The Planning Inspectorate

Appeal Decision

Site visit made on 2 November 2016

by George Mapson DipTP DipLD MRTPI

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

Decision date: 5 December 2016

Appeal Ref: APP/G5750/C/3145426

45 Seventh Avenue, Manor Park, London, E12 5JL

- 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 Kultar Bance against an enforcement notice issued by the Council of the London Borough of Newham.
- The Council's reference is 15/01247/ENFC and 16/00076/ENFNOT.
- The notice was issued on 29 January 2016.
- The breach of planning control as alleged in the notice is: *"Without planning permission the material change of use to a house in multiple occupation (HMO)."*
- The requirements of the notice are: *"1. Cease the use as a house in multiple occupation. 2. Remove all fixtures and fittings that solely facilitate the use as a house in multiple occupation, including (but not limited to) all internal locks on bedroom doors and any additional mattresses and beds. 3. Remove from the site all debris arising from compliance with steps 1 and 2."*
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(b) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.

Decision

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

Background

The appeal property and evidence of its use when the notice was issued

2. No. 45 Seventh Avenue is a two-storey mid-terrace property which was originally built as a single dwellinghouse. The appellant says that he bought the property in November 2013, at which time it had been offered for sale as an HMO.

3. The building has since been significantly altered and enlarged, in part by the construction of single-storey rear and side extension, a rear double dormer and a loft conversion. These works were completed in March 2014.

4. On 18 January 2016 Council officers visited the appeal property and established that it contained 7 bedrooms, with sleeping accommodation for 11 people. At that time the property was occupied by 7 unrelated people. The Council considered that a material change of use of the property to use as a large HMO had taken place. This was a use for which planning permission had been neither sought nor granted. The Council considered that it was expedient to take enforcement action in respect of this alleged use and on 29 January 2016 the enforcement notice was issued.

5. During the site visit of 18 January 2016, Council officers made a sketch plan of the layout of the appeal property. This plan shows that the ground floor contained 2 bedrooms (each with a double bed), a W.C. and a kitchen. The 1st floor contained 3 bedrooms (one with a double bed, two with single beds) and a bathroom. The 2nd floor contained 2 bedrooms (one with a double bed, the other with a single bed) and a shower room.

6. At my site visit, I saw the same arrangement of rooms, but with one exception in terms of its use. The single bedroom on the 1st floor was being used as a sitting room/dining room, the implication of which is that now there is sleeping accommodation for 10 people, rather than 11.

Appeals made on legal grounds only

Evidence and burden of proof

7. Ground (b) is one of 4 legal grounds of appeal, the others being grounds (c), (d) and (e). With such grounds 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 of the case are not a relevant consideration.

8. The burden of proof regarding decisive matters of fact rests on the appellant. Where assertions of lawfulness are made, it is for the appellant to adduce enough relevant, clear and unambiguous evidence to demonstrate the truth of those assertions. The relevant test of the evidence is 'the balance of probability' (i.e., that it is more probable than not).

HMOs

The Housing Act 2004

9. The Housing Act 2004 introduced a new definition of an HMO, which replaced the previous definition that was set out in the Housing Act 1985. With effect from 6 April 2006 in England, the Act introduced a new scheme for controlling conditions in HMOs. Since that date licensing has been mandatory for all HMOs which have 3 or more storeys and are occupied by 5 or more persons forming 2 or more households.

The UCO[1] and GPDO[2]

10. In April 2010 the UCO was amended[3] and changes introduced to planning regulations for dwellinghouses and HMOs[4]. A concurrent amendment to the GPDO allowed a change of use from Class C4 (HMO) to Class C3 (dwellinghouse) as permitted development. In October 2010 a further change to the GPDO allowed a change of use from Class C3 to Class C4.

11. These changes were explained in DCLG circular 08/2010, to which the appellant has referred. This circular was issued in November 2010, but cancelled on 7 March 2014 by the PPG[5]. The circular drew attention to the differences between small HMOs (Class C4) and large HMOS. Paragraph 7 explained that "*Large houses in multiple occupation*

[1] The Town and Country Planning (Use Classes) Order 1987.
[2] Town and Country Planning (General Permitted Development) Order 1995, as amended, was in force in 2010. In April 2015 the 1995 Order was replaced by the Town and Country Planning (General Permitted Development) (England) Order 2015.
[3] The UCO was amended by the Town and Country Planning (Use Classes) (Amendment) (England) Order 2010.
[4] Under the UCO amendment, Class C3 was split into 3 parts. These were: C3(a) - a single person or people living together as a single household, as defined by the Housing Act 2004 (basically a 'family'); C3(b) - not more than 6 people living together as a single household and receiving care; and C3(c) - not more than 6 people living together as a single household with no care provided and who do not fall within the C4 definition of a house in multiple occupation. In addition, a separate Class C4 (HMO) was added which covers small shared houses or flats occupied by between 3 and 6 unrelated individuals who share basic amenities.
[5] 'Planning Policy Guidance', DCLG's web-based resource (http://planningguidance.communities.gov.uk/about/).

(those with more than 6 people sharing) are unclassified by the Use Classes Order. In planning terms they are described as being sui generis (of their own kind). In consequence, a planning application will be required for a change of use from a dwellinghouse to a large house in multiple occupation or from a Class C4 house in multiple occupation to a large house in multiple occupation where a material change of use is considered to have taken place".

Article 4 direction

12. Paragraph 3 of circular 08/2010 explained that in certain circumstances local planning authorities are able to issue 'directions' that require applications for planning permission to be submitted where they would not normally be needed.

13. Directions to remove permitted development rights are made under article 4(1) of the GPDO. Some London Boroughs, including Newham, have made borough-wide article 4 directions which have removed permitted development rights for the change of use from a use falling within Class C3 to a use falling within Class C4. In Newham, the direction came into force on 1 August 2013[6].

The parties' positions

The appellant's case

14. The appellant acknowledges that at the time the notice was issued, 7 residents occupied the appeal property. However, he asserts that the Council is wrong to claim that a material change of use had occurred simply because the number of occupants had risen above 6, the threshold for a small HMO.

15. He refers to the guidance in paragraphs 16 and 17 of circular 08/2010, which stated that "… *a material change of use will occur only where the total number of residents has increased to the point where it can be said that the use has intensified so as to become a different character …".*

16. The appellant goes on to say that, to the best of his knowledge, the appeal property has been used as an HMO for at least twenty years, and assumes that the Council's internal records would confirm this. This claim implies an appeal on ground (d). Although no appeal is made explicitly on this ground, it is necessary to consider this claim and whether there is any evidence to support it.

The Council's case

17. The Council contends firstly, that the lawful use of the appeal property is as a single dwellinghouse; secondly, that there is no evidence of a lawful use as a small HMO; and thirdly, that the change of use to a large HMO was material in planning terms.

18. The Council's records show that Council Tax officers visited the property in September 2012 and again in December 2013. On the first occasion it was seen that it was occupied by four unrelated individuals and the attending officer concluded that it was being used as a small HMO. On the second occasion it was seen that the property was uninhabitable and unfurnished and that "*extensive building works*" were underway, which were intended to be completed by March 2014.

19. The Council's building control records show two relevant dates. The first date is 4 December 2013, when works commenced to construct the single-storey rear and side extension, the roof extension and the rear double dormer. The second date is 10 March 2014, when a building control completion notice was issued for these works. As

[6] The article 4 direction of August 2013 predated the appellant's acquisition of the property. If, as the Council contends, the lawful use of the appeal property is use as a single dwellinghouse, by the time the appellant bought it in November 2013, any change of use to an HMO would have required an express grant of planning permission.

a result of the roof extension and rear double dormer, two bedrooms and a toilet were provided at 2nd floor level.

20. The Council's case is that there is no evidence of a continuous use of the appeal property as an HMO for 20 years, as the appellant has claimed. Even if there had been a 10 year period of continuous use of the appeal property as a small HMO prior to December 2013, that use would have ceased when the "*extensive building works*" were carried out, the property became uninhabitable, and a new large HMO was formed.

21. The Council's records show that it was only after those building works were completed that mandatory HMO Licences were issued is respect of the appeal property. On 3 April 2014 the 1st licence was issued for a maximum of 5 people living as 4 households. On 3 July 2014 that licence was superseded by a 2nd licence for a maximum of 7 people living as 5 households. On 20 August 2014 a 3rd licence was issued, this time for a maximum of 7 people living as 7 households.

The implied appeal on ground (d)

22. An appeal on ground (d) is that at the date the notice was issued no enforcement action could be taken in respect of the matters alleged in the notice. This ground of appeal assumes that at some stage there has been a breach of planning control, but that it is immune from enforcement, having subsisted for the 4 or 10 year periods laid down by section 171B of the 1990 Act. The relevant period in the case of a material change of use to an HMO is 10 years.

23. Where there has been a change of use during the 10 year period which did not constitute development, or did not require planning permission, then immunity can be claimed for the use subsisting at the date of issue of the notice on the basis that the original breach of planning control took place more than 10 years ago and there has been no material change of use since.

Reasons and conclusions on ground (d); the 'immunity' argument

24. It is usual for an appeal made on ground (b) to be considered before one made on ground (d), but in this case it is necessary to start by addressing the appellant's 'immunity' argument. He claims that the appeal property had been used as an HMO for over 20 years and consequently, this use was lawful.

25. However, this claim is simply an assertion. It is unsupported by any relevant documentary or other evidence. There is no evidence to show when the HMO use commenced and nothing to show that it subsisted continuously for any period of 10 years prior to the issue of the notice, to the extent that the Council could have taken enforcement action against it at any time during that period.

26. Since April 2006 mandatory HMO licences have been a legal requirement for a property used as an HMO, but the only evidence of the property being licensed for such a use dates from April 2014. There is no evidence of licences being sought or issued before that time. Furthermore, the appellant has not produced any tenancy agreements, rent books or bank statements that would show a continuous use of the property as an HMO.

27. I find, as a matter of fact and degree, that the appellant has failed to discharge the burden of proof placed upon him. No relevant, clear and unambiguous evidence has been presented to demonstrate that a use of the appeal property as an HMO was lawful, either before the appellant acquired it in November 2013 or at any time since.

28. On the facts and circumstances of this case, I must concur with the Council that the lawful use of the appeal property is as a single dwellinghouse and accordingly, the implied appeal on ground (d) fails.

The appeal made on ground (b)

29. An appeal on ground (b) is that the matters stated in the notice which may give rise to the breach of planning control have not occurred. This ground of appeal was introduced to meet the straightforward situation where what the Council says has happened has not in fact happened.

Reasons and conclusions on ground (b); the 'materiality' argument

30. The appellant's ground (b) argument is predicated on the proposition that prior to December 2013, the property had acquired a lawful use as a small HMO and that the change to a large HMO was not a 'material' one. As I have concluded above, there is no evidence to support that proposition, but I shall nevertheless consider the merits of the argument that has been put forwarded.

31. The appellant says that it is necessary to look beyond the fact that if occupied by between 3 and 6 unrelated individuals who share basic amenities, a property will fall within Class C4, whereas if it is occupied by more than 6 people sharing, its use is unclassified by the UCO and in planning terms is sui generis. In his submission, it is necessary to consider the 'materiality' of any change that has taken place, and in this case there is no material difference between the use prior to the alterations being carried out and the use since they were completed.

32. As a matter of planning principle, it is right to take the view that a change becomes material only if, as a matter of fact and degree, it results in the original planning unit being used in a way that has "planning consequences". However, looking at the particular facts and circumstances of this case, it is not simply a matter of the appellant providing additional bathrooms, or other facilities, within the original building to enable a more intensive use of the same space. The evidence indicates that a significant amount of operational development was carried out to alter and enlarge the property.

33. These works facilitated the occupation of the property by a significantly greater number of people than had previously been the case. The number of bedrooms increased from 4 in September 2012 to 7 by March 2014. The evidence suggests that this operational development was carried out with the clear purpose of facilitating the use of the building as a large HMO.

34. Whether or not the appellant had been able to demonstrate that, prior to these works, there had been a lawful use of the appeal property as a small HMO, these alterations are tangible planning consequences of a material change of use to a large HMO.

35. In a physical sense, one example of a planning consequence might be that the enlarged building could have a greater visual impact when viewed from public vantage points or neighbouring properties, possibly changing the character and appearance of the host building and the wider area.

36. In terms of the wider implications for occupiers of neighbouring properties, another example of a planning consequence arising from use of a building as a large HMO is an increase in the comings and goings by residents and visitors, some of whom could be car-borne. This has the potential to increase the demand for on-street parking space in the vicinity, adding to congestion on the highway and posing a greater risk to the safety and convenience of road users and pedestrians.

37. I do not pass comment on the merits of such planning consequences in this particular case. I simply point out that these are some of the factors that can indicate a discernable degree of materiality in a change of use to a large HMO. The evidence before me leads me to conclude that the Council assessed correctly that the change that has taken place was material in planning terms. I find that the matters alleged in the notice occurred as a matter of fact and accordingly, the appeal on ground (b) fails.

Overall conclusions

38. I have taken account of my observations at the site and in the surrounding area, and of all the matters raised in the written representations. For the reasons given above I conclude that the appeal should not succeed and I shall uphold the enforcement notice.

George Mapson

INSPECTOR