
Appeal Decision

Site visit made on 12 September 2016

by George Mapson DipTP DipLD MRTPI

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

Decision date: 21 September 2016

Appeal Ref: APP/N5090/C/15/3141070

Flat B, 46 Long Lane, London, N3 2PU

- 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 Michael Wilson against an enforcement notice issued by the Council of the London Borough of Barnet.
 - The Council's reference is 16/00042/ENF.
 - The notice was issued on 16 November 2015.
 - The breach of planning control as alleged in the notice is: *Without planning permission, the sub-division of the flat to form two self-contained units of residential accommodation.*
 - The requirements of the notice are: *Restore the land to the state in which it was prior to the breach of planning control by converting the dwellings back into a single flat and fully removing the (sic) all but one set of kitchen facilities (including kitchen units, sinks, cookers and food preparation areas.*
 - The period for compliance with the requirements is four months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.
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Decision

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

Preliminary matters

The land to which the enforcement notice relates

2. Nos. 46 and 48 Long Lane are a pair of two-storey semi-detached houses, which were originally built as single dwellinghouses. The front doors of these properties are now numbered "46ABC" and "48ABC", indicating that each property contains three flats.
3. In Section 2 of the enforcement notice, and the attached plan, Flat B, 46 Long Lane is identified as the land to which the notice relates.
4. However, on the appeal form (*Section D. Appeal Site Address*) the appellant has given his own address, and the address of the land affected by the notice, as Flat B 48 Long Lane. This appears to be an error. Elsewhere in Section D the appellant states that his interest in the land/building is "Mortgagee".

The deemed application

5. The appeal was made on ground (d) only, but in an email to the Planning Inspectorate dated 17 February 2016 the appellant confirmed that he wanted to add an appeal on ground (a). In an email to the Planning Inspectorate of 26 February 2016, the Council confirmed receipt of the appellant's payment of the correct fee for the deemed planning application.

6. Despite the Planning Inspectorate's emails to the appellant dated 20 April 2016, 19 May 2016 and 20 June 2016 requesting the submission of information to support the ground (a) appeal - and agreeing revised deadlines for submission - no supporting information has been received. Accordingly, the appeal on ground (a) and the planning merits of the deemed planning application cannot be considered.

The site visit

7. On the appeal form and questionnaire the parties have ticked the boxes that asked if it is "*essential for the Inspector to enter the premises to check measurements or other relevant facts*". An accompanied site visit was therefore arranged for Monday 12 September 2016 at 11:00, but neither the appellant nor a representative of the Council attended and I was unable to see inside the building.
8. The appellant does not contest the allegation that a material change of use by the subdivision of the building has occurred. The only ground of appeal for me to consider is ground (d), where the decision turns on the evidence as to when that material change of use occurred. I am therefore satisfied that I can determine the appeal on the information provided.

Background

9. According to the Council's Delegated Report of 13 November 2015 (which carries the reference ENF/0086/15), Flat 46B occupies the 1st floor of the building. The report says that the "*building as a whole [meaning No. 46] previously consisted of 3No. self-contained flats. The unauthorised sub-division has resulted in 4No. flats.*"
10. The report says that on 8 September 2015 an officer gained entry to the appeal building "*with one of the freeholders*" and saw that Flat 46B had been converted into two flats, one of which was seen to be occupied by two tenants. It goes on to say that the "*owner (presumably the person referred to previously as the 'freeholder') claims that the works were carried out by the leaseholder without his consent and he is unable to contact him.*"
11. In the report's planning appraisal, the officer argues that the creation of an additional flat is "*an over-intensive use of the site*" and that "*an inspection of the property has indicated that insufficient floorspace has been provided*" to meet the space standards for a 1 bed 1 person flat (37sqm) or a 1 bed 2 person flat (50sqm) that are set out in the London Plan (2015).

The appeal on ground (d)

12. An appeal on ground (d) is that at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice.
13. The notice was issued on 16 November 2015. The time limit for taking enforcement action against the change of use of a building, or part of a building, to use as a single dwellinghouse is four years¹. Therefore, the relevant date for the purposes of this appeal is 16 November 2011.

Evidence and burden of proof

14. Where an appeal is made on legal grounds only, the decision depends entirely on factual evidence about the history and planning status of the building, structure or land in question and the interpretation of any relevant planning law or judicial authority. The planning merits are not relevant and are not therefore an issue for me to consider.

¹ The four-year period in section 171B(2) of the Act applies to notices alleging a material change of use by the subdivision of a residential building. "*Building*" is defined in section 336 as including any part of a building, and flats are dwellinghouses for the purposes of the Act (but not the GPDO). Each subdivided unit has the protection of the four-year rule (*Van Dyck v SSE, Doncaster MBC v SSE* [1993] JPL 564).

15. The burden of proof regarding decisive matters of fact rests on the appellant. He has asserted that the development is lawful and thus immune from enforcement action. He must therefore adduce enough relevant, clear and unambiguous evidence to demonstrate the truth of that assertion. The relevant test of the evidence is 'the balance of probability' (i.e., that it is more probable than not).

General principles relating to a change of use to a self-contained flat

16. With a change of use to a self-contained flat or a single dwellinghouse, deciding the date on which the four-year period will begin to run involves looking firstly, at the physical works – the date the premises were capable of providing viable facilities for self-contained living, rather than the date when all the works were completed – and secondly, when the use actually commenced.
17. In conversion cases it is a matter of fact and degree as to when the change of use occurs, and it would be incorrect to simply regard the commencement of the actual residential use after the conversion as giving rise to the change of use.
18. The next matter to consider is whether, once the residential use of the flat had begun, occupation was continuous throughout the four-year period to the extent that the Council could have taken action against it at any time.
19. The correct approach is to establish whether there was any period during the four years when the building was not physically occupied, even though available for occupation. It is also necessary to establish whether the periods of non-occupation were *de minimis*² or not. Even though a building might be fitted out for residential use, the question to be answered is whether it had been actually used as a dwelling for a continuous period, apart from *de minimis* breaks.

The appellant's case

20. The appellant's case is set out firstly, on the appeal form (*Section E. Grounds and Facts*); and secondly, in an email to the Planning Inspectorate dated 9 February 2016.
21. In Section E of the appeal form, the appellant states that: "*The reason for issuing the notice is factually incorrect.*"
22. In his email of 9 February 2016, he states that: "*The present use has been carried out continuously in excess of 10 years [see footnote 1] by occupation of tenants. The property from which it was first purchased on (sic) 2002 has always had two separate entrances which are still unchanged and have continued to function separately from that time. I trust this is sufficient information for your consideration – please advise if you require any further details.*"

The Council's case

23. The Council's case is that the appellant has failed to produce any evidence in support of his claim that the present use of the 1st floor is immune from planning control. There are no planning or building control records to indicate when the subdivision of No. 46 into two flats occurred or when the subsequent subdivision of Flat 46B took place.
24. The Council's documentary evidence includes:
- 1) A copy of the Council Tax Valuation List (last updated 21/03/2016) which shows that No. 46 Long Lane contains one ground floor flat and one 1st floor flat, each being within Council Tax Band D³. It also shows that No. 48 contains three flats

² An abbreviation of '*de minimis non curat lex*' – a Latin expression meaning '*about minimal things*' (literally, "*The law does not concern itself with trifles*").

³ The information on the Council Tax Valuation List is at odds not only with the present use of the building as four flats, but also with the officer's statement that prior to the conversion of the 1st floor the building had contained three flats.

- 2) An email dated 13 March 2016 that the Council received from Mahesh Patel, the freeholder of the property, states that:

"Martin Gerard [that is, 'Martyn Gerrard Estate Agents, of 197 Ballards Lane, London N3 1LP] has full managements on 46/48 Long Land Finchley N3 2PU since Sept 2011. Tom Crane [of Martyn Gerrard Estate Agents] was dealing with this ...on managements. He visited in Feb 2011 the flat was in one unit. In 15/2/12 it was two flats. Ever since February 2012 we never got access until 2013 we got access to go in and was 2 flats."

Reasons

25. The email of 13 March 2016 is evidence that the creation of two self-contained flats on the 1st floor occurred sometime between February 2011 and 15 February 2012. The conversion works *could* have taken place before the relevant date (16 November 2011), but there is no documentary evidence, such as builders' invoices or receipts, to show when the works commenced or were substantially completed.
26. Furthermore, no tenancy agreements, rent books, utility bills or other documents have been produced to indicate when the residential use of the two 1st floor flats commenced or whether their use was continuous thereafter.
27. I find that the appellant has failed to adduce any relevant, clear and unambiguous evidence to demonstrate the truth of his assertion that the use of the 1st floor of the building as two self-contained flats is immune from planning control and thus lawful. He has failed to discharge the burden of proof placed upon him and accordingly, the appeal on ground (d) must fail.
28. For these reasons, the appeal is dismissed and the enforcement notice is upheld.

George Mapson

INSPECTOR