

Appeal Decisions

Site visit made on 30 November 2016

by **A U Ghafoor BSc (Hons) MA MRTPI**

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

Decision date: 6 January 2017

Appeal A Ref: APP/M2372/C/16/3149333

Land at Atlas Mill, Atlas Road, Darwen BB3 3BY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 [hereinafter 'the Act'].
- The appeal is made by Mr Gerald Dunbar on behalf of Hunt for Houses against an enforcement notice issued by Blackburn with Darwen Borough Council.
- The enforcement notice was issued on 23 March 2016.
- The breach of planning control as alleged in the notice is without planning permission the material change of use of offices (B1) to 1 no. 3 bedroom and 1 no 1 bedroom flats (C1).
- The requirements of the notice are to permanently cease the unlawful residential use of the land.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (f) (e) and (g)¹ of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld as corrected and varied in the terms set out below in the formal decision.

Appeal B Ref: APP/M2372/W/16/3149143

Atlas Mill, Atlas Road, Darwen BB3 3BY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 as amended against a refusal to grant planning permission.
- The appeal is made by Mr Gerald Dunbar on behalf of H 4 H Ltd against the decision of Blackburn with Darwen Borough Council.
- The application ref 10/15/1483, dated 2 December 2015, was refused by notice dated 29 January 2016.
- The development proposed is retrospective permission for change of use of offices B1 to 2 flats.

Summary of Decision: The appeal is dismissed.

Matters concerning the notice

1. Reference to B1 and C1 in the allegation relate to type of use classified in the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended. There is no need to refer to this classification in the allegation, because the latter alleges a material change of use from office to two self-contained flats. If classes are cited in the allegation reference should be correct. Class C1 in the Schedule relates to Use as a hotel or as a boarding or guest house where, in each case, no significant element of care is provided, and Class C3 single dwellinghouse. In addition, there is no need to refer to the layout of the flats.

¹ Ground (g) inserted after the initial appeal form was submitted. The parties have commented on this matter.

2. I propose to correct the allegation to describe the breach as follows:

Without planning permission, the material of change of use of the building from its use as an office to use as two self-contained flats.

The issued notice requires *permanently cease the unlawful residential use of the land*. The word *permanently* in step 5 (i) is both unnecessary and inappropriate having regard to the provisions of S181(1) of Act, which states compliance shall not discharge the notice. For consistency, it should simply require cessation of the building's use as self-contained flats.

3. The reasons for issuing notice, section 4 sub-paragraph (i), is incorrect in that it appears to the Council that the alleged breach of planning control occurred in the last ten years. Because the allegation is a change of use from office to two flats, S171B(2) of the Act undoubtedly applies. In the grounds of appeal, Mr Dunbar says that the residential use began in January 2015. That being so, the alleged change of use occurred within the last four years and there is no prejudice caused to amending the reasons to accurately reflect the time-limit.
4. There are some errors in the issued notice but it is not fundamentally flawed. The corrections I have identified are minor in nature and do not undermine the notice. Indeed, from the representations, it is obvious to me that the issued notice caused no confusion and the recipient correctly interpreted it. I am satisfied that no injustice arises from the above corrections to any party. It follows that the notice will be corrected.

Appeal A - ground (e)

5. In pursuing an appeal on this ground, Mr Dunbar needs to show, on the balance of probabilities, that copies of the issued notice were not served as required by S172 of the Act. Section 172, paragraph (2)(a)(b), states a copy of a notice shall be served on the owner, occupier and on any other person having an interest in the land. An *owner* is defined in S336(1); a person may be an *occupier* because of a lease, licence or oral permission. An interest in the land connotes a legal or equitable interest. A person entitled to appeal under S174(2) is specifically defined as a relevant occupier. There is a distinction between occupiers with an interest who must be served, and persons with an interest, which entitles them to make an appeal. I am also mindful of S176(5).
6. Given the potential liability with failure to comply with the terms of a notice, all reasonable steps should be taken to identify all persons entitled to be served with a notice and they should be served. It is for the Council to decide who is materially affected by the notice, but it risks an appeal on ground (e) if it exercises its discretion wrongly.
7. From the representations before me, it appears a planning contravention notice or requisition request under S171C and 329 of the Act has not been issued, although a discretionary power. That might have shed some light on the exact ownership and occupation of the land during the period leading up to the issuing of the notice, and pinpoint who to serve. However, it does not automatically follow ground (e) succeeds on this point. Evidently, service of the notice in accordance with relevant legislative provisions on Mr Dunbar, Mr Hunter and Hunt 4 Homes Limited², who appear to have a legal interest in the land as landlords, is undisputed.

² Mr Dunbar's statement and final comments, 26 July 2016, suggest the owner and landlords have been served with a copy of the notice.

8. The notice was properly authorised and issued by the Council on 23 March 2016 and it specified effective date as 2 May 2016. Mr Dunbar received a copy of the notice and validly appealed on 27 April 2016, well before the effective date. Mr Dunbar now says that the notice has not been served upon the tenants of the flats. He argues tenants' interests may differ from that of the landlords because their home is at risk. They should have the right of appeal. Consequently, the claim is the tenants have been prejudiced by this failure to properly serve the notice. For the following reasons, I profoundly disagree.
9. It is apparent that those with a material interest in the land are aware of the notice because a timely appeal was made. Mr Dunbar's appeal, which is made on grounds (a), (c) and (f) as specified in S174(2) of the Act, protects the interests of the occupiers as well as the owners. I appreciate the tenants might have wanted to submit their own appeal, but there is no evidence prejudice has occurred by failure to personally serve them with a copy of the notice. Given the representations made by Mr Dunbar, it seems to me every point that could have been taken on their behalf has already been taken under pleaded grounds of appeal. The Council's failure to serve the tenants does not result in substantial prejudice.
10. For all of the above reasons, the appeal on ground (e) fails.

Appeal A - ground (c)

11. In pursuing an appeal on this ground, the onus of proof is squarely upon Mr Dunbar to show, on the balance of probabilities, that the matters stated in the notice do not constitute a breach of planning control. According to the evidence presented, the residential use started in January 2015³. Mr Dunbar's claim is a simple one, namely, express planning permission for the alleged material change of use is not required because that change of use is permitted development. For the following reasons, this ground of challenge is doomed to fail.
12. In force at the date of the material change of use was the Town and Country Planning (General Permitted Development) Order 1995 (GPDO) as amended by a series of statutory instruments, which I do not need to cite here. Schedule 2, Part 3, Class J of that Order permitted a change of use of a building and any land within its curtilage to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order (UCO)⁴ from a use falling within Class B1(a) (offices) of that Schedule. The 1995 version of the GPDO has been repealed. Now in force is the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended, which came into force on 15 April 2015. The former Class J is now Class O.
13. Class O (formerly class J) is subject to various limitations, qualifications and conditions. Condition O.2(1) states that development is permitted subject to the condition that *before beginning the development*, the developer must apply to the local planning authority (LPA) for a determination as to whether its prior approval will be required as to: (a) transport and highways impacts of the development, (b) contamination risks on the site, (c) flooding risks on the site, and (d) impacts of noise from commercial premises on the intended occupiers of the development, and the provisions of paragraph W (prior approval (formerly paragraph N)) apply in relation to that application [emphasis added]. Development that requires an application for prior approval cannot be begun before receipt by the applicant from

³ Date is taken from Mr Dunbar's grounds of appeal.

⁴ This refers to the Town and Country Planning (Use Classes) Order 1987 as amended.

the LPA of a written notice of their determination, or expiry of 56 days following the date on which the application was received by the LPA.

14. I have reviewed the planning history in the representations made to me but there is nothing to suggest an application for prior approval had been made before the change of use commenced. Additionally, Mr Dunbar provides no evidence to show that an application for prior approval had, in fact, been made to the LPA before the change of use. Development that is begun in breach of condition O.2 (formerly J.2) cannot be permitted development. The deemed planning permission provided by the GPDO is for prospective development and it does not apply retrospectively.
15. I understand a retrospective planning application for the change of use was made, which is now the subject of Appeal B. However, at the date when the notice was actually issued, the evidence before me indicates express planning had not been obtained for the matters stated in the corrected notice. On the balance of probabilities, these matters constitute a breach of planning control. Ground (c) must fail.

Appeals A and B - ground (a) and S78

16. The common **main issue** is whether the change of use results in overdevelopment of the property, having particular regard to internal and external space for prospective occupants and the effect on neighbours' living conditions, having particular regard to privacy.
17. I undertook a comprehensive accompanied site visit and carried out a full internal inspection to see for myself the flats' arrangement and to gain an impression of the standard of accommodation⁵ and appreciate the surrounding area. The sloping nature of the topography results in a building that has a lower ground floor level, which is in commercial use. Access to the flats above is via a footbridge at street level.
18. The Council states that the conversion fails to comply with minimum internal floor area for flats in its supplementary planning document (SPD): *Houses in Multiple Occupation and Residential Conversions and Sub-Divisions* April 2012. This being: 55 square metres for a one bedroom flat; 67 sq m for two bedroom three person flat, 77 sq m for two bedroom four person apartment, and 81 sq m for three bedroom four person flat. The total aggregate floor area for living space should be 25 sq m for one bedroom flat, and 27 sq m for three people flat.
19. The Department's published *Technical housing standards – nationally described space standards*, March 2015, set internal space standards within new dwellings and are suitable for application across all tenures. The standard requires that the dwelling provides at least the gross internal floor area and built-in storage area set out in Table 1 of that document. This shows a one bedroom one person dwelling 39 m² of gross internal floor area (GIA) and two person 50 m² with 1.5 m² built-in storage space. The GIA for two bedroom three person one-storey dwelling is 61 m² and 70 m² for four person flat and 2 m² storage space. The GIA for a three bedroom four person dwelling is 74 m² and 2.5 m² storage space.
20. Mr Dunbar concedes that the three bedroom flat 'downstairs'⁶ amounts to over-development, but he argues that the upstairs flat is acceptable. The floor space of the latter is 48 sq m; the former is 68 sq m. In an attempt to overcome the

⁵ Measurements were taken at the site visit. The results were agreed with the appeal parties.

⁶ Mr Dunbar describes it as such and I will use the same terminology for consistency.

Council's concern about available floor space, a third and second bedroom have been converted into an office/utility or storage room. The argument now is that the accommodation satisfies local and national space standards. The floor space for the downstairs two-bedroom flat is 72.74 sq m, and the one bedroom flat's floor space is 58.2 sq m.

21. I acknowledge Mr Dunbar's attempt to accommodate the Council's objections in term of available floor space. However, in practice, I consider that the design, shape and layout of the building significantly reduce the amount of useable floor space. Low ceiling heights create large amount of voids and inhibit the practical use of the floor space. In terms of quality the flats are perceived as being overly contrived and cramped because domestic furniture further reduces the amount of space available for free circulation and movement. There is inadequate space to store possessions or undertake normal activities such as socialising. Potentially, the lack of adequate useable floor space could have knock-on effects on the health and wellbeing of future occupants.
22. There is no amenity area because of a lack of space. Mr Dunbar has purchased an adjoining property and that allows the creation of an amenity space adjacent to the appeal building. The space would be created over the roof of an existing building that is accessed at lower ground floor. The roof garden would be accessed via a ramp at street level. The problem is that this space would not be private for amenity purposes because of its front location and position. There is a lack of detail as to how this amenity area would function and its design. For example, if means of enclosures would be required for privacy. The lack of useable and private amenity space reinforces my concern about the suitability of this site for its use as two self-contained flats.
23. To the rear of the building there is a row of terraced dwellings with small yards adjoining a passageway. In the rear elevation the building has windows at ground floor level and skylights in the roof slope. These windows, due to a difference in ground level, appear at higher level and are visible from the rear properties. The building's residential use introduces the possibility of excessive overlooking because of the location and positioning of these habitable room windows. Mr Dunbar recommends aluminium louvers could be fixed to two openings and obscure glaze a third window. But it is unclear how this would work in practice. The added complexity being the windows could be opened thereby increasing the sense of being overlooked. Given the intensified residential use of the building, I consider the development has the potential to cause loss of privacy because of the flats' configuration and layout.
24. Mr Dunbar suggests planning permission should be granted for a different scheme, subject to a condition limiting the building's use as a two-bedroom flat and a one bedroom flat. Firstly, no specific detail has been provided and it is unclear how such a scheme would work in practice and address planning objections satisfactorily. Secondly, given the flats' layout, considerable building work is necessary to rearrange the design of the apartments and, in the absence of detailed drawings, this is not achievable by imposing conditions. A grant of planning permission for such a scheme would radically change the nature of the development originally enforced against. Of course, it is open to Mr Dunbar to produce a materially different scheme for the Council's determination.
25. In my planning assessment, the change of use has resulted in the overdevelopment of the property because of its intensified residential use. The character of the use

has the potential to adversely affect living conditions of future occupiers and neighbours.

26. I have taken into account an alternative suggestion as well as the sustainable location of the site and the need to provide additional housing, but such considerations do not outweigh my finding on the main issue. Accordingly, the development conflicts with the aims and objectives of policies 8, 11, 18, 19 of the Local Plan Part 2 (2015), which seek good standard of design and amenity in conversion of buildings into flats.

Appeal A - ground (f)

27. In pursuing appealing on this ground, Mr Dunbar needs to show that the steps specified in the corrected notice exceed what is required to remedy the breach of planning control or, as the case may be, any injury to amenity caused by the breach. I am afraid he has advanced no lesser step that can remedy the breach of planning control. The notice cannot be varied so as to give effect to use of the building as a two-bedroom flat and a one-bedroom flat. Such a variation would, potentially, introduce significant degree of imprecision in its terms; that is unacceptable given the liability. I find that the remedial purpose behind the notice requires full compliance. Consequently, ground (f) must fail.

Appeal A - ground (g)

28. This has come about because the Council suggest the period of compliance should be varied from 3 to 6 months. Given the nature of the work required by the notice and the need for the occupiers to find alternative accommodation, I concur that a slightly extended period would be reasonable. This is a just and proportionate response to the particular circumstances presented, and strikes a fair balance between the competing interests of the wider public and individuals involved in this case. Therefore, ground (g) succeeds.

Appeals A and B - conclusions

29. For the reasons given above and having considered all other matters, in Appeal A, I conclude that the appeals on ground (c), (a) and (f) should not succeed, but ground (g) succeeds. I shall uphold the enforcement notice with corrections and a variation but refuse to grant planning permission on the deemed application. In Appeal B, I further conclude that the appeal should not succeed.

Formal decisions - Appeal A Ref: APP/M2372/C/16/3149333

30. It is directed that the enforcement notice be corrected by:

- (1) The deletion of all of the text in section 3, the breach of planning control alleged, and the substitution therefor of the following text:

Without planning permission, the material of change of use of the building from its use as an office to use as two self-contained flats.

And

- (2) The deletion of the word 'ten' in section 4, reasons for issuing this notice, sub-paragraph (i), and its replacement with the word 'four'.

And

- (3) The deletion of all of the text in section 5: what you are required to do, and substitution therefore by the following text:

Cease the use of the building as self-contained flats.

31. It is directed that the enforcement notice be varied by the deletion of the figure '3' and replaced with the figure '6' in section 6, time for compliance.
32. Subject to the above corrections and variation, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B Ref: APP/M2372/W/16/3149143

33. The appeal is dismissed.

A U Ghafoor

Inspector