The Planning Inspectorate

Appeal Decision

Site visit made on 3 January 2017

by K R Saward Solicitor

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

Decision date: 6 January 2017

Appeal Ref: APP/T5150/C/16/3157954
45 Mora Road, London NW2 6SJ

- 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 Tehfur Iqbal against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 4 August 2016.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises to six flats.
- The requirements of the notice are:-
  STEP 1 Cease the use of the premises as self contained flats
  STEP 2 Alter the internal layout of the premises so that it is converted back to a single family dwellinghouse by removing all kitchens and cooking facilities, except ONE, all bathrooms, except TWO.
  STEP 3 Remove all partitions and any other items and materials associated with the unauthorised change of use from the premises.
- The period for compliance with the requirements is 6 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.

Decision

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

   - insertion of the words "self contained" before "flats" in Schedule 2; and
   - deletion of STEP 2 of Schedule 4 in its entirety and substitution therefor with the following wording:

     "Remove all kitchens and cooking facilities, except ONE kitchen, and all bathrooms, except TWO."

2. Subject to these corrections, the appeal is dismissed and the enforcement notice is upheld.

Procedural Matters

3. The appellant did not attend the first site visit scheduled for 28 November 2016 and so it was re-arranged for 3 January 2017 when both parties were present.

4. The appellant's Grounds of Appeal refer to 'pictures' and copy tenancy agreements being attached, but these were not provided despite prompting.

5. The allegation and requirements of the notice should match. Whilst the requirements refer to "self contained" flats, these words do not appear in the

allegation although it is clear that is what is meant. The notice can be corrected to include the words "self contained" in the allegation without causing injustice to either party.

6. The requirements of an enforcement notice cannot go beyond requiring remedy of the breach. The first part of Step 2 of the notice refers to the layout being returned to that of a single family dwelling. It appears to be an attempt to require the property to be restored to its condition before the breach took place. This would be achieved by compliance with the second part of Step 2 which requires the removal of multiple kitchen/bathroom facilities along with the requirements in Step 3 to remove partitions and other items associated with the unauthorised use. In view of this, the notice requires correction. No injustice would arise since the effect of the correction is to make the notice comply with section 173(3) of the 1990 Act in relation to changes of use and section 173(4) in terms of what steps they should specify.

Reasons

7. In order for the appeal to succeed on ground (b) it would need to be demonstrated that there has been no material change of use of the premises to six flats, as alleged. The appellant has the burden of proof and the test of the evidence is the balance of probabilities. The wording of ground (b) is that the matters alleged have not occurred rather than the matters are not occurring. The relevant date is when the notice was issued i.e. 4 August 2016.

8. It is the appellant's case that the premises are in use as a House in Multiple Occupation (HMO) rather than flats and so the breach, as alleged, has not occurred. The Council has supplied a copy of the Licence for a HMO under section 64 of the Housing Act 2004 at the premises which was granted on 22 June 2015 for a period of 5 years. Notwithstanding the Licence, the Council maintains the premises have not been in use as a HMO.

9. The appellant contends that there are five double bedrooms with a lounge/tv room, garden and kitchen/dining area being shared facilities used by all the tenants. The HMO Licence was issued on the basis of 6 rooms being suitable for occupation by a maximum of 2 occupiers in each. The Council suggests that if it is a HMO with five double bedrooms then there would be more than six occupants meaning that planning permission would still be required for a change of use of the dwellinghouse[1]. That is not the issue before me, however. The crux of the matter is whether the premises were in use as flats when the notice was issued. If they were not, then the wrong use has been alleged which could not be corrected without causing injustice to the appellant. In that scenario, the ground (b) appeal would succeed and the notice would be quashed. The success or failure of the appeal therefore depends upon whether or not the premises have been identified correctly as being in use as flats.

10. To be a HMO, the building (or part) must satisfy one of a number of tests contained in section 254 of the Housing Act 2004. The "standard test" is met where there is one or more units of living accommodation not consisting of a self-contained flat or flats, the accommodation is occupied by persons who do not form a single household, it is their only or main residence and constitutes

[1] A change of use from Class C3 (dwellinghouse) to Class C4 (small houses in multiple occupation occupied by between 3-6 unrelated individuals) within the meaning of the Town and Country Planning (Use Classes) Order 1987, as amended, is permitted under the Town and Country Planning (General Permitted Development)(England) Order 2015, subject to such rights not having been removed.

the only use of that accommodation. At least one occupier must be liable to pay rent or to provide other consideration for occupying the property. Finally, two or more of the households must either share, or be lacking in, one or more basic amenities i.e. a toilet, personal washing facilities or cooking facilities.

11. A 'self-contained flat' is defined in section 254 of the 2004 Act to mean a separate set of premises (whether or not on the same floor) which forms part of a building, either the whole or a material part of which lies above or below some other part of the building and in which all three basic amenities are available for the exclusive use of its occupants.

12. The Council refers to site visits having been undertaken by its officers on three separate occasions. On the first occasion in September 2014 the premises were found to have been converted into six flats. At the second visit in June 2016, access could only be gained to ground floor Flat 3 at the rear of the building which was self-contained. Access to other parts of the building was gained in July 2016 and the Council says that the premises were found to be in use as 6 self-contained flats with no shared facilities.

13. Prior to the issue of the HMO Licence, the appellant described six self-contained flats, three on each floor, in email exchanges with the Council's HMO Licensing Team. On 24 May 2015 he stated that "All the flat [sic] are self contained studio flats which are open plan, with living, kitchen areas combined. There are no separate kitchens. All studios have their own high spec en-suite toilet/ shower facilities."

14. Online marketing for the address in July 2016 describes a "selection of studios" for rent "comprised of fully fitted kitchen own bathroom and fully furnished". This was shortly before the notice was issued.

15. At my site visit, access to one first floor room was unavailable, but the appellant identified it as being identical to a room below which I was able to inspect. It was apparent that, at the time of my visit there were three lockable units of accommodation on the first floor and two on the ground floor. All had a fitted kitchen area containing cupboards, sink with drainer, worktop with integrated hob and hood, microwave and space below counter for the washing machine and fridge. The rooms that I saw were furnished and had a double bed. Each had en-suite facilities providing a toilet, wash basin and shower.

16. Further accommodation was located off the ground floor hallway which the Council had identified as Flat 3. The appellant described the space as being communal areas. When I visited, it comprised a room containing a sofa and television, an open plan kitchen/dining area with a table and chairs and a shower room with toilet and sink. A patio door led from the kitchen into the rear garden. An internal door had been removed in the hallway to allow free access into these rooms and the garden. Both the kitchen and bathroom facilities were similar in size, layout and content to those in the self-contained accommodation.

17. It was evident that there are currently five separate units of accommodation equipped with the facilities required for day-to-day private domestic existence, having their own basic amenities of comparable size and specification to those in the shared areas. There would be no need for any occupant to use the shared toilet, personal washing or cooking facilities available on the ground

floor and it would be questionable why anyone would choose to do so. All five units that I saw were self-contained flats.

18. The significant difference between the 'communal' areas and the flats is the provision of a 'tv room' instead of a bedroom and the absence of a lockable door. Had the door not been removed, then the layout and facilities would be compatible with there being a sixth self-contained flat. There is sign that the door has been removed fairly recently from the condition of the wood in the door frame which looks quite newly splintered. An external double-glazed door did not appear to be in use, but during the Council site visit in June 2016, it apparently provided sole access to what was marked as 'Flat 3' with the internal door which is now removed having been blocked up. Instead of a tv room, the Council identifies there having been a bedroom.

19. The Council's evidence is corroborated by photographs dated 2 June 2016 showing the double-glazed door with "Flat 3" marked on the top panel along with an unmade bed and clothing in what is now the tv room. Numerous personal effects in the lounge/kitchen areas and shower room are shown in photographs which all support use as a flat rather than a communal area. Thus, there is clear evidence that a rear ground floor flat existed in the space now said to be shared facilities.

20. Since that time, evidently there have been quite simple changes to alter the contents and remove the internal door to provide communal facilities. Notwithstanding those changes, the presence of six flats at the relevant time corresponds not only with the Council officer's observations but is consistent with the marketing information and the appellant's previous description of the premises. No substantive evidence has been produced by the appellant to demonstrate otherwise. On the evidence, I believe there were six units all with their own basic amenities for the exclusive use of their occupants. As such, they would be self-contained flats and the 'standard test' would not be fulfilled. Consequently, this would not have been a HMO.

21. Premises are capable of being in use as flats without being registered separately at H.M. Land Registry. Indeed, if they are short term tenancies they would not normally be registered. The presence of only one gas and electricity meter and a single utility bill for the whole premises does not mean these cannot be flats. It simply shows the arrangement made for the supply and payment of the utilities, the costs of which could be capable of recovery from the tenants through the rent or otherwise. Nor does an integrated fire alarm for the building indicate how it is used. Although a HMO licence has been issued it does not establish that is the use to which the premises have been put particularly when there is clear evidence to the contrary.

22. It is clear to me that the premises do not fulfil the definition of a HMO with the evidence pointing firmly to there being six self-contained flats when the notice was issued.

23. I conclude on the balance of the probabilities that as a matter of fact the breach, as alleged, has occurred. The appeal must fail.

KR Saward

INSPECTOR