

15 May 2015

BUILDING ACT 1984 - SECTION 39

APPEAL AGAINST REFUSAL TO RELAX REQUIREMENT L1 (CONSERVATION OF FUEL AND POWER) IN PART L (CONSERVATION OF FUEL AND POWER) OF SCHEDULE 1 TO THE BUILDING REGULATIONS 2010 IN RESPECT OF A MATERIAL CHANGE OF USE BY CONVERTING OF TWO DWELLINGS INTO ONE.

I am directed by the Secretary of State for Communities and Local Government to refer to the appeal made under section 39 of the Building Act 1984, against the decision by The Council to refuse to relax requirement L1 Conservation of Fuel and Power) of Schedule 1 to the Building Regulations 2010 in respect of the above building work.

Details of the appeal are set out in the appellant's letter and appeal form dated 12 January 2015 (with enclosures). The building control body, (hereafter referred to as "the Council"), provided representations in its letter to you of 21 October 2014 and subsequently to the Secretary of State on 6 February 2015. The enclosures submitted include copies of plans/drawings of the building work.

The building work and appeal

The building is a modest 3 bedroom former farm cottage set out on two floors with three upstairs bedrooms and a small bathroom. Downstairs has been converted to a through lounge with kitchen, small utility room and conservatory. No. 4 is a two bedroom former farm cottage set out on two floors with an upstairs bathroom and two small reception rooms downstairs together with a kitchen. Both properties have always provided residential accommodation.

The building works are basically the opening of a single doorway upstairs between two bedrooms of numbers 4 and 5 and the establishment of an opening downstairs of approximately 7' between the rear reception rooms of the two properties. The Council has classed the conversion of two residential properties into one as being a material change of use within regulation 5(g) of the 2010 regulations and judged that the conversion work does not comply with requirement L1 of Schedule 1 to the Regulations. Plans were re-submitted with a number of energy efficiency upgrades including increased loft insulation, thermostatic radiator valves and replacement windows. The appellant now appeals against the need for replacement of two existing central heating boilers with new A rated ones.

On 31 October 2014, the appellant applied to the Council for a relaxation of the requirement in paragraph L1 in respect of the boilers. Under section 39(2) of the Building Act 1984 the local authority has two months to respond to an application

for a relaxation, In this case it did not do so. The Act provides in such cases as the absence of a reply to be deemed as a refusal.

It is against this deemed refusal that the appellant has appealed to the Secretary of State.

The appellant's case

To support the appeal the appellant stated that:

- “1 - The existing boilers are functionally adequate as they stand.
- 2 - Replacing the boilers would be a waste of recently incurred maintenance costs
- 3 - The additional costs are too onerous in terms of the conversion work being undertaken.
- 4 – The property is generally unoccupied during the day so the costs benefit of replacing the boilers would be minimal
- 5 – Some experts suggest that best policy is to retain existing boilers until they need replacing and not upgrade then just a matter of course
- 6 – Other green measures requested by the council have been or will be complied with which compensates for the older boilers.
- 7 – When the existing boilers do fail they will automatically be upgraded to current standard and so including the provision now as part of building regulation requirements is necessary.”

To add further support to the appeal on 31 October 2014 the appellant wrote to the Council in response to its letter dated 21 October:

“I refer to your letter of 21st October which presented itself as almost an ultimatum to complete the above project within a set time or face a black mark on land registry records. It would appear that you are unhappy at the time it is taking for the project to be completed although, as I understand it, there are no time constraints that apply. The situation was partly resolved following a telephone conversation on 27th October but I have felt obliged to reappraise the requirements attached to the original approval and I should now like to appeal for a relaxation of one of these requirements.

Under regulation 5 of the 2010 regulations, the works are deemed a material change of use and consequently we have been obliged to comply with paragraph L1 to schedule 1 of the 2010 Building Regulations. Specifically, we have been required to replace the windows in No.4 (works completed), further insulate the loft space in both properties (works completed), fit thermostatic radiator valves in both properties (works complete at no. 4 and in progress at no.5) and fit new grade A boilers in each property. It is the last aspect against which we are now appealing for relaxation for the requirements since we feel that they are far too onerous and unnecessary as the current boilers are functionally adequate.

Whilst the existing boilers have been installed for a few years they continue to perform in a manner satisfactory for their intended use. Indeed, the boiler at no.

5 had, in the early part of this year, a replacement fan and control unit and so to dispose of the boiler now would be a waste of the costs incurred. It is of course the case that a number of experts extol the virtues of installing new combination boilers in place of their older counterparts but there are also a number of experts that suggest that if your old boiler is working fine there is little advantage in replacing it for the sake of it and I enclose copies of some arguments in this respect. Financially it is accepted that a new boiler could typically save £150- £200 per annum in fuel costs but on a life expectancy of around 10 years and installation cost quoted for no.5 on its own at circa £3,000 replacement does not make economic sense. It should also be considered that my wife and I both work full time and consequently are out of the house all day so performance advantages are limited to a few hours in the evening and weekends.

As mentioned above, other thermal improvements have been or will be completed and these should address some of your efficiency concerns. It is also the case that, in due course, the boilers will undoubtedly fail or become unviable and will need to be replaced at which time they will automatically meet new guidelines. Bearing all of this in mind it seems unreasonable to force their replacement now as part of building regulations approval and we feel a relaxation of the requirement is appropriate to the specific circumstances of our conversion.”

The appellant also enclosed additional information from that found on the Internet and which the appellant considers supports the view that the boilers need not be replaced.

The Council's case

The Council wrote to the appellant on 21 October 2014 as follows:

“I refer to the above building works and note that according to our records, a notification of completion has not been received.

In order for us to conform that the finished work complies with the relevant Building Regulations, it will be appreciated if you would contact this office to allow a final inspection to be carried out.

It is hoped that you will contact us within the next three weeks to enable this application to be concluded, however if we do not receive a response within this time, we will finalise our records by noting that a final inspection has not been carried out.

Your attention to this matter would be appreciated, as unless a satisfactory completion can be confirmed, this fact will be disclosed on any future land search enquiry and may affect the sale of the property.”

In addition to the correspondence from the Council enclosed with your appeal the Council sent further views to the Secretary of State on 6 February 2015

“Council’s Response to Appeal Under Section 39.

The work in question relates to the alteration of two dwellings into one. The application was submitted under the Full Plans procedure and initially the drawings did not indicate any works beyond the creation of two openings in the former party wall between the dwellings.

The work is considered to comprise a material change of use under Regulation 5(g) and therefore is required to comply with the applicable requirements of paragraph L1 of Schedule 1.

Following the formal submission, the applicant’s agent was advised of this requirement and a site meeting was held to discuss the available options. Following this meeting revised plans were received which were considered to show reasonable compliance with Regulation L1 and were subsequently approved.

From the information available, the thermal performance of various elements of the structure of the building was below the threshold values indicated in the supporting Approved Document. These areas comprised:

- Retained solid external walling.
- Pitched Roofs.

There was a lack of adequate thermal separation between the kitchen and conservatory in number 5 and some windows within number 4 had a U-value worse than 3.3 W/m².K.

The applicant did not wish to apply a thermal upgrade to the external walling and the Council’s view is that the work detailed on the approved drawing, being thermal upgrade to accessible roof voids, introduction of thermal separation to the conservatory attached to number 5, replacement windows to number 4 together with the upgrade of the inefficient gas fired boilers particularly within number 4, demonstrated reasonable compliance with Regulation L1.

It is believed that the Council has demonstrated flexibility in its interpretation and would be happy to review alternative proposals that support reasonable compliance.”

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 first considered whether there had been a material change of use.

Regulation 5(g) of the Building Regulations 2010 states that a material change of use occurs where a building which contains at least one dwelling contains a greater or lesser number of dwellings than it did previously. Numbers 4 and 5 were before conversion two separate dwellings. The conversion, which consists of removing part of the dividing wall on both the ground and first floor, means that they are now a single dwelling. The Secretary of State has concluded that a material change of use under regulation 5(g) has occurred. In such cases the relevant provisions of regulation 6 will need to be complied with. Regulation 6 requires compliance with requirement L1.

The guidance in Approved Document L1B sets out reasonable provision for demonstrating compliance with requirement L1 (Conservation of fuel and power) of Schedule 1 to the Building Regulations 2010. In further considering the appeal, the Secretary of State notes that the thermal performance of some retained elements of the building is below the threshold values set out in Approved Document L1B.

The appellant does not want to upgrade thermally the retained external walling and the Council's view is that thermal upgrade to accessible roof voids, thermal separation to the conservatory to number 5, replacement windows to number 4 together with the upgrade of inefficient gas fired boilers, particularly that within 4 Rose Cottages., would as an alternative, demonstrate reasonable provision for demonstrating compliance with requirement L1 in this case.

The Secretary of State is of the view that the Council has been flexible in its interpretation of the applicable requirements of L1 of Schedule 1 and reasonable in its offer of an alternative option for demonstrating compliance. The replacement of two existing boilers with A rated condensing boilers is likely to be less disruptive and potentially less costly than thermally upgrading the retained external walls.

In its letter to the appellant of 21 October 2014, the Council says it would be happy to review further alternative proposals that support reasonable compliance. On this, Approved Document L1B includes an option, at paragraph 4.16, to provide flexibility when carrying out a material change of use to show that reasonable provision has been made for the conservation of fuel and power in requirement L1 of Schedule 1 to the Building Regulations 2010. This allows the Government's Standardised Assessment Procedure (SAP) for the Energy Rating of Dwellings to be used as an option to show that the calculated carbon di-oxide (CO₂) emissions from the converted dwelling are no greater than had it been improved to the standards set out at paragraph 4.15 in the Approved Document.

This option would require a SAP calculation to be carried out and there is no guarantee that any potential compliance solution would be less disruptive or less costly than the alternative compliance option that includes replacing existing boilers with A rated condensing boilers as offered by the Council.

In considering the argument that the existing boilers would have be replaced with A rated condensing boilers in the future, the Secretary of State notes that the replacement boilers have been suggested by the Council as an alternative compliance solution and would need to be completed at the same time as the

change of use work before a completion certificate could be issued by the Council.

In considering the further argument that the appellant's particular occupancy of the new dwelling would result in reduced savings from replacement A rated condensing boilers, the Secretary of State observes that it is not possible to speculate about future changes of occupancy. The savings from A rated condensing boilers are based upon a standardised occupancy related to the type and size of home and are generally considered to be reasonable provision for demonstrating compliance with requirement L1 (Conservation of fuel and power) of Schedule 1 to the Building Regulations 2010.

The Secretary of State has therefore concluded that it would not be unreasonable in the circumstances of this case to require the replacement of the existing boilers in 4 and 5 Rose Cottages with A rated condensing boilers as a way to comply with requirement L1.

The Secretary of State's decision

The Secretary of State considers that compliance with requirement L1 (Conservation of fuel and power) of Schedule 1 to the Building Regulations 2010 applies to the building work in question and, as such, he would normally only consider it appropriate to relax or dispense with it in exceptional circumstances. As indicated above, he considers that a sufficient case has not been made to relax the requirement in this case. He has therefore concluded that it would not be appropriate to relax requirement L1 (Conservation of fuel and power) of Schedule 1 to the Building Regulations 2010. Accordingly, he dismisses your appeal.

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.