comment on this evidence but has provided no explanation for the first review. It has not been said, by way of example, that the reviews have been fabricated. Since they appear to have been sourced from a number of recognised internet platforms if any such claim had been made I would have discounted it. In my view there is a strong sense of credibility about the entries that, on the balance of probability, tend to support the claims that have been made by the Council and local residents. On balance I attach significant weight to the quoted entries from these websites.
31. In relation to the reviews posted in July 2017, I am far from persuaded that the explanation given in the email dated 29 November 2017 is credible. It is noticeable that the Appellant's statement dated 25 August 2017 offers no such explanation for the reviews on which comments had been sought in PINS letter dated 22 August 2017. Indeed implicit to the late submission is an admission that both rooms in the outbuilding were let to paying guests in July 2017. It must follow that the related claim, that the *outbuilding has always been used as a gym, office and for the Appellant's employees* is incorrect. As a matter of

- fact I conclude that the whole of the outbuilding was let to paying guests just before the date of the quoted reviews, namely on or just before 26 July 2017.
32. The timing of the reviews posted in July 2017 are of particular significance. A fair reading of the statements made by the Appellant and Mrs Tapping is that she has been staying 2 nights a week in the outbuilding in the period from June to August 2017. The Appellant's statement is the only clear evidence that the office within which Mrs Tapping works is in the outbuilding at issue. If that is correct then the reviews dated July 2017 are evidence that the office in the outbuilding is also used as a bedroom for paying guests. On the balance of probability this supports the claims that have been made by the Council and local residents, including the Council's assertion that there were double beds in each of the rooms at the time of the unannounced visit on 14 August 2017.
33. For the above reasons I consider that the Appellant has not discharged the onus of proof to show that the breach of control alleged in the notice has not occurred as a matter of fact. Moreover even if I were to accept the Appellant's version of events, which appears to be contradicted by other evidence before me, I am unconvinced that the breach would not have been made out. Mrs Tapping is an employee of a limited company. The Appellant has given no information as to the nature of the company or why a business employee would travel up from Poole to sleep and work in the outbuilding at the appeal site. It is not suggested by way of example that she cleans or cooks for the Appellant and his wife whilst they reside at No 18. The possible inference might be that Mrs Tapping looks after the guests who stay in the ground floor rooms of No 18 but that might point to there having been a material change of use of the whole property to something other than a single dwelling house. Since that is not the allegation, and there would plainly be injustice if I were to widen the notice to that effect, this is not a matter on which I intend to speculate further.
34. Although it has been asserted that such "*use is incidental to enjoyment of the main dwelling house*"¹³, since no ground (c) has been lodged I decline to comment¹⁴. However the use admitted by the Appellant and Mrs Tapping also appears to be pursuant to using the outbuilding as a residential unit. It does appear to be capable of providing self-contained accommodation, as is evident from the extent of facilities in the bathroom and the evidence that the lobby has been used as a kitchen following the importation of a hob and microwave. In all the circumstances I find that the admitted use by Mrs Tapping is itself evidence that the outbuilding has been used as a residential unit, as alleged.
35. For the above reasons I conclude that not only has the Appellant failed to discharge the onus of proof to demonstrate on the balance of probability that the breach of control alleged in the enforcement notice has not occurred as a matter of fact, but my view that the allegation is correct is confirmed by the Appellant's own admissions as to what the outbuilding has been used for. In the circumstances I conclude that the ground (b) appeal must fail.

Other matters

36. I recognise that concerns are expressed about the manner of the Council's inspection in August 2017, but I deliberately express no view on this issue and have instead focussed on the evidence that has been placed before me. The Act provides a right of entry and so this is a matter between the parties.

¹³ Source of quote: Appellant's final comments.

¹⁴ If a ground (c) had been lodged the Appellant would have needed to show that such use would not have been a breach of planning control, but mere assertion in essentially one sentence would not have achieved this.

37. The Appellant's final comments note that the Council has conceded that a sink was shown in the lobby area on the drawing that was approved at appeal. The plans also show a room labelled "BATH". However no appeal has been lodged under ground (f). Paragraph 5 of the appeal decision dated 22 December 2015 records that the Council had claimed that a change of use to separate bed and breakfast accommodation "*may have occurred*", in the past tense. The review dated June 2015 would appear to be consistent with that claim. This evidence, which is unchallenged, would support a finding that the breach of planning control commenced before the grant of planning permission. On this basis, noting that the Appellant is legally represented but has chosen not to lodge a ground (f) appeal, I find no clear reason to vary the requirements of the notice.

Overall Conclusion

38. For the reasons given, and having regard to all other matters raised, I conclude that the appeal should be dismissed and I shall uphold the corrected notice.

Pete Drew

INSPECTOR