The Planning Inspectorate

Appeal Decision

Inquiry held on 6 December 2016 and 31 January 2017
Site visit made on 6 December 2016

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 7 February 2017

Appeal Ref: APP/T5150/C/15/3138227
33 Humber Road, London NW2 6EN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Nathan Kuflik against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice was issued on 2 October 2015.
- The breach of planning control as alleged in the notice is:
  Without planning permission, the unauthorised material change of use of the premises from a single family dwellinghouse to five flats. AND
  Without planning permission, the erection of a single storey rear extension of the rear of the premises to facilitate the conversion of the property to five flats.
- The requirements of the notice are:
  STEP 1. Demolish the single storey rear extension, remove all items and debris arising from that demolition and remove all materials associated with the unauthorised development from the premises.
  STEP 2. Cease the use of the premises as five flats and its occupation by more than ONE household, remove all items, materials and debris associated with the unauthorised change of use, including all kitchens, except ONE, and all bathrooms, except TWO, from the premises.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice upheld.

Applications for costs

1. At the Inquiry applications for costs were made by Mr Nathan Kuflik against the Council of the London Borough of Brent and by the Council of the London Borough of Brent against Mr Nathan Kuflik. These applications are the subject of separate Decisions.

Background and procedural issues

2. No.33 is a terraced 2-storey property on the south-east side of Humber Road. It was purchased by the appellant in late April 2014, and work was commenced in 2014 to enlarge the premises. At the date of issue of the Notice it provided accommodation comprising 5 units. The use of the term 'unit' is intentionally neutral and does not imply either a self-contained flat or a room in a House in Multiple Occupation (HMO). It is also the term used by the builder who provided an estimate for works to be undertaken.

3. It is common ground that No.33 was leased to a property management company, Milton Properties Limited, on 1 October 2014 and that from about that date it has been occupied by 5 tenants, who have exclusive use of a unit behind a locked door. This occupation by 5 tenants appears to have subsisted at the time the Enforcement Notice (the Notice) was issued on 2 October 2015.

4. It is also agreed by the parties that whether or not the units are part of an HMO or are self-contained flats in their own right depends, in part, on the provision or otherwise of 3 basic amenities. Section 254(8) of the Housing Act 2004 defines basic amenities as (a) a toilet, (b) personal washing facilities, and (c) cooking facilities. Each of the five units has its own toilet and personal washing facilities. What is at issue is whether or not each unit had exclusive cooking facilities at the time the Notice was issued. Legal opinions submitted by the appellant say that the use of a 'plug in' appliance for the heating of food is sufficient to amount to 'cooking facilities'. Thus in turn if these are absent the unit is not a self-contained flat. There is no dispute that the other limitations in Section 254 are met.

5. The Courts have held that the appellant's own evidence does not need to be corroborated, particularly if it is unchallenged, in order to be accepted[1] However in an enforcement appeal the onus of proof is firmly on the appellant to provide evidence which is sufficiently precise and unambiguous. The test of the evidence is the balance of probabilities.

6. All evidence at the Inquiry was made on oath or by way of affirmation.

The appeal on Ground (b)

7. Under this ground of appeal the appellant must demonstrate that the alleged breach of planning control has not occurred as a matter of fact. It was agreed at the Inquiry that the arguments under this ground are in connection with the alleged material change of use only. It is acknowledged, as a matter of fact, that the operational development, namely the erection of a single storey extension, has occurred.

8. The appellant's case is that the 5 units are not capable of self-containment because there are no cooking facilities in the rooms and because a kitchen has been provided which all the tenants can use. Thus he says the units are part of an HMO because the units do not provide all the 3 basic facilities. In support of this he submitted floor plans that indicate a communal kitchen on the first floor of No.33 and evidence of an HMO license. Moreover reliance is placed on two appeal decisions[2] and what he says are similar circumstances in other properties that he owns.

9. The Council accepts that they were not able to inspect the units prior to issuing the Notice and thus were not able to obtain first hand evidence of cooking facilities in any of the units. The enforcement officer logs a series of 5 unsuccessful visits and records that even when a Notice of Entry letter was obtained, the builder on the site did not allow access. Mr Wicks said at the Inquiry, on behalf of the Council, that several attempts had been made to contact Milton Properties Ltd to arrange access to the interior but that these attempts had also been unsuccessful.

[1] *Gabbitas v SSE & Newham LBC* [1985] JPL 630
[2] Appeal decisions dated 12 October 2016 (Short references 3146056 & 3146057) (the 'Preston' decision) and dated 28 June 2016 (Short references 3137773, 3137866 & 3137867) (the 'Woolnough' decision)

10. Consequently the appellant is correct that the Council has not inspected the internal layout or seen for itself the basic amenities that were available at the time the notice was issued. Thus this lack of first hand evidence weighs in favour of the appellant's testimony.

11. However, neither of the appellant's witnesses, Mr Kuflik, the appellant, nor Mr Ormonde, his agent, appeared to be familiar with No.33. Thus although their respective proofs said in terms that there were no cooking facilities in the separate units, Mr Ormonde did not visit No.33 until after the issue of the Notice and Mr Kuflik was content to leave all the day-to-day management to Milton Properties Limited. Indeed there is no evidence before me that the appellant ever visited the property before the Notice was issued. No written or verbal evidence was provided to the Inquiry by the management company other than a general letter about the role of such housing for persons who cannot provide security deposits. Consequently neither main party was able to provide first hand evidence of the availability or otherwise of cooking facilities in the units.

12. The only first hand evidence of the layout of No.33 was given by a neighbour. She said, under oath, that she had visited the premises shortly after the completion of the building work and also had subsequently gone into one of the units to visit a tenant. Whilst she did not refer to cooking facilities as such, she had no doubts that the building was in use as separate flats[3].

13. In these circumstances it is necessary to turn to the documentary evidence at the Inquiry. This includes the 2 quotations for the building work. The earliest of these is dated 5 May 2014 and this was a quote for use of No.33 as a 3 bedroom house. The later quote, dated 25 July 2014 is for the creation of 5 units each with its own WC and shower and also including a communal kitchen. There is little or no evidence whether or not either 'job' proceeded in accordance with the quotes and the builder did not give evidence to the Inquiry. Thus I can only give limited weight to these documents.

14. The second group of the documents are the submitted plans. These show an 'existing layout' and a 'proposed layout'. The plans are undated and show no company name or identifying features. Mr Kuflik said that the plans formed part of the purchase package and he did not know if they accurately represented the existing or the proposed layout. However he conceded that the 'existing layout' plan showed No.33 arranged as 2 flats and the 'proposed layout' showed 5 units. Neither plan showed the property arranged as a C3 dwelling. Mr Ormonde did not visit the property until after the Notice was issued and thus could not provide first hand evidence about the layout and facilities at the relevant time.

15. The third item of evidence is the lease to Milton Properties Ltd. This says at paragraph 6.12 that the Lessee covenants to use reasonable endeavours to prevent any tenant from cooking or using any cooking facilities outside the communal kitchen. This lease has some weight but is a statement of intent rather than factual evidence. The subsequent invoice for building work after the issue of the Notice seems to suggest that 'reasonable endeavours' were insufficient to prevent tenants cooking in their individual units. This possibility is lent support by the evidence I saw at the site visit which demonstrated that

[3] In her written submissions Mrs Dever referred to No.33 as an HMO, but her evidence under oath was that it was divided into flats.

one or more of the tenants continues to have his own or her own individual cooking appliances. The work undertaken in late 2015 included the removal of power points above the worktops in each of the units and an upgrade of the fire alarm system so that cooking in rooms could be detected.

16. Four individual affidavits have been submitted, the typed wording of all of these is identical and it seems doubtful that they were individually drafted by the tenants who signed the declarations. These all said that "the only cooking facilities I am permitted to use and am using is the one in the communal kitchen on the first floor." These declarations were made after the Notice was issued and they are expressed in the current tense. Whilst the appellant says that this is not significant, the normal meaning of phrases written in the current tense is that they relate to 'present circumstances' rather than historic events. None of the tenants attended the Inquiry.

17. Finally, the appellant provided a copy of a (draft) HMO licence dated 13 July 2015. This says that Milton Properties would be the beneficiaries of the licence and the overall occupancy of the property would be restricted to a maximum of 5 persons. Irrespective of whether or not the licence was subsequently confirmed, such licenses can equally be issued in circumstances described by S257 of the Housing Act to properties that have been converted into self-contained flats.

18. Thus the appellant's evidence is ambiguous at best because he did not provide any first hand evidence of the use of No.33 at the time the Notice was issued and by his own admission is not familiar with the property and how it is occupied on a day-to-day basis. None of the documents provide cogent evidence that cooking facilities were not being used in the units at the time the Notice was issued.

19. Turning to the Council's evidence, this relies heavily on the applications for housing benefit submitted by the tenants. It appears that these forms are web based forms filled in remotely or alternatively in the Council offices where computers are provided for use by members of the public. Four applications have been submitted as evidence. In all cases the tenants declared that they had, as a minimum, the following rooms which were used only by the tenant: 1 bedroom, 1 kitchen, 1 bathroom and 1 toilet. In terms of two units on the first floor, the tenants also said that they had exclusive use of a sitting room. Crucially none of these tenants stated that they shared any rooms in No.33; on the contrary all the tenants declared that there was no shared use of any kitchen. On the basis that the four units all had exclusive use of a bedroom, kitchen, bathroom and toilet, housing benefit was paid at the rate applicable to a self-contained unit. This is not challenged by the appellant.

20. In each case these applicants for housing benefit were still tenants in No.33 at the date of issue of the Notice[4]. For this reason, on the balance of probability, the accommodation as described in the housing benefit applications would be unchanged. There is no counter evidence to suggest otherwise. Indeed this conclusion is given additional weight by reason of the fact that the property was classified for the purposes of the Valuation Office as 5 separate flats with effect from 2 September 2014.

[4] As confirmed by the affidavits and/or tenancy agreements submitted by the appellant.

21. Notwithstanding the suggestion that these forms were inaccurate and that all the 'drop down menus' were not printed in full, the tenants had no reason to provide misleading information as the housing benefit was paid directly to the landlord. In each case the claimant had to declare that the evidence provided was correct and complete[5]. The appellant has suggested that this information should be excluded on the grounds that it breaches the privacy of the individuals concerned, but matters of data protection are outside my remit and can be pursued, if appropriate, by other means. Thus there is no cogent reason to exclude such information which provides contemporaneous evidence of the units in the period before the Notice was issued.

22. The Council also says that the works undertaken to remove worktop power points in each unit, and the upgrading of the fire detection equipment which took place after the Notice was issued, indicate that cooking was taking place other than in the communal kitchen. The timing of this work is not disputed but all it indicates is that the ability to cook within the units was compromised from late 2015. It does not, on its own, demonstrate that cooking was actually taking place within the units at the date of the issue of the Notice, only that at that time would have been easy to plug in a portable hob or other cooking appliance. However, when looked at in the context of the declarations on the housing benefit forms, this adds weight to the Council's allegation.

23. I have taken account of the appeal decisions by Inspector Preston and Inspector Woolnough relied upon by the appellant. But in both cases I find that the circumstances were materially different to those before me. This is because of the direct testimony in those appeals, given by tenants amongst others, and an apparent lack of evidence to support the Council's case. This includes in the 'Woolnough' appeals, a lack of information on housing benefit which he described as "conspicuous by its absence"[6]. Nor do I find the evidence of other properties in the appellant's ownership to be persuasive, because both of these were concerned with proposed development rather than a property subject to enforcement action. In any event it is a well established principle that an appeal must turn on its own facts.

24. Neither main party has been able to provide first hand knowledge of the use of cooking faculties in the units at the date of the issue of the Notice, thus I must rely on documentary evidence. For the reasons I have given above, I find that the documents provided by the appellant are inconsistent and vague at best. I similarly find that the Council's evidence is sparse. However, on the strength of the housing benefit applications which provide probably the sole independent evidence and in the light of *Gabbitas*, I find, on the balance of probabilities, that the appellant's evidence is not sufficiently precise and is both inconsistent and ambiguous. Consequently the onus of proof has not been discharged.

25. I thus conclude, that the balance of evidence suggests that when the Notice was issued, each of the units had the 3 basic amenities defined by Section 254(8) of the Housing Act 2004. Hence in turn, on the balance of probabilities, the use of No.33, at the time the Notice was issued was as 5 flats. Consequently the appeal on Ground (b) fails.

[5] The wording of the declaration is set out in full in the application by the tenant of Flat 3
[6] Paragraph 20 appeal short references 3137773, 3137866 & 3137867 (the 'Woolnough' decision)

The appeal on Ground (c)

26. Ground (c) arises where an appellant seeks to argue that the matters alleged by the enforcement notice do not constitute a breach of planning control. As with Ground (b) the onus of proof lies with the appellant, the relevant test of the evidence being the balance of probability. Both parts of the allegation are subject of this ground of appeal and I consider these in turn below.

Alleged change of use

27. The appellant says that his intention was to purchase a property suitable for converting and letting as an HMO. He said at the Inquiry that he did not visit No.33 at the time of purchase in April 2014 and does not know how it was laid out. However, as I have noted above, plans he has submitted as part of his appeal show an 'existing property' laid out as two flats, one on the ground floor and one on the first floor. This may suggest that at the time of purchase No.33 was not in use as a single dwelling house. Council tax records also show that at some stage No.33 was in use as two flats but it is not clear at what date this use commenced or ceased. However the appellant's evidence is internally contradictory because the builder, Mr Stern says in his statutory declaration dated 27 October 2015 that before he carried out the work to No.33 it was in use as a single dwelling house. Thus the evidence before me is inconsistent and unreliable.

28. Section 55(1) of the TCPA[7] says that development includes the material change of use of any buildings or other land. Section 55(3)(a) of the TCPA says that the use as two of more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used. Consequently if No.33 was in use as 2 flats prior to its conversion to 5 flats, that change comprises a material change of use. In the alternative, even if No.33 was in use as a single dwelling house, a change of use to 5 flats is similarly a material change of use.

29. Section 57(1) says that planning permission is required for any development of land other than in respect of specified exceptions none of which applies. Section 171A (1)(a) of the TCPA says that the carrying out of development without the required planning permission constitutes a breach of planning control. Because no such planning permission was granted the alleged change of use from 2 flats, or alternatively from a single dwelling house to 5 flats, is a breach of planning control.

The extension

30. The builder, Mr Stern, provided a statutory declaration which says that "he did the building work…between April 2014 and October 2014". Mr Kuflik says in his replies to the Planning Contravention Notice (PCN) that the building work took place between May and September 2014.

31. Neither Mr Kuflik nor Mr Ormonde were able to explain why these dates are inconsistent nor provide any more details of the timing of the building work at No.33. However the appellant says that the extension was constructed when the building was still a dwelling house and in support of this he provided a letter from an interested buyer and an estimate for refurbishment and extension of No.33 as a house.

[7] Town and Country Planning Act 1990 as amended

32. However this evidence is challenged by the Council who says that the first evidence of building work was on 19 August 2014 when it received a complaint about works to erect a single storey rear extension. Although the builder refused access to Council officers, the enforcement officer's notes say that on 10 September 2014 a single storey extension was being erected and it was possible to see this from an adjoining road. There is no reason to doubt this statement because the rear extension is today clearly visible from Tankridge Road because the ground rises to the south-east. At about the same time a complaint was received alleging that No.33 was being used as 5 self-contained flats. Thus this evidence suggests that the extension works were undertaken in parallel with the conversion of the main house.

33. Moreover, there is nothing in the PCN or in the builder's statutory declaration to suggest that the work to erect the rear extension was substantially complete prior to the conversion works to provide 5 units. Both suggest that the works of conversion and extension were carried out together. Similarly it is highly improbable at best, for the reasons I have given above, that the first tenants shared any basic amenities and thus there is no cogent evidence to suggest that at the time the rear extension was constructed No.33 was in use as a C4 HMO.

34. Mr Kuflik acknowledged that he did not visit the premises at the time of his purchase and that he left day-to-day management of his properties to others. He was unable to verify the timing of the works or to explain inconsistencies in his evidence. In these circumstances I give greater weight to the Council's evidence and the testimony of neighbours who report that the extension and the conversion works appear to have been developed as one building operation.

35. Section 57(1) says that planning permission is required for any development of land other than in respect of specified exceptions. One such exception is where planning permission has been granted by a development order. The appellant says that the extension was built while the premises were in use as a single dwellinghouse and so benefited from the deemed permission conferred by Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order[8] (GPDO). However, on the balance of probability, I find that the extension was carried out as part of the works to create the 5 units. In these circumstances the extension does not benefit from that exception.

36. Consequently, both the change of use and the construction of the single storey extension required an express planning permission. Section 171A (1)(a) of the TCPA says that the carrying out of development without the required planning permission constitutes a breach of planning control. In the absence of any such permission the appeal on Ground (c) fails.

The appeal on Ground (f)

37. Ground (f) is where an appellant seeks to argue that the steps required by the Notice exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy the injury to amenity which has been caused by

[8] At the date the extension was constructed this was the Town and Country Planning (General Permitted Development) (England) Order 1995 (as amended) but the relevant provisions were subsequently amalgamated into the 2015 order.

any such breach. In this appeal the requirements seek two steps. The first step requires the demolition of the rear extension (operational development) and the second step requires the cessation of the alleged change of use. In this case therefore the primary purpose of the Notice must be to remedy the breach and this is confirmed in the Council's evidence.

The extension (Step 1)

38. In terms of the first step the appellant says that the extension was erected with the benefit of permitted development rights enshrined in the GPDO. However for the reasons I have given above the evidence shows that the building works were part and parcel of the development involving the provision of 5 flats. Thus I do not need to revisit this.

39. The appellant further says that the removal of the extension would be a disproportionate interference with his human rights under Article 1 of the First Protocol to the ECHR[9]. This is because the extension could lawfully be re-erected immediately after demolition if the premises were then in a C4 use. But no alternative lesser step is proposed other than the deletion of the requirement in its entirety. Moreover because there is no Ground (a) appeal the merits do not fall to be considered.

40. I have considered the 'fall back' position as an 'obvious alternative' but, as the Council has noted, the materials used in the extension do not match the appearance of those used in the construction of the exterior of the dwellinghouse. In these circumstances the as-built extension does not meet Condition A.3 (a) of Schedule 2 Part 1, Class A of the GPDO. Thus even if the premises had been in C3 or C4 use at the time the extension was erected, the development would not have been permitted development. In any event, the deemed consent conferred by the GPDO cannot be granted retrospectively.

41. Article 1 of the First Protocol says that the right for peaceful enjoyment of possessions does not impair the right of the decision maker to enforce such laws as it is deemed necessary to control the use of property in accordance with the general interest. The retention of the extension would jeopardise the Council's policies to retain lower cost accommodation and the breach of planning control would not be remedied. Although Article 1 of the First Protocol is engaged the remedy in Step 1 is in the general interest of proper planning and is proportionate to remedy the breach of planning control thus the appeal in relation to Step 1 fails.

Cessation of use (Step 2)

42. The appellant acknowledges that the works to create 5 units were undertaken as part of the building operations by Mr Stern in 2014. Thus as a matter of fact the kitchen fittings and bathrooms together with other items were installed to facilitate the unauthorised use. However the appellant says that the requirements go beyond what is necessary and reasonable and the removal of power points at work top level and alterations to the fire alarm system are sufficient to ensure that the use as 5 separate units ceases.

43. The Courts have held[10] that where a Notice is issued alleging a change of use, its requirements may demand the removal of works integral to and solely for

[9]European Convention on Human Rights
[10] *Somak Travel v SSE and LB Brent* [1987] JPL 630

the purpose of facilitating that use. There is no evidence that the works were undertaken for a different and lawful use, and on the contrary there is no doubt that the works referred to in the requirements facilitated the unauthorised use. In these circumstances their removal is necessary and proportionate to remedy the breach of planning control.

44. Although Article 1 of the First Protocol is engaged the remedy in Step 2 is also in the general interest of proper planning and is proportionate to remedy the breach of planning control thus the appeal in relation to Step 2 similarly fails.

45. Accordingly the appeal on Ground (f), both in respect of Step 1 and Step 2 does not succeed.

The appeal on Ground (g)

46. The appellant says that 9 months are required to ensure that tenants have time to relocate and vacant possession is secured. But I note that the letter submitted by the letting agent, Mr Krausz (Milton Properties), suggests that letting arrangements are flexible and may proceed without security deposits.

47. The Inquiry was told that all the current tenants have changed since the issue of the Notice and the tenancy agreements submitted as evidence have all expired. Thus I have no details of the terms of the tenancies held by the current occupiers, or the arrangements in place governing the occupation of units. Thus there is little or no evidence in relation to matters such as the duration of the tenancy agreements, if any, or any notice period.

48. The Council say that there is a demonstrable stock of properties that could provide alternative accommodation at or below the level of the lease granted to Milton Properties. This evidence has not been challenged by the appellant.

49. In these circumstances, on the information before me, a period of three months is necessary and reasonable to secure compliance with the notice so the appeal on Ground (g) fails.

Formal decision

Appeal Ref: APP/T5150/C/15/3138227

50. The appeal is dismissed and the enforcement notice is upheld.

Sukie Tamplin

INSPECTOR

51.
APPEARANCES

FOR THE APPELLANT:

Saira Kabir Sheik QC	Of Counsel instructed by Alvin Ormonde, Planning and Management Services
She called	
Nathan Kuflik	Appellant in person
Alvin Ormonde	Proprietor, Planning and Management Services

FOR THE LOCAL PLANNING AUTHORITY:

Edmund Robb	Of Counsel instructed by London Borough of Brent
He called	
Nigel Wicks MRTPI	Director, Enforcement Services Ltd

INTERESTED PERSONS

Marisa Dever	Local Resident

DOCUMENTS submitted at the Inquiry

1 Letter dated 29 December 2015 submitted by Abraham Krausz, Letting Agent.
2 Closing statement by the London Borough of Brent
3 Closing statement by the appellant
4 Skeleton costs application by the appellant.