
Appeal Decision

Site visit made on 25 November 2016

by George Mapson DipTP DipLD MRTPI

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

Decision date: 6 January 2017

Appeal Ref: APP/T5150/C/16/3149177

Flats 1-4, 75 Harlesden Gardens, London, NW10 4HB

- 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 Dr Shakeel Abbassi¹ against an enforcement notice issued by the Council of the London Borough of Brent.
 - The Council's reference is E/15/0769.
 - The notice was issued on 19 March 2016.
 - The breach of planning control as alleged in the notice is "*Without planning permission, the material change of use of the premises from a single dwellinghouse to four flats*".
 - The requirements of the notice are "*Step 1 Cease the use of the premises as four self-contained flats. Step 2 Remove all kitchens and cooking facilities, except ONE, and remove all associated debris and materials arising from this removal from the premises thereby converting the house back to a single family dwellinghouse. Step 3 Remove all bathrooms and bathroom facilities, except TWO, and remove all associated debris and materials arising from this removal from the premises thereby converting the house back to a single family dwellinghouse*".
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) and (g)² of the Town and Country Planning Act 1990 as amended. As no appeal is made on ground (a), and no fees have been paid, 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.
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Decision

1. The enforcement notice is varied by deleting from Schedule 4, Step 1, the word "*four*" and substituting "*separate*"; and by deleting from Schedule 4, Steps 2 and 3, the words "*thereby converting the house back to a single family dwellinghouse*". Subject to these variations, the appeal is dismissed and the enforcement notice is upheld.

Preliminary matters

The requirements of the notice

2. Two matters arise from the wording of the requirements of the notice. The first matter is that a requirement to cease a use as 4 flats presents a problem because it introduces an element of uncertainty. It could be taken to allow use as any number of flats other than 4. The appropriate wording is to cease the use as 'separate flats'.

¹ The appeal was submitted by the appellant's agent. The evidence suggests that the appellant's surname is misspelt on the appeal form and that it should be spelt "*Abbasi*" with a single 's' (the spelling that appears on the planning and building notice applications made in 2011 and the planning and LDC applications made in 2015).

² The appeal was initially made on ground (c) only, but in an email of 8 June 2016 to the Planning Inspectorate, the appellant's agent requested that an appeal on ground (g) be added.

3. The second matter is that where a single dwellinghouse has been changed to a use for flats, a requirement simply to cease the use is sufficient. A positive requirement to restore the use as a "*single family dwellinghouse*", as specified here, would be excessive.
4. I shall vary the requirements of the notice as set out in paragraph 1 above. I am satisfied that these variations would not cause injustice to any party.
5. As regards the requirements to remove fixtures and fittings (for example, separate kitchens, bathrooms/or WCs, or pre-payment meters) that facilitate the unlawful uses, these may be appropriate according to the circumstances, and bearing in mind the scope of use Class C3³. The courts have held that this is a matter for the Inspector's judgement⁴. No appeal is made on ground (f) and I am satisfied that the steps required by the notice are proportionate.

The appeal made on ground (c); implied appeal on ground (d)

6. An appeal on ground (c) is that there has not been a breach of planning control, for example because no 'development' has taken place; or planning permission has already been granted; or it is 'permitted development'.
7. In this case, no evidence has been advanced to support an appeal on ground (c). Section E of the appeal form ('Grounds and Facts') contains the following statement:

The existing self contained apartments have been present and functioning since the mid 90s. The planning officer involved knew this and has admitted haphazardly rejecting the plans without any notice of which she was asked to give before concluding the report, of which she failed to do.

8. The appellant has not submitted a statement of case. His agent has sent emails to the Planning Inspectorate (dated 19 May 2016, 8 June 2016 and 15 August 2016) and extracts taken from 7 Assured Shorthold Tenancy Agreements. These documents indicate that the appellant's case relates to the length of time that the unauthorised use has been operating.
9. This type of argument would fail within an appeal made on ground (d); that at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice. The Council has responded to the appeal as if it was made on ground (d) and I shall do the same.

Background

The appeal site

10. No. 75 Harlesden Gardens is a two-storey residential property within a terrace of four similar properties. It was originally built and used as a single dwellinghouse, but it has been significantly altered and enlarged and is now in use as 4 self-contained flats.

Relevant planning history

24 January 2011 - planning application (Ref. 11/0365)

11. The appellant applied for planning permission for the proposed "*conversion of dwelling to four units as shown on enclosed drawings*". According to the application form, the work had not already started at that time and the existing use of the property was stated as "*dwelling house*". The application plans showed the existing and proposed layout and usage of the building.
12. The Council identified the application as one for the conversion of the dwellinghouse into 3 flats (possibly because of an arithmetical error that appears in section 18 of the

³ See the judgment in *Bowring v SSCLG & Waltham Forest BC* [2013] EWHC 1115 (Admin).

⁴ *Hereford CC v SSE and Davies* [1994] JPL 448.

application form), but the plans showed 4 proposed flats. The application was not validated because information that the Council had requested in March 2011 had not been provided by November 2011. The Council informed the applicant and his agent that the application had been 'technically deleted', but that it would be retained on the Council's files as a record.

2 February 2011 and 21 February 2011 - building notice applications

13. During February 2011 the appellant submitted 2 building notice applications for building regulations approval⁵. The first was for a single-storey rear extension; the second was for a loft conversion and rear dormer. Planning permission was neither sought nor granted for either development. Information given on both building notice application forms confirmed that the existing use of the building was a "dwelling", indicating that the proposed works would be carried out under permitted development rights that apply to a 'dwellinghouse'⁶.

5 January 2015 - planning application (Ref. 15/0083)

14. The appellant applied for planning permission for the "Conversion of single dwellinghouse into 3 flats & 1 bedsit". According to the application form, the work/change of use had not already started at that time and the existing use of the property was stated as "dwelling house". The internal layout of the building shown on the 'existing' plan differed from that shown on the 'existing' plan to the January 2011 planning application. On 10 February 2016 the Council informed the appellant that the application had been 'technically deleted', following a request from his agent that the Council should not proceed with it.

23 November 2015 - LDC application (Ref. 15/5101)

15. The appellant applied for a certificate of lawfulness for an existing use of the appeal property as 4 self-contained flats (1 x 2bed) (2 x 1bed) (1 x studio). On 15 March 2016 the Council issued a notice of refusal to grant a certificate, on the basis that the evidence failed to show, on the balance of probability, that the property had been used continuously as 4 self-contained flats for a period of 4 years or more before the application was made.

The implied appeal on ground (d)

Evidence and burden of proof

16. Ground (d) is one of 4 legal grounds of appeal, the others being grounds (b), (c) 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. 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).

The appellant's case

17. The appellant has submitted the 7 Assured Shorthold Tenancy Agreements in support of his grounds of appeal (see paragraph 8 above).

⁵ Building regulations approval sought by a 'building notice application' (as opposed to a 'full plans application') does not entail submitting plans. The building inspector approves the works by an inspection process.

⁶ Permitted development rights for the alteration or enlargement of a 'dwellinghouse' are conferred by Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 [the GPDO]. In 2011, the provisions of the GPDO 1995, as amended, applied. The interpretation of 'dwellinghouse' for the purposes of the GPDO is set out in Article 2 of the Order. It states that "Dwellinghouse" does not include a flat, or a building containing one or more flats, or a flat contained within such a building.

The Council's case

18. The gist of the Council's case is as follows:

1. Information provided on the application forms

19. With each of the appellant's planning and building notice applications made in 2011 and 2015 (see paragraphs 11-15 above) the existing use of the appeal property was stated as a 'dwellinghouse'. The appellant now claims that the property had been occupied as self-contained flats since January 1999 (the starting date of the 1st Assured Shorthold Tenancy Agreement submitted). For that to be correct, he must have knowingly and deliberately given false and misleading information on his application forms with the positive intention of deceiving the Council.

2. Information provided by the appellant's brother

20. On 15 December 2015 Council officers visited the appeal property and spoke to a person who identified himself as '*Jameel Abbasi, the brother of the appellant*'. He told the officers that the property had been used as 4 self-contained flats for about 2½ - 3 years (i.e., less than 4 years before the enforcement notice was issued).

3. Council Tax records

21. These records show that the appeal property was valued as 4 self-contained flats, and that Council Tax payments began, on 12 April 2012 (i.e., less than 4 years before the enforcement notice was issued).

4. Electoral Register 2007–2010; 2012; and 2014-2015 (no records for 2011 or 2013)

22. Between 2007 and 2010, 2 people at the appeal property registered to vote. Only 1 of them registered to vote in 2012. In 2014 the same 2 people registered to vote, together with 2 others (4 in all). In 2015 there were 5 names, including the 2 names that had been present from 2007 onwards, 1 of the additional names from 2014 and 2 others. Although the Electoral Register shows only those people who registered to vote, the information provided suggests a different level of occupation of the appeal property from that claimed by the appellant.

5. The Tenancy Agreements

23. The authenticity of the tenancy agreements is questionable. Several of the claimed tenants came from Rawalpindi, Pakistan (according to their passport details) and have the same surname as the appellant. It appears that one tenant was the appellant's brother, Jameel Abbasi.

24. In any case, these agreements do not provide proof (1) that the signatories actually resided at the appeal property during the stated rental periods; or (2) that the use of the property was as 4 self-contained flats at that time; or (3) that any use as flats was continuous for any 4 year period prior to the issue of the enforcement notice.

6. Rents charged

25. The tenancy agreements show that between 1999 and 2007 the rent of each flat ranged between £85pcm and £190pcm. However, a property advertisement on the *Zoopla* website from 15 January 2015 marketed a "*Beautifully refurbished two double bedroom first floor flat*" at the appeal property.

26. According to the advertisement, it had previously been marketed on 12 April 2012, just after the works of conversion had been carried out and the flat was ready for occupation. The stated rent of £1,408pcm represents a significant rise in the rental charges for the flats and does not reflect general market prices or the rise in rents for flats in this area at the time.

Reasons and conclusions on the implied appeal on ground (d)

27. I shall deal first with the principles involved in establishing the lawfulness of the residential use of a property, whether it be as a dwellinghouse, flats or a house in multiple occupation. There is clearly a difference between an established residential use - such as a dwellinghouse where an occupier does not have to be continuously or even regularly present in order for it to remain in use as a dwellinghouse - and a situation where there is no established use and lawful use rights are being accrued. At the start of the material period, the residential use has to be "*affirmatively established*" and it must continue over the relevant immunity period.
28. In this case, the correct approach is to identify whether there was any period during the 4 years immunity period when the building was not physically occupied as self-contained flats - even though they were available for occupation - when the Council could not have taken enforcement action against the use.
29. It is also necessary to consider whether the periods of non-occupation were *de minimis* or not. Even though a building might be fitted out for use as self-contained flats the question to address is whether it had been actually used as such for a continuous period, apart from *de minimis* breaks.
30. Turning next to the facts and circumstances of this appeal, I share the Council's misgivings about the authenticity of the tenancy agreements that have been submitted. On 2 of the agreements, only the first names of the tenant appear; the surnames - *Abbasi* in each case - are omitted. Examination of the passport details supplied reveal that 5 of the 7 tenants have the surname of the appellant, but this is only evident on the face of 3 of the agreements. It is unusual, in my experience, for a tenancy agreement to use simply the first names of a tenant.
31. In any case, the tenancy agreements are of little, if any, assistance. They cover rental periods from 1999 to 2007, but do not provide evidence that the property contained 4 self-contained flats throughout that period or if any or all of the flats were occupied continuously throughout that period to the extent that the Council could have taken action against it any time during that period. For example, there are no records of payments made by or received from the tenants during that period that might help to demonstrate a continuous use.
32. No agreements have been submitted after the one signed in 2007. There is a void in the appellant's account of the planning history of the property until 2011. From 2011 onwards the existing use of the property is repeatedly said to be a dwellinghouse.
33. The evidence indicates that building works were carried out during 2011 to enlarge the appeal property and create the accommodation needed to provide the 4 self-contained flats that now exist. Those flats were ready for occupation in April 2012, as corroborated by the *Zoopla* website and the Council Tax valuation of the property, less than 4 years before the enforcement notice was issued.
34. Turning finally to the Council's 'deception' point, there is clearly a contradiction between the use of the appeal property that was taking place from April 2012 onwards and the information that the appellant supplied on his planning application of 5 January 2015. The appellant has offered no explanation for this contradiction, but the Council suspects that he knowingly made that planning application on a fraudulent basis.
35. In all cases where deception is alleged, the judgment turns on the facts. Deception, in this context, is positive conduct with the aim of deceiving the local planning authority. There is a difference between keeping a low profile on the one hand and deliberately misleading conduct to prevent discovery on the other. In this case, providing false information on the application form could be regarded as positive deception in order to conceal from the Council the fact that the property was already in use as self-contained flats.

36. Sometimes this tactic is used in order to throw planning authorities 'off the scent' and delay enforcement action until 4 years of continuous use is acquired that would ensure immunity from enforcement action. However, it is no longer effective in securing an entitlement to immunity from enforcement action. This is because, even if an appellant is able demonstrate, on the balance of probability, that a property has been put to an unauthorised use continuously for the relevant period, the Courts have held that if positive deception can be shown to have taken place, he or she would not be entitled to immunity from enforcement action under section 171B(2) of the 1990 Act⁷.
37. In conclusion, I find that the Council has presented clear, relevant and unambiguous evidence to show, on the balance of probability, that the unauthorised use of the appeal property as self-contained flats commenced less than 4 years before the enforcement notice was issued.
38. The appellant has presented no cogent evidence of his own to contradict, or cast doubt upon, that of the Council. His evidence, taken in the round, lacks credibility. His ground (d) case is little more than an inadequately supported assertion. He has failed to demonstrate that the matters alleged in the notice are lawful and accordingly, the implied appeal on ground (d) fails.

The appeal on ground (g)

39. An appeal on ground (g) is that the time given to comply with the notice is too short. The appellant says that 12 months rather than 6 months are needed. The tenancy agreements on the property are for 12 months and requiring existing tenants to vacate the premises within the period of their tenancies could result in homelessness.

Reasons and conclusions on the ground (g) appeal

40. No tenancy agreements have been submitted for consideration in support of the appellant's argument. The Council points out that some or all of the tenancy agreements could be completed before the end of the 6 month compliance period. If not, the Council has discretionary powers under section 173A of the Act to waive or relax any requirement of an enforcement notice, including extending the compliance period, if there is a good reason for doing so. It is unnecessary to extend the compliance period on the basis of the appellant's unsubstantiated claim.
41. As regards the removal of internal fixtures and fittings, as required by the notice, in the Council's experience these works tend to take a much shorter time than their initial installation might have done. Although it might take 1-2 months to appoint a contractor for this type of work, the removal of fixtures and fittings are likely to take about a week. The Council's opinions are not contested by the appellant.
42. I find that 6 months provide sufficient time to cease the unlawful use of the property and carry out the required works. Consequently, I shall not vary the period for compliance with the requirements of the notice and the appeal on ground (g) fails.

Overall conclusions

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

George Mapson

INSPECTOR

⁷ Local planning authorities' powers in respect of concealed breaches of planning control are contained in s.124 of the Localism Act 2011. These changes followed the high profile judgments in *Secretary of State for Communities and Local Government & Another v Welwyn Hatfield BC* [2011] UKSC 15 (the *Beesley* case); and *Fidler v First Secretary of State & Reigate and Banstead BC* [2003] QBD 1/10/03 and [2004] EWCA (the *Fidler* case).