Appeal Decision

Site visit made on 27 September 2016

by Chris Preston BA (Hons) BPl MRTPI

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

Decision date: 4 November 2016

Appeal Ref: APP/Z5060/C/16/3142252
12 St. Erkenwald Road, Barking, Essex IG11 7XA

- 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 Siddharth Mahajan against an enforcement notice issued by the Council of the London Borough of Barking & Dagenham.
- The Council's reference is 15/00325/NOPERM.
- The notice was issued on 09 December 2015.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of a single family dwelling-house, to a house in multiple occupation.
- The requirements of the notice are: Cease the use of the property as a House in Multiple Occupation; and Remove the fittings and alterations (including locks on doors and kitchen and bathroom fittings) that have been installed to achieve the use of the property as a House in Multiple Occupation.
- The period for compliance with the requirements is three months after the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decision

1. The enforcement notice is corrected: by the deletion of the words "within the last four years" from the first paragraph of section 4 and the substitution with the words "within the last 10 years". Subject to that correction the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the material change of use of the property to use as a House in Multiple Occupation (HMO) at 12 St. Erkenwald Road, Barking, Essex IG11 7XA, subject to the following condition:

   1) No more than 6 residents shall occupy the property at any time.

Preliminary Matters

2. Within section 4(1) of the enforcement notice the Council state that they consider that the alleged breach of planning control has occurred within the last four years. The statutory time limits for taking enforcement action are set out within section 171B of the Town and Country Planning Act 1990 (the Act). Further to the submission of the appeal, both parties have confirmed their view that the time limit for taking action against a material change of use to a HMO

should be ten years and not four. I have been invited to correct the notice accordingly.

3. Neither party has specified why they consider that ten years is the appropriate period but I consider that is the correct period having regard to the terms of the Act. Section 171B(2) states that no enforcement action may be taken after the end of four years beginning with the date of the breach where there has been a change of use of any building *to use as a single dwellinghouse*. I note that the definition of a House in Multiple Occupation (HMO) within Use Class C4 of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO) is: *Use of a dwellinghouse by not more than six residents as a "house in multiple occupation.* In this case, the alleged breach does not relate to a change of use "to" a single dwellinghouse but the change of use "of" a single dwellinghouse to a HMO.

4. Having regard to that distinction, it appears to me that the breach is not one that would be covered by the four year period set out in s171B(2) of the Act. Rather, the ten year period specified in s171B(3) is applicable and I have corrected the notice accordingly within my decision.

The Appeal on Grounds (c) and (d)

5. The basis of the appeal on grounds (c) and (d) is inter-related. The appellant's case on ground (d) is that the use as a HMO had existed for a continuous period from at least 2004 up until the point that the enforcement notice was served in 2015. The case on ground (c) is essentially that planning permission was not required to change the use of the property from a dwellinghouse to a HMO at the point when that change took place. As such, he contends that the change to a HMO did not amount to a breach of planning control. Thus, both grounds of appeal relate to the time at which the alleged breach took place and, to save repetition, I shall examining the history of the site and the evidence presented before concluding on the implications for both grounds of appeal.

The Statutory Framework

6. In terms of the ground (c) appeal, whether planning permission was required to change the use of a building from use as a family dwelling to a HMO is dependent, to some degree, upon the point at which that change took place. The Town and Country Planning (General Permitted Development) Order 1995 (the GPDO) was amended in October 2010 to introduce permitted development rights for the change from dwellinghouses (Class C3) to small HMOs (Class C4)[1]. That change in the GPDO was introduced to coincide with changes to the Town and Country Planning (Use Classes) Order 1987 (the UCO) which was also amended in 2010[2]. The C4 Use Class was created as a result of those amendments. Therefore, from 01 October 2010 changes between Class C3 and Class C4 would have benefitted from deemed planning permission under the terms of the GPDO.

7. However, an Article 4 Direction came into force in the area to which the appeal relates on 14 May 2012. The effect of that Direction was to remove permitted development rights for the change from Class C3 to C4. Thus, if the change of

[1] The Town and Country Planning (General Permitted Development) (Amendment) (No. 2) (England) Order 2010 (SI 2010/2134)
[2] The Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (SI 2010/653)

use took place between 01 October 2010 and 14 May 2012 it would have benefited from permitted development rights. After 14 May 2012, planning permission would have been required.

8. Prior to April 2010 there was no definition of a HMO within the UCO. The C4 Use Class did not exist. Use Class C3 was defined as:

   - *Use as a dwellinghouse (whether or not as a sole or main residence) — (a) by a single person or by people living together as a family, or (b) by not more than 6 residents living together as a single household (including a household where care is provided for residents).*

9. At that point in time, it would have been a matter of fact and degree, as to whether non-related individuals who shared facilities within a dwellinghouse were living together as a single household. Where separate, lockable, rooms were let on an individual basis to unrelated individuals who shared cooking facilities, it would be unlikely that those residents would have formed a single household within Class C3. Whether any change was material to the extent that planning permission would have been required would have been dependent on the circumstances of the individual case, taking account of factors such as the size of the property, number of bedrooms, and the degree to which facilities were shared.

10. Given the statutory framework identified above, it is possible that a change from a family dwellinghouse to a HMO, or vice versa, could have occurred without the need for planning permission, depending on the circumstances of the case and the point at which that change took place. Consequently, in relation to the appeal on ground (c) it appears to me that the Council's assertion that the appellant must be able to demonstrate that use as a HMO has continued for a minimum of 10 years in order for it to be lawful is misconceived.

11. Rather, the key questions are when the change of use took place, whether planning permission was required for that change of use at the time, and whether the use has continued since that point. As noted correctly by the appellant, the terms of the Article 4 Direction did not take effect retrospectively. If the use of the property had changed lawfully before the Direction came into force, and has remained in that use since, then no breach of planning control will have occurred.

The Evidence Relating to the Use of the Property

12. There is no dispute that the property is currently in use as HMO or that it was in use as a HMO at the time the enforcement notice was served. It would appear that the Council became aware of the use when the appellant went to see them to discuss the possibility of applying for a certificate of lawful use. At the time of my visit, the property was laid out over three floors, with six bedrooms with lockable doors, three on the ground floor, two at first floor level and a further attic bedroom. No cooking facilities were present in the rooms and a shared kitchen was available at ground floor level containing two washing machines, two cookers, two microwaves and two sinks.

13. The enforcement notice does not specify whether the Council consider that the use relates to a HMO within Class C4 i.e. use of a dwellinghouse by up to six people, or whether they consider it to be a larger house in multiple occupation

falling outside that class. The Council's statement notes that each of the six rooms has a double bed and that the property has the potential to house up to 12 people. However, they do not suggest, or provide any evidence to indicate, that 12 people have ever lived in the property at the same time. Within his sworn declaration, the appellant states that no more than six tenants have occupied the property since he purchased it in 2015. Individual tenancy agreements for each tenant have been provided, dating from 2015 onwards, and those add substance to that claim that no more than six people were resident when the notice was served. No evidence has been presented by the Council and it is likely that the property was in use as a HMO within Use Class C4 at the time the notice was served.

14. An assured shorthold tenancy (AST) agreement, dated 25 May 2010, has been provided by the appellant. That AST was made between the previous landlord, Mr Fiaz Mohamad, and six tenants. Two of those, Mr Asif Manman and Afzan Riaz, were identified as 'lead tenants' and the other four as 'co tenants'. The tenancy was for an initial period of 12 months. Unlike the tenancy agreements dating from 2015 onwards, which were individual to each tenant, the AST was a single agreement covering all six tenants. Rent was shown to be payable at £1600 per calendar month and the agreement identifies that the rent includes council tax, electricity, water and gas bills. It is not clear how the rent was to be divided between each tenant.

15. The tenancy agreement was then extended, year on year, with the final agreement between the landlord and the two lead tenants expiring on 01 June 2015. Although the initial AST from June 2010 includes the names of six tenants, the subsequent addendums for following years only include the names of the 'lead tenants'; Mr Riaz and Mr Manman. Thus, the agreements do not make clear if the other four tenants remained at the property beyond the initial one year period.

16. Sworn declarations have been submitted from the lead tenants; Mr Afzan Riaz and Mr Asif Manman. Mr Riaz states that he was a tenant at the property between June 2007 and May 2015 and notes that, to the best of his knowledge, the property was in use as a HMO during that period, with only minor breaks for refurbishment and change of tenants. Mr Manman states that he was the manager at the property between June 2004 and May 2015 and confirms his view that the property was in use as a HMO during this time.

17. Whilst Mr Manman and Mr Riaz describe the use of the property as a HMO it is not clear what they understand that to mean. Given the technicalities, in planning terms, of the definition between a dwelling and a HMO, as set out above, it would be unlikely if a lay person would have a full grasp of the intricacies of the UCO or of the difference, in planning terms, between a dwellinghouse and a HMO.

18. The declarations provide little additional information about the use of the property in terms of the number of occupants; whether those occupants were related or knew one another; how the property was laid out; whether individual rooms were lockable; the extent to which facilities were shared; details of what was involved in the 'breaks for refurbishment' in terms of the length of time or works undertaken; or how frequently tenants came and went over time.

19. Mr Manman described himself as the manager of the property and does not specifically state that he resided there at any point. Exactly what his role as

manager role entailed is not clear. Mr Riaz declared that he was 'the tenant' between June 2007 and May 2015, implying that he was 'the tenant' in a singular manner. It is not clear whether the use of that phrase is intentional or a typographical error. Given the ambiguities described above, the tenancy agreements themselves do not provide a clear picture of how the property was used from 2010 onwards.

20. No bills for the property over that period have been provided, and no corroborative evidence to show who lived there is before me, such as electoral register or council tax details.

21. The AST identifies that 'Irwin Fisher Lettings' were acting for the previous landlord from 2010 to 2015 and a letter from the estate agency, dated 21 December 2015, has been submitted with the appeal. That letter confirms that the property was let via their company on 01 June 2010 and that they provided a 'let only' service to the landlord, who was responsible for rent collection and managing the property. The letter also confirms that estate agent's understood that the same tenants were in occupancy throughout the tenancy period from 2010 to 2015. However, it does not identify who those tenants were. The letter indicates that the agency had a role in identifying tenants for the landlord but not the on-going management of the property. Consequently, it is not clear what level of knowledge the agent had as to who lived there at particular points in time, what the relationship between the tenants was, or how the property was laid out.

22. The evidence prior to 25 May 2010 is even less clear. No tenancy agreements have been provided for the period between 2004 and 2010. A letter from Sue Sangha of 'Ideal Locations' letting agents states that they introduced six tenants to Mr Fiaz Mohamad in June 2004 and that those tenants stayed in the property for three years. Similarly, a letter from Mr Ian Orr of Docklands Prestige Lettings indicates that they worked for the landlord to facilitate tenants for the '6 room house' between July 2007 and July 2010. However, the letters from agents, and the statutory declarations that have been submitted, provide limited detail as to who the tenants were; how many tenants there were at specific points in time; the relationship between those residing at the property; the extent to which facilities were shared; or how the property was laid out. No bills, council tax records or electoral registry information are before me.

23. To summarise, no evidence is available prior to 2004. The details provided for the period from 2004 up until May 2010 create an uncertain picture of events and do not demonstrate, on the balance of probabilities, that the property had been in continuous use as a HMO over that period. From 2010 up until the point at which the appellant purchased the property more detail is provided by way of the tenancy agreements. However, as set out, the tenancy agreements, and the other evidence before me, fail to provide a clear picture of precisely who lived at the property over that period or their relationship with one another. Very little information is provided as to how the property was laid out internally or the extent to which facilities were shared. Consequently, between 2004 and 2015, when the appellant purchased the property, there are significant uncertainties as to the nature of the use of the property.

Conclusions on Ground (c)

24. When making an appeal on legal grounds, the burden of proof, on the balance of probability, rests with the appellant. However, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to dismiss an appeal, provided the applicant's evidence alone is sufficiently precise and unambiguous.

25. In effect, the appellant's submissions on ground (c) are that the property was in lawful use as a HMO prior to the introduction of the Article 4 Direction in May 2012 and that the use has continued from that point up until the time the notice was served. For the reasons given, precisely who was living in the property in May 2012, their relationship with one another, or the layout of the property at that time is not clear. Thus, the evidence does not demonstrate that the property was being used as a HMO immediately prior to the Article 4 Direction coming into force.

26. Due to the uncertainties in the evidence for the period between 2004 and 2015 I cannot conclude, on the balance of probabilities, that the property was in lawful use as a HMO at any point during that period or whether a material change of use had occurred from the previous use as a single dwellinghouse within Class C3. To be able to draw such conclusions I would need detailed evidence relating to the occupants of the property, their relationship with one another, the extent to which services were shared and details of how the property was laid out. To my mind, the evidence does not provide sufficient details on those matters for me to conclude that the use of the property had changed at any point from a dwellinghouse to a HMO and, if so, whether such a change was lawful.

27. Whilst the Council has provided little information of its own to contradict the appellant's version of events, the evidence provided by the appellant is not, of itself, sufficiently precise and unambiguous to demonstrate his case. For the reasons given, I cannot conclude, on the balance of probabilities, that the property was in lawful use as a HMO at any point prior to the service of the notice. Accordingly, the appeal on ground (c) fails.

Conclusions on Ground (d)

28. It is not in dispute that the property has been let as HMO to individual tenants by the present landlord since September 2015. A HMO license was granted in November 2015. It is also possible, in my view, that the property had been used as a HMO at various times between 2004 and the point at which the notice was served in 2015. However, there is significant ambiguity in the evidence presented and, as a result, that evidence does not present a clear picture of how the property has been occupied between 2004 and 2015. In particular, the evidence is lacking as to precisely who lived in the property over that period; the relationship between individuals living at the property; whether there were any breaks in occupation; and how the property was laid out internally. Bearing in mind that the onus is on the appellant to demonstrate his case on legal grounds of appeal, I find that the evidence does not demonstrate satisfactorily that the property had been in continuous use as a HMO for a period of ten years prior to the service of the notice. Consequently, the appeal on ground (d) fails.

The Appeal on Ground (a)

29. Having regard to the content of the enforcement notice and the information before me the main issue in relation to the appeal on ground (a) is the effect of the development on the ability of the area to meet its local housing needs with particular regard to the provision of family housing.

30. Policy BC4 of the Borough Wide Development Policies Development Plan Document (2011) (the DPD) relates to residential conversions and houses in multiple occupation. The first section of the policy states that the Council will resist proposals which involve the loss of family housing with three bedrooms or more. The second element sets a number of criteria that will be considered where sub-division to flats or HMOs is proposed.

31. The Council maintain that the property has six bedrooms and is thus protected under policy BC4. The property has six bedrooms in its current use as a HMO – three at ground floor, two at first floor and one in a converted loft space. There is no shared living space and the only shared room is the kitchen. Clearly, conventional living room and dining rooms that would normally be associated with a terraced family dwelling have been converted into bedrooms to facilitate the change to a HMO. Thus, the property would not have had six bedrooms in its former use as a dwellinghouse and, it appears to me that the Council have misinterpreted the policy in that regard. In order to understand whether the change of use complies with the policy it is necessary to understand how many bedrooms were in the dwelling prior to conversion to a HMO.

32. No information has been provided by either party as to how the property was laid out prior to conversion. Layout plans of the current situation have been provided by the appellant. Having viewed the property I consider that it would have originally been a modest two storey dwelling with living accommodation at the ground floor level and most probably two bedrooms at first floor level. A bedroom has been added in the loft space at some point. Therefore, judging from the scale of the property I consider that it would originally have had two bedrooms. Whether the third bedroom in the loft was added as part of a conversion into a HMO, or was already in place prior to that point, is not clear. Like most terraced houses I consider it likely that the ground floor would have contained living, kitchen and dining facilities.

33. Therefore, due to the lack of evidence before me, it is a mute point whether the dwelling would have had two or three bedrooms prior to conversion and, thus, whether it would have been the kind of dwelling that the Council seeks to protect under policy BC4.

34. Regardless of that point, policy BC4 states that the Council will 'resist' the loss of family housing with three bedrooms or more and does not state that such proposals will necessarily be refused. It is therefore necessary to examine the evidence in each case before making a judgement. The modest size of the original dwelling is something that weighs in favour of the proposal, particularly when one notes the sub-text to policy BC4 which identifies that the Council will adopt a particularly strict approach to the conversion of dwellings with four bedrooms. I consider it highly unlikely that the property in question contained four bedrooms prior to conversion to a HMO.

35. Moreover, the policy was adopted in 2011, prior to the adoption of the National Planning Policy Framework (the Framework). In line with paragraph 215 of the Framework, due weight should be given to policies in existing plans subject to the degree of consistency with the Framework. Whilst I consider that the principle of seeking to maintain the stock of family housing may be consistent with the aims of the Framework, paragraph 50 notes that planning authorities should plan for a mix of housing based on current and future demographic trends, market trends and the needs of different groups in the community. It also requires that they should identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand. Given that policy BC4 was adopted in 2011, the evidence base that underpins the policy must pre-date that point in time. No up to date evidence regarding local housing needs has been provided and the Council's evidence does not highlight whether there is a shortage of family housing within the particular area of the site or, conversely, whether there is a need or demand for other forms of housing, including HMOs.

36. Given the emphasis of paragraph 50 the Framework of planning for housing needs of particular areas based on current and future demographic trends, and the lack of evidence presented in that regard, the weight that I can attach to policy BC4 is reduced. Given the lack of up to date information regarding the particular housing needs of the area and the fact that the property, prior to conversion to a HMO, would have been a dwelling of modest scale, the evidence before me does not indicate that the change of use to a HMO has had a significant or undue impact on the local supply of family housing or on the ability of the Council to meet its housing needs with regard to that type of housing. Having regard to the information before me, I consider that planning permission should not be withheld on the basis of the first limb of policy BC4.

37. In terms of the specific criteria to be considered under the second limb of the policy the appellant has provided details from the valuation office showing the Council Tax bands for respective properties in St. Erkenwald Road in support of his case that no more than 10% of those properties are currently in use as HMOs. The way in which properties are assessed by the Valuation Office may not be an indicator of whether they are in use as single dwellinghouses; I cannot be sure of the methodology used in those assessments. Nonetheless, no evidence has been presented by the Council to indicate anything to the contrary and there is nothing before me to suggest that more than 10% of houses on the street are in use as HMOs.

38. Whilst the Council have raised general concerns regarding noise and car parking no evidence has been provided to indicate that the use has caused local problems in those respects. It appears that the Council only became aware of the use as a HMO when the appellant went to see them to discuss a potential application for a lawful development certificate. In other words, the enforcement investigation did not appear to stem from any complaints from neighbouring residents. No third party letters have been submitted in relation to the appeal and there is nothing to suggest that use of the property as a HMO has had a noticeable effect on the character of the area. Residents of the property are well placed in connection to local shops and services and public transport provision. Therefore, there is no indication to suggest that the use as a HMO is unacceptable having regard to the criteria set out in the second limb of policy BC4.

39. In terms of amenity issues, the appellant has put forward a suggested condition to the effect that no more than 6 residents should occupy the premises at one time. Although the notice does not state that the property is in use within Class C4, the evidence before me indicates that no more than 6 residents have occupied the dwelling at any one time and my conclusions on the impact of the property are based on occupation at that level. In order to avoid an over-concentration of people within a relatively modest property, having regard to the character of the area, the amenity of neighbouring residents, and the amenities of the residents of the property itself, I consider that such a condition is necessary and would meet the tests set out at paragraph 206 of the Framework. Subject to that condition, the development complies with the aims of policies BP8 and BR9 of the DPD.

40. In view of the above, the evidence before me does not demonstrate that the use of the property as a HMO has had an unduly negative impact on the supply of family housing or the ability of the area to meet its housing needs in regard to that form of housing. Moreover, the development has not led to an over-concentration of HMOs within the area and no evidence of any negative transport or amenity issues has been presented.

41. Accordingly, having regard to the development plan, the Framework, and all other material considerations, I conclude that the appeal on ground (a) should succeed and that planning permission should be granted for the development, subject to a condition limiting the number of occupants to a maximum of 6.

The Appeal on Grounds (f) and (g)

42. Given that I have decided to allow the appeal on ground (a), planning permission will be granted and the notice will be quashed. Consequently, it is unnecessary for me to consider the appeal on grounds (f) and (g).

Chris Preston

INSPECTOR