The Planning Inspectorate

Appeal Decision

Inquiry held on 10 November 2016
Site visit made on 10 November 2016

by Paul Freer BA (Hons) LLM MRTPI

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

Decision date: 03 January 2017

Appeal Ref: APP/T5150/C/16/3142994
Land at Flats 1-7 and Garden Flat, 664 North Circular Road, Neasden, London NW2 7QJ

- 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 Mordechai Aksler against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice was issued on 15 December 2015.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use of the premises to eight flats.
- The requirements of the notice are:

  Step 1 Cease the use of the premises as flats and its occupation by more than one household and remove all items, debris and materials associated with the unauthorised use of the premises.

  STEP 2 Remove all cooking facilities from the main dwelling, except ONE kitchen, and all bathrooms, except TWO, and all partitions, so the layout of the premises reflects that of a single family dwellinghouse, including the provision of a kitchen, lounge and dinner room on the ground floor of the premises.

  STEP 3 Remove all cooking facilities, bathrooms, fences, fixtures and fittings associated with the unauthorised use from the building in the rear garden of the premises.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

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

Application for costs

1. At the Inquiry an application for costs was made by Council of the London Borough of Brent against by Mr Mordechai Aksler. This application is the subject of a separate Decision.

Procedural matters

2. Although included in the context of the appeal on ground (d), the points made in the Proof of Evidence of Mr Ormonde, on behalf of the appellant, relate more to an appeal on ground (c). The Council was able to respond to the points raised by Mr Ormonde, both in cross-examination and in submissions. I am therefore satisfied that the Council would not be caused injustice by

considering the points raised in Mr Ormonde's Proof of Evidence as an appeal on ground (c).

3. Because the grounds of appeal rely on matters of fact, the evidence of all witnesses was taken on oath by way of affirmation.

The appeal on ground (c)

4. On this ground of appeal the onus is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control. The essence of the appellant's appeal on this ground is that no development or material change of use has occurred by the refurbishment of the property.

5. In considering the appellant's case on this ground of appeal, it is first necessary to record that the appellant has not made an appeal on ground (b) and, as confirmed by Mr Ormonde in cross-examination, accepts that the allegation in the notice has occurred as a matter of fact. The change of use of the premises, which the appellant contends does not amount to a material change of use, is therefore the change to use as eight flats: seven in the main part of the property, plus the garden flat. This is the benchmark against which an assessment has to be made as to whether the change of use from the last lawful use of the premises was material or not.

6. This was not, however, the situation at the time of my site visit. The main part of the property was not arranged as seven flats, but as five bedsit rooms and communal cooking facilities in two rooms. At the time of my visit, five of bedsit rooms were occupied by tenants that were unrelated to each other. These rooms were numbered 1 to 5 inclusive. Each of these rooms featured a lockable door but I was able to gain access only to four of them, the fifth being locked. Each of these rooms had a fridge, a sink and a washing machine but none had cooking facilities. Each room also featured a separate space within it incorporating a shower and a toilet.

7. Cooking facilities, comprising a conventional oven plus a microwave oven with hobs on top, were provided in a communal kitchen on the first floor. This room was not numbered but the door clearly showed the outline of a previous number, that being the number 4. A second room on the first floor, numbered 6, also featured 2 microwave ovens as well as a sink and a washing machine. At ground floor level, there were a total of eight electrical boxes and one control unit in the entrance lobby, although it was not apparent which rooms these electrical boxes served.

8. The appellant explains in his written evidence that when he purchased the property it was laid out as a self-contained dwelling on the ground floor and occupied by a Mr Faruku. The remainder of the property was at that time in use as a House in Multiple Occupation (HMO) with shared toilet facilities. At the Inquiry, Mr Aksler explained that the only cooking facilities were in a communal kitchen on the ground floor which, he believes, may also have been used by the occupier of the self-contained flat. Mr Aksler went on to explain that he purchased the property in 2013 and began the conversion works soon after, including the relocation of the communal kitchen to the first floor. All other works were carried out in 2014.

9. I have no reason to doubt that the use described by Mr Aksler, on oath, is an accurate description of the use of the property at the time he purchased it. However, that does not necessarily mean that this was the lawful planning use of the property. To ascertain whether that was the case, it is necessary to look at other evidence.

10. The Council confirm that there is no record of planning permission being granted for the use described by Mr Aksler. However, in June 2005, planning permission was granted for a single storey rear extension and a rear dormer window at the property (Council Ref: 05/0053). The application form just identifies the site as 664 North Circular Road, with no mention of being subdivided into flats, the use being simply described as "residential". The existing floor plans show a kitchen on the ground floor and the bathroom on the first floor, all the other rooms simply being numbered. The proposed floor plans also show a kitchen on the ground floor and the bathroom on the first floor, but the rooms on the ground floor are separately identified as being a dining room and a living room. The existing and proposed layouts are therefore indicative of use as a single family dwellinghouse at that time.

11. The above application was submitted on behalf of Mr Faruku, from whom Mr Aksler purchased the property. In his evidence, Mr Aksler explains that, at the time of purchase, Mr Faraku indicated to him that the rooms were numbered on the planning application drawings precisely because the property was operated as a HMO. However, Mr Faruku did not give evidence to the Inquiry and that evidence was not tested. This reduces the weight that I can attach to it.

12. The Council also confirm that there is no history of a HMO licence dating to that period, or any private housing services history to record the use of the premises. The Council Tax records do not indicate use of the property as separate flats or bedists, the first valuation and Council Tax records only being created in 2014 and therefore after, on the appellant's own evidence, the conversion works took place.

13. The plans accompanying the Land Registry Transfer of the registered title show a ground floor layout similar to that submitted with the application for planning permission in June 2005, with a kitchen in the same position and now with two toilets in a rear extension but no bathroom. No first floor layout has been provided. The drawing is titled "HMO Proposal" and, with reference to the date of February 2014, I note not "existing".

14. Also in February 2014, an application under the Building Regulations was submitted on behalf of the appellant for the removal of chimneys and the installation of en-suite bathrooms. The use of the building is described on the application form as a "house".

15. In December 2015, the appellant submitted a planning application for the retention of use as 8 self-contained flats. The applications drawing, dated November 2013, shows a layout of seven flats in the main part of the property, plus the garden flat. This application was subsequently withdrawn. Mr Aksler explained at the Inquiry that he was not satisfied with the service provided by the agent who submitted this application on his behalf indicating, amongst other things, that the agent did not visit the site. Nonetheless, this planning application was submitted by an agent appointed by Mr Aksler to represent him

and I must therefore attach due weight to the drawings submitted with that application.

16. In considering this history of the appeal premises, there is no documentary evidence to indicate that planning permission has been granted for the use described by Mr Aksler comprising of a self-contained flat on the ground floor with a HMO on the upper floors. I have had careful regard to the evidence of Mr Aksler, including the explanation of the use of the property given to him at the time of purchase. However, this evidence was not supported by due diligence conducted at the time of purchase or documentary evidence in terms of tenancy agreements, rent records or a HMO licence covering the period prior to purchase by Mr Aksler and the conversion works that took place in 2013/2014. I also appreciate that Mr Faruku was not a professional landlord and that this might explain the lack of documentation over that period, but this does not assist the appellant in discharging the burden of proof that falls upon him under this ground of appeal.

17. The documentary evidence that is available, particularly the planning permission granted in June 2005, the Land Registry Transfer plan and the description on the Building Regulation application, tends to point to the use of the property as a single-family dwelling. This is therefore not a situation where the local planning authority has no evidence of its own to contradict that of the appellant or make his version of events less than probable. On the contrary, I find that the appellant's evidence is not sufficiently precise to counter the documentary evidence produced by the Council. Accordingly, I conclude that, on the balance of probability, the lawful planning use of the appeal property prior to the conversion to eight flats was as a single dwellinghouse.

18. The assessment that I must make, in terms of determining whether the breach of planning control alleged in the notice constitutes a material change of use, is therefore that from a single dwellinghouse to eight self-contained flats (including the garden flat). In this respect, Section 55(3) of the 1990 Act specifically provides that the use as two or more separate dwellinghouses from any building previously used as single dwellinghouse involves a material change of use of the building as a whole and each part of it which is so used. The change of use of the appeal property from a dwellinghouse to eight self-contained flats therefore constitutes a material change of use that requires planning permission.

19. There was some discussion at the Inquiry as to whether the fencing off of part of the rear garden had created a separate planning unit. However, the identification of the planning unit is only the initial step in assessing whether a material change of use has taken place. In this case, the answer is provided by Section 55(3) of the 1990 Act. As indicated above, this specifically provides that the use as two or more separate dwellinghouses from any building previously used as single dwellinghouse involves a material change of use. It is therefore not necessary for me to consider that matter further.

20. The appellant's main argument in relation to this appeal on ground (c) is that the use of the property as eight self-contained flats has not changed the overall character of the use of the property compared with that existing when purchased by Mr Aksler. The appellant therefore contends that there has not been a material change of use. In support of that, the appellant has referred me to two appeal decisions, one relating to a property in Mornington Crescent

(APP/X5210/C/07/2034125) and one relating to a property in Fellows Road (APP/X5210/C/12/2187790), both in the London Borough of Camden. The appellant also submitted at the Inquiry an appeal decision in relation to two properties in Romford (APP/B5480/C/16/3146056; 3146057), although I note that these appeals both succeeded on ground (b) rather than ground (c). However, given my finding that the lawful planning use of the current appeal property was as a single dwelling, the considerations that resulted in the above appeals succeeding do not apply to this case.

21. I recognise that the property as currently configured more closely resembles the description of the use of the property when purchased by Mr Aksler, insofar as it exhibits some of the characteristics of a HMO. I also recognise that a HMO Licence under the Housing Act 2004 was granted in relation to the property in March 2016. However, comparison with the drawings submitted with the withdrawn planning application reveals that the layout appears to have been altered, at least in relation to the use of the rooms. That drawing, dated November 2013 and titled "Existing Floor Plans", show seven flats in the main part of the building, plus the garden flat as a separate unit. No separate kitchens are shown on the drawing.

22. At the time of my visit, two of those rooms had been converted into communal kitchens. As noted above, there is evidence that the room numbers had been swapped around: the communal kitchen had clearly been previously numbered 4 whereas the second room containing cooking facilities retained the number 6 on the door. The room in the loft space, shown on the drawing as Flat 7, was numbered 4 and there was no room numbered 7. To my mind, this suggests that the two rooms now used to provide cooking facilities may have previously been used as self-contained flats. I must also go back the fact that the appellant did not make an appeal on ground (b) and therefore accepted that the change of use of the premises to eight flats had occurred as a matter of fact. I am therefore satisfied, on the balance of probability, that the layout of the main part of the property as existing at the time of my site visit had been adapted from a layout providing seven flats that existed at the time the enforcement notice was served.

23. If this had been the lawful planning use of the property at the time the enforcement notice was issued, then I accept that this would have required a different approach to assessing whether the change of use to eight flats was a material one, in which I would have had regard to the overall character of the respective uses. However, given my finding that the lawful planning use of the current appeal property was as a single dwelling, that is not an assessment that I need to make in this case.

24. Having regard to all the above, I conclude that the change of the use of the property to eight self-contained flats alleged in the notice is a material change of use and as such constitutes a breach of planning control. Accordingly, the appeal on ground (c) fails.

The appeal on ground (d)

25. The appeal on this ground is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. In order to succeed on this ground, the appellant must show that the use had been continuous for a period

of four years beginning with the date of the breach. The test in this regard is the balance of probability and the burden of proof is on the appellant.

26. In giving his evidence at the Inquiry, Mr Aksler explained that he purchased the property in 2013 and began the conversion works soon after. This was, at best, only some 2 years before the enforcement notice was issued and less than the four years beginning with the date of the breach required for the use to have become immune from enforcement action. On that basis alone, the appeal on ground (d) cannot succeed. However, the timing of the conversion work is corroborated by photographs taken by Council officers during a visit in June 2014, which clearly show conversion works in progress but not complete.

27. Accordingly, the appeal on ground (d) fails

The appeal on ground (f)

28. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach. In this case, the requirements of notice include to cease the use of the premises as flats and its occupation by more than one household. The primary purpose of the notice must therefore be to remedy the breach.

29. This is expressly accepted by the appellant, who concedes that is correct to restore the property to its lawful planning use. However, the appellant points out that a change of use from a dwellinghouse (Use Class C3) to a HMO (Use Class C4) is permitted development under the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) and considers that removing all kitchens save 2 would ultimately achieve the same end, given the current arrangement of the property.

30. However, simply removing all kitchens save 2 would not achieve the purpose of the notice. Moreover, the permitted development rights to change between Use Class C3 and Use Class C4 would only be available to the appellant once the notice has been complied with. The Council indicates that there is no Article 4 Direction in place to remove normal permitted rights and therefore the requirements of the notice would not preclude the appellant from exercising those rights once the notice has been complied with, but the purpose of the notice cannot be achieved until that point is reached.

31. Accordingly, the appeal on ground (f) fails.

The appeal on ground (g)

32. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is 6 months.

33. The appellant explains that securing vacant possession of a property is notoriously difficult, even after a Section 21 notice is served. The appellant

therefore seeks a period of compliance of nine months in which to rehouse the tenants and comply with the notice.

34. I am mindful that the appellant is an experienced landlord and has in interest in several properties. I therefore have no reason to doubt his evidence that securing vacant possession may prove problematic. The Council does not have the benefit of that same experience, and does not have the same intimate knowledge of the properties operated by the appellant as the appellant himself. Accordingly, I attach only limited weight to the Council's suggestion that the tenants at the appeal property could be rehoused in other properties owned or operated by the appellant.

35. Nonetheless, I have not been provided with copies of the tenancy agreements held by the tenants at the appeal property or details in relation to those tenancy agreements. I therefore have no details of the terms of the tenancies held by the current occupiers, particularly in relation to matters such as the duration of the tenancy agreements and the notice periods required by either side. In the absence of that information, I have no means of assessing how problematic it might be to secure vacant possession or how long that might take. I am therefore not persuaded, on the information before me, that a period of nine months is necessary to secure compliance with the notice or that the period of six months specified in the notice is not proportionate to the breach of planning control that has occurred.

36. Accordingly, the appeal on ground (g) fails.

Conclusion

37. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Formal Decision

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

Paul Freer

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Miss Anne Williams	Of Counsel, instructed by Mr Alvin Ormonde, Planning and Project Management Services

She called

Mr Mordechai Aksler	Appellant
Mr Alvin Ormonde	Planning and Project Management Services

FOR THE LOCAL PLANNING AUTHORITY:

Mr Edmund Robb	Of Counsel, instructed by Mr Timothy Rolt, Head of Enforcement

He called

Mr Nigel Wicks MRTPI	Enforcement Services Limited

DOCUMENTS SUBMITTED AT THE INQUIRY

1/ Appeal decision dated 12 October 2016 in relation to 53 Sheffield Drive, Romford RM3 9YB (APP/B5480/C/16/3146057) and 79 Sheffield Drive, Romford RM3 9YB (APP/B5480/C/16/3146056).

2/ Copy of Policy H6 of the London Borough of Brent Unitary Development Plan, 2004.