

BUILDING ACT 1984 - SECTION 16(10)(a)

DETERMINATION OF COMPLIANCE WITH THE REQUIREMENTS OF THE BUILDING REGULATIONS 2010 (AS AMENDED) RELATING TO THE CONVERSION OF A DWELLING INTO TWO SEPARATE UNITS

The proposed work and question arising

The papers submitted indicate that the building / building work to which this determination relates is the conversion of an existing two storey property into two separate units with one bedroom on first floor. The site slopes from front to back. The whole property is an existing building. No new extension is planned. The work the applicant wishes to undertake is just the provision of new party wall to separate the two units, plus other minor works allied to this separation.

The above proposed work was the subject of a Building Regulations full plans application on 06 January 2014, which was rejected by the Council on 12 May 2014 on the grounds that the proposals are a material change of use and do not comply with the applicable requirements of regulation 6 of the Building Regulations 2010. However, the applicant believes that the Council's building control have misinterpreted the issues. It is in respect of this question that the applicant has applied for a determination.

The applicant's case

In support of the case, the applicant stated in the determination application that every room in these properties will remain as it currently exists and that no changes or new facilities are required. All that is required is to provide a party wall to separate the dwelling into two units.

In addition, the applicant included with his application a letter dated 07 July to the Department that read:

"Please find attached two sets of plans and details supplied for a "Determination under Building Regulations.

As will be seen with the attached documents / plans are read, this determination is based on the fact that the application is not a 'normal standard' straight forward form of sub-division of a property, which would normally entail changing the designation and use of a number of rooms within the building, together with the provision of kitchens / bathrooms and toilets etc.

In this case there is not one room that requires a change of name or use, neither is there any need for new kitchens / bathrooms or toilets. The original property (on the North – East side of the property includes a bedroom on first floor, which pre-existed my clients' purchase of the property back in early 1997, which has been, still is (now approaching twenty years of continual use), and will continue to be used by the owners / applicants.

This property has been extended over the years (to the South / West) and this part (now 40), has all been carried out under FULL building regulation and planning consents, and thus complies with all aspects of the building regulations. In the original building the cavity wall had been filled with insulation, prior to the applicants purchase, this provides an acceptable 'U' value of 0.57 W/m².K.

As will be seen amongst the responses [in the letter dated 19 Feb 2014], to the council's request for further information dated 06/02/14, setting out the reasoning as to why the requirements are for by the council, these are considered as most unreasonable in respect of this particular property. For an inspection of the plans submitted for this sub division, these clearly illustrate that nothing whatsoever has changed, either internally or externally. Every aspect of these dwellings remains exactly as it has always, both in use and occupants. Other items which are reasonably requested by building control (such as door to kitchen, and fire door stopping at top of party wall), have been or will be agreed and will be provided.

Please note that the Council have been informed that the clients are shortly going to re-furbish the first floor bedroom, (voluntarily) and for their own benefit, with the installation of insulation / D.P. Membrane and replacement of plasterboard to walls / ceiling and ceiling areas obviously with re-decoration.

The sub division is to provide separate accommodation, instead of sharing the accommodation, for the current owners (parents), their children and grand children, who live there now having done for some considerable time, and who will continue to live there, but in self contained units.

To achieve this, all that is required is the provision of a fully compliant 'party wall' which has been applied for, and will be built to fully comply with building regulations, under today's requirements, to separate this dwelling into separate units, for which planning permission has been granted.

Trusting that the above information, together with copies of the submitted plans, can be seen to be completely reasonable and acceptable in this particular case."

Prior to that, in a letter dated 31 March 2014, to the Council's Building Control Department, the applicant stated:

"As you know I have been corresponding with the Council's building control on this application and he has suggested that I write directly to yourself with my views on this application.

Firstly, this cannot be construed as 'creating a new dwelling', on the firm basis that the same people have owned and occupied these premises since September

1997, they have slept in the first floor bedroom (which was already there when they purchased the property). All of the rooms remain exactly as they are and have been since the property was purchased. There are no other changes whatsoever within either property, not even new sanitary ware.

The only requirement in the application is for a full separating 'party' wall, complete with fire stopping at junction between new party wall and underside of roof, to regularise the use of two properties, as was recently approved by the Planning Department.

The 'West Side' newer part of the dwelling complies with Building Regulations, having been constructed and approved under current regulations, in the last couple of years. Information has been supplied to confirm that the walls of the existing original dwelling meet with thermal requirements, having their cavity filled quite some time ago, thus meeting the requirements for "upgrading dwellings", details have also been supplied that the owners will shortly be upgrading the thermal properties of the existing first floor bedroom, for their own benefit during scheduled re-decoration, as well as to reduce costs of heating. Further to this it has been agreed that a full 'protected route'/ means of escape from the existing part of the property will be formed with appropriate smoke detectors fitted in both sections.

This is hoped that, on behalf of The Council, this situation can be accepted, as the true position of this structure, and without detracting in any way from Building Regulations stipulations. Thus avoiding the necessity of making an application to the Secretary of State for a 'Determination' which my clients are prepared to do, should this become necessary.

As is set out above, there can not be a "new" dwelling produced here, they are both totally existing, having been for some twenty years and will remain so, without change, in the same ownership, for the foreseeable future, as my clients have no intention of selling the property. A further point to note is that the owners of this property also own the eastern half of the large grass area between the properties".

The Council's case

The Council's building control department wrote to the applicant on 06 February 2014 and the 20 March 2014, on the grounds that the Council had concerns and wanted clarification on these issues, as copies of the following correspondence show:

Date: 06 February 2014

"Outstanding Items

Regulation 14 of and Schedule 1 to the Building Regulations 2010

1. B1 - Escape windows required to ground floor inner rooms (bedroom 2 & bedroom 3 and bedroom 2, bedroom 6 and living room. Escape windows to have unobstructed openable area that is at least 0.33m² and at least 450mm high and

450mm wide e.g. If the minimum 450mm clear horizontal dimension is used, then the minimum vertical clear dimension of the window will need to be 735mm; bottom of openable area no more than 1100mm above floor.

Please note, if a door is proposed between the kitchen and hallway, bedroom 2 and the living room no longer become inner rooms, however an escape window would still be required to the first floor bedroom 1 unless a protected route is provided.

2. B1 - Smoke detection:

Mains operated interlinked smoke detection to be provided within living/dining room and heat detector to be provided within kitchen.

Mains operated interlinked smoke detection to be provided to the circulation space within each storey.

3. B3 - Please provide fire stopping detail at junction between top of party wall and underside of roof tiles.

4. B4 - Please provide legal confirmation from a solicitor that the new boundary is to be positioned at least 1m away from south west elevation. If proposed boundary is within 1m, only 1m² of unprotected area allowed to south west elevation. Excess openings to be of fire resistant glazing, fixed shut and within fire resistant frame.

5. C2 - Advisory - If additional roof insulation is required to meet upgraded U-values (see item 10 below), additional so fit and ridge ventilation may be required (depending on existing).

6. E1 - A sound test will be required to be undertaken between the flats/houses upon completion of the works (at applicant's expense). Please ensure party wall between dwellings will achieve minimum airborne sound insulation of 43 dB.

7. F1 - Background ventilation to be provided to all habitable rooms (equivalent of 5000mm²) and to kitchens and bathrooms (equivalent to 2500mm²).

8. L1 - As from 1st October 2008 an EPC (Energy Performance Certificate) will be required to be produced (for each dwelling) and written confirmation that it has been given to the building owner will be required together with details of the certificate number and assessor's details before a completion certificate can be issued.

9. L1 - Full heat loss calculations required due to excess openings within kitchen/ dining area Please note, upgrading works may be required.

10. L1B: As the application is for a material change of use (forming two dwellings from one single dwelling) all existing thermal elements must already achieve following minimum threshold U-value standards:

Walls - $0.7w/m^2.K$ or less
Floor - $0.7w/m^2.K$ or less
Roof - $0.35w/m^2.K$ or less
Windows - $3.3W/m^2.K$ or less

If existing construction is not able to meet these values then elements will need to be upgraded to following standards:

Walls $0.55W/m^2.K$ for cavity fill or $0.30W/m^2.K$ where insulation internally or externally placed.

Floor $0.25W/m^2.K$
Roof $0.16W/m^2.K$ where insulation at ceiling level or $0.18W/m^2.K$ where insulation at rafter level.
Windows - $1.6W/m^2.K$ or less.

Or a SAP 2009 thermal calculation can be produced for a more flexible design approach. Any calculations to be provided to Building Control to demonstrate Carbon Dioxide emissions from dwelling(s) following alterations will be NO GREATER than if each previous dwelling (s) had been upgraded to the new standards. Please note some thermal upgrading may still be required using this approach.

11. Reg 14 - We do not appear to have any record of the loft conversion to form a habitable room. Please provide details of when the loft conversion occurred and any permissions that were sought at the time. Please note, if a Building Regulations application was not made, Structural Engineer's calculations/check will be required. Additional insulation, ventilation and other items to meet Building Regulations may also be required.

12. Reg 14 - We do not appear to have any record of the front extension (glazed extension). Please provide details of when this extension occurred and any permissions that were sought at the time. Please note, the glazed extension may have formerly been exempt from Building Regulations, as it is now forming a kitchen and is open to the main dwelling, exposure works will be required to check the adequacy of the structure e.g. foundations, oversite, wall, roof structure etc. Please note this may require Structural Engineer's calculations/check, plus heat loss calculations due to excess glazing (additional insulation/upgrading may be required).

Important Note:-

REVISED PLANS – Please ensure when submitting revised plans that you clearly identify ALL changes that have been made to each plan and where they differ from those that were submitted with your initial application. This should be irrespective of whether the changes are to satisfy Building Regulation requirements. Please list ALL changes in your covering letter and clearly highlight each change in colour on the relevant plan.

This requirement is particularly important where you have already obtained Planning Permission for the works and are now seeking Building Regulation approval. Please note also that if the revisions introduce changes to the details that have received Planning Permission, these will need to be approved separately before any work commences.”

Council’s letter dated 20 March 2014:

“Conversion of property into two separate units requiring new party wall for separation

Thank you for your letter dated 19th February 2014 in response to outstanding items requiring amendment or further information to clarify compliance with the Building Regulations. I respond to each point in turn;

1. If a door is fitted between the kitchen and hallway to the left hand side property, I agree the living room and bedroom are no longer inner rooms and escape windows to these rooms will not be required.

For the requirement of the escape window to the first floor bedroom (loft conversion) of the left side property, this refers to point 11 on my original letter, please see the section on ‘regularisation’ below.

2. Please confirm positioning of existing mains operated smoke and heat detection within each property. Please note that as the application is to form two separate units, each dwelling must have its own separate system and not to be interlinked with each other.
3. Fire stopping detail to be provided at junction between top of party wall and underside of roof tiles – consider use of Rockwool for this detail (intumescent strip would not be suitable in this location).
4. Copy of revised deed plan to be provided in due course.
5. Requirement of material change of use – The Building Regulation 2010, Part 2, Section 6, requirement C2(c) (interstitial and surface condensation). Please also see material change of use below’.
6. Please confirm that a new sound test will be undertaken upon completion of works. Please ensure that all sections of new party wall (including construction , blocked up doorways etc.) will achieve a minimum airborne sound insulation of 43 dB.
7. Requirement of material change of use – The Building Regulations 2010, Part 2, Section 6, requirement F1 (ventilation). Please also see ‘material change of use below’.

8. Requirement of material change of use – The Building Regulation 2010, Part 2, Section 6, requirement L1 (Conservation of fuel and power). Please also see ‘material change of use below’.
9. This item refers to the Regularisation of the existing conservatory, please see ‘regularisation’ below.
10. The requirement of a material change of use – The Building Regulation 2010, Part 2 Section 6, requirement L1 (conservation of fuel and power.) Please also see Approved Document Part L1B, para 4.11c ‘the building, which contains at least one dwelling, contains a greater or lesser number of dwellings than it did previously. Please also see ‘material change of use below’
11. Please see ‘regularisation’ below.
12. Please see ‘regularisation’ below.

Material change of use

The Council has viewed your application as a material change of use. We have referred to The Building Regulation 2010, Part 2: Regulations 5; Meaning of material change of use. As detailed on your original application form, the proposed works have been addressed as ‘conversion of property into two separate units requiring the new party wall for separation’. We also observe that Planning Permission has been sought and approved, for the ‘conversion of dwelling into one two bedroom dwelling and one three bedroom dwelling’. We therefore believe the works relate to category (g) of Regulation 5 of the Building Regulations 2010, ‘the building, which contains at least one dwelling, contains a greater or lesser number of dwellings than it did previously’. Therefore the plans have been checked, in accordance with Regulation 6; Requirements relating to material change of use, and all outstanding items as detailed in my original letter of 6th February 2014 refer to all these requirements.

Regularisation

A regularisation application has been requested for the loft conversion as we believe these works were unauthorised and undertaken after 1985. On previous Building Regulations application for a side extension to the property, the loft conversion does not appear on the existing or proposed plans. We therefore believe that the loft conversion occurred prior to 1996. As the current application is to form a newly formed dwelling to the left hand side of the property, we need to ensure that the loft conversion meets the building regulations of the time it was constructed.

All areas of the building regulations will require consideration during the Regularisation of the loft conversion, including structural check of the existing structure and support, fire safety (adequate means of escape and early warning), ventilation, insulation, staircase design etc.

A regularisation application has also been requested for the front glazed extension as this is now to accommodate the kitchen of the left hand side dwelling. We have noted that Planning Permission was sought and approved in 2001 for the erection of a white PVCu conservatory to front elevation', however, a Building Regulations application was not made, possibly due to the conservatory being exempt from the Building Regulations. As the former conservatory is now part of the dwelling, not a room of occasional use in which a conservatory is considered. As part of the regularisation application, all areas of the Building Regulations will need to be considered , including for example adequacy of existing structure (foundations, oversite, wall, roof, tying into existing structure) heat loss calculations, due to excess glazing and thermal loss (additional insulation may be required) etc.

We believe that incorporating these earlier unauthorised building works into the newly proposed dwelling would effectively be condoning and give legitimacy to these earlier works which may not comply with the Building Regulations applicable at the time they were constructed.

If you disagree with the above and wish to apply to the Secretary of State for a determination, guidance on how to do this can be found on the Planning Portal website under the section 'how to apply for a determination'. The determination fee is calculated as half of the local authority's plan charge, (the plan charge fee was calculated using Table A of our fees table: Conversion (change of use), category 2 from single dwelling to two dwellings."

On the 12 May 2014, the Council's Building Control Department rejected the plans for the conversion. The Council's comments were:

Date of rejection: 12 May 2014

Detail of works – Conversion of property into two separate units requiring new party wall for separation

Rejection:

The plans for the above works were deposited by you, with the Council on 22 January 2014, in accordance with the Building Regulations.

Notice is hereby given that the Council, in pursuance of the requirements of Section 16 of the Building Act 1984, REJECT the said plans as failing to show adequacy with the following schedules of the Building Regulations:

- Part A (Structural adequacy of unauthorised loft conversion and conservatory becoming habitable accommodation)
- Part B1 (Means of escape from loft conversion, each unit to have separate smoke detection)
- Part B3 (Fire stopping detail to party wall)

- Part C (Additional ventilation may be required if additional insulation required to loft conversion)
- Part E (Sound test between properties)
- Part F (Background ventilation required to each dwelling)
- Part L (EPC requirement, heat loss due to excess openings, material change of use requirement for existing and new elements)
- Reg 14 No previous record of the loft conversion, existing plans of the property suggest that the loft was converted after 1996, as loft conversion is to become part of dwelling, all areas of the Building Regulations to be considered. Front glazed extension (exempt conservatory) to become part of habitable dwelling with kitchen being located within this space, all parts of the Building Regulations to be considered.

The Secretary of State's consideration

The Secretary of State has given careful consideration to the particular circumstances of this case and the arguments presented by both parties. He considers that the application raises four issues:

- i. whether there is a material change of use;
- ii. whether a regularisation is required in respect of the bedroom in the loft conversion;
- iii. whether a regularisation is required in respect of the work in what was previously an exempt conservatory; and
- iv. depending on the decisions on the above issues, what work is required to be carried out to achieve compliance with the requirements of the Building Regulations.

Material change of use

Both the applicant and the Council agree that the work involves the conversion of a single dwelling into two dwellings by means of the construction of a party wall to separate the two new dwellings but the applicant has asked the Secretary of State to determine whether this conversion is a material change of use. Regulation 5 of the Building Regulations 2010 sets out the circumstances where a material change of use occurs. One of these circumstances (regulation 5(g)) is where

“the building, which contains at least one dwelling, contains a greater or lesser number of dwellings than it did previously.”

The Secretary of State considers that the work proposed by the applicant falls within this circumstance and that therefore there would be a material change of use. The building currently contains a single dwelling; following the proposed work it will contain two dwellings, i.e. a greater number of dwellings than it did previously.

Where a material change of use occurs, regulation 6 sets out which requirements of the Regulations would need to be complied with; in this case each of the new dwellings would need to comply with any applicable requirements (see below).

Regularisation of the loft conversion

The Secretary of State notes that the Council has advised the applicant that it is necessary to apply for a regularisation of the conversion of the loft into habitable accommodation as the conversion was unauthorised building work. Work is unauthorised if it is carried out without a building notice being given to or full plans deposited with a local authority and there was no initial notice given in respect of the work.

It would appear that the conversion of the loft took place before 1997 but after 11 November 1985, the date before which no regularisation is possible. It would also appear that the work was carried out by a previous owner of the building. Any regularisation would be against the Building Regulations requirements in force at the time the work was carried out. In this case this would appear to be the requirements in the Building Regulations 1991 as amended. The Council have expressed the view that not to regularise the work would mean that the Council was in effect condoning unauthorised work.

Regulation 18(2) allows, but does not require, the owner of a building which was subject to authorised building work to apply to the local authority for a regularisation of such work. The Secretary of State therefore considers that no application for a regularisation of the unauthorised work in carrying out the loft conversion can be required. It is entirely a matter for the building owner to decide whether to apply for a regularisation.

The Secretary of State also notes that work required under regulation 6 on the material change of use would in any event likely mean that aspects of the loft conversion would need to be brought into compliance with current Building Regulations standards rather than those that pertained before 1997.

Regularisation of work to the conservatory

The Secretary of State notes that the Council has also requested an application for regularisation of work to what appears to be a previously exempt conservatory. The work consists of using the conservatory's structure to accommodate a kitchen and removal of the thermal separation of the conservatory from the rest of the building.

The Building Regulations provide (regulation 9(1)(a) and Schedule 2, Class 7) that conservatories are exempt from compliance with the Building Regulations. The Regulations also set certain conditions that must be satisfied for a conservatory to benefit from the exemption; these are set out in Schedule 2, Class 7 and in regulation 21(4) of the Regulations.

Regulation 9(1)(b) provides that, where work to an exempt conservatory is such that the conservatory no longer satisfies conditions for exemption, the exemption is lost. In this case the removal of the thermal separation means that the conservatory is no longer exempt and any new work that is carried out to it must

therefore comply with the requirement in regulation 4(1) that the work complies with the applicable requirements in Schedule 1 to the Regulations.

In the Secretary of State's view a regularisation is therefore not needed in the case of the work on the conservatory.

Requirements relating to a material change of use

Regulation 6 of the Building Regulations sets out the applicable requirements of Schedule 1 that must be satisfied. Where the material change of use is within regulation 5(g) and there are a greater number of dwellings, each of the dwellings created must comply with the applicable requirements. In this case this means that each of the new dwellings created by the erection of a party wall would need to comply with the applicable requirements.

The Secretary of State notes the plans that were submitted with the application for a determination and also the correspondence between the applicant and the Council on what might be required on a material change of use. The Secretary of State considers that the plans as submitted do not show compliance with the applicable requirements in regulation 6 nor with the requirements for work involved in the conversion of the conservatory into a kitchen; nor do they take account of his view on the proposed regularisation applications. The Secretary of State therefore suggests that the applicant and the Council reconsider what work needs to be carried out in the light of this determination.

The determination

As indicated above, the Secretary of State has therefore concluded and hereby determines that the proposed work constitutes a material change of use under regulation 5(g) of the Building Regulations 2010. He has also concluded and hereby determines that a regularisation of the loft conversion cannot be required and that the work proposed on the conservatory does not need an application for regularisation.

You should note that the Secretary of State has no further jurisdiction in this case and that any matters that follow relating to the building work should be taken up with the building control body. A copy of this letter is being sent for information to the Council.