
Appeal Decision

Site visit made on 4 January 2017

by Susan Wraith Dip URP MRTPI

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

Decision date: 2 February 2017

Appeal Ref: APP/C5690/C/16/3148490

Land and premises at basement and ground floor level at 31 Dartmouth Road London SE23 3HN

- The appeal is made under s174 of the Town and Country Planning Act 1990 [hereafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Rustramax Limited against an enforcement notice issued by the Council of the London Borough of Lewisham.
 - The notice was issued on 19 February 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission, the making of a material change of use of the ground floor and basement of the Premises from Use as a shop; Use Class A1 of the Town and Country Planning (Use Classes) Order 1987 (as amended), to use as an A1 shop at ground floor level and a self-contained flat at basement level (Use class C3).
 - The requirements of the notice are:
 1. Cease the use of the basement of the premises as a self-contained flat
 2. Remove the shower fixtures and fittings from the basement of the premises
 3. Remove the kitchen fixtures and fittings from the basement of the premises
 4. Remove all materials, debris, waste and equipment, resulting from compliance with requirements 2 and 3, from the premises
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the ground set out in s174(2)(f) of the Act.
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Decision

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

Preliminary matter

2. There is no clear evidence as to the duration and extent of any earlier use of the basement as self-contained living accommodation. In 1994 planning permission was granted for the change of use of the ground floor and basement to use as a restaurant. The appellant recalls that the restaurant operator stayed overnight in the basement flat. However, by 2010 all fixtures and fittings had been stripped out and the building was empty. No appeal has been lodged on ground (d)¹ and the appellant acknowledges that four years continuous use cannot be demonstrated. Therefore, I do not need to take further the question of whether the notice was issued in time.

¹ An appeal on ground (d) of s174(2) of the Act is that, at the date the notice was issued, no enforcement action could be taken in respect of the alleged breach. S171B(2) states that where the breach consists of the change of use to use as a single dwellinghouse, the relevant period within which enforcement action may be taken is four years beginning with the date of the breach.

The appeal on ground (f)

3. An appeal on ground (f) is that the steps required by the notice exceed what is necessary to remedy the breach or, as the case may be, to remedy any injury to amenity that has been caused by the breach². The words “as the case may be” indicate that the main purpose of the notice should fall within one or the other category.
4. Unlike an appeal on ground (a), where the full planning merits of a development can be considered, an appeal on ground (f) is constrained by the Council’s purpose in issuing the notice. In this case, the notice is seeking a complete remedy of the breach insofar as the change of use of the basement area to a self-contained flat is concerned. The appeal is limited to the consideration of whether the steps go further than necessary to achieve that purpose.
5. S173(4)(a) of the Act states that remedy of the breach can be achieved by making any development comply with the terms of any planning permission which has been granted, by discontinuing any use or by restoring the land to its condition before the breach took place. There is no suggestion of any planning permission having been granted. My consideration, therefore, focuses upon the other elements of this provision.
6. The requirement to “cease the use” as a self-contained flat (step 1) flows directly from the allegation of the change of use to a self-contained flat. It is a necessary step to remedy the breach and is clearly not excessive. Steps 2 and 3 require removal of the shower and kitchen fixtures and fittings. It is these requirements on which the appellant takes issue.
7. The appellant argues that the installations of the shower and kitchen were internal works. Reference is made to the meaning of development under s55 of the Act which states (amongst other things) that carrying out of alterations which affect only the interior of a building shall not be taken to involve development of the land.
8. However, under s173(4)(a) a notice can specify steps necessary to restore the land to its condition before the breach took place. In remedying a breach, S173(5) states that a notice may require (amongst other things) the removal of any works. It has been held by the courts that a notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, so that the land is restored to its condition before the change of use took place.³ It is, therefore, legally possible to include steps for the removal of a shower and kitchen where a change of use to a flat is alleged.
9. Evidence, in this case, in the form of a Council Tax Bill indicates that the flat was occupied in September 2013 prior to which it was “empty and unfurnished”. The appellant’s evidence is that, when the restaurant operator moved out, fixtures and fittings were stripped out and by 2010 the basement area was a “rat infested hovel”⁴. The appellant then pursued proposals (unsuccessfully) to extend and convert the basement accommodation. It was following those refusals that the

² These provisions are set out in s174(1)(f) of the Act. They reflect the purposes of an enforcement notice that are set out s173(4).

³ *Murfitt v SSE* [1980] JPL 598; *Somak Travel v SSE* [1987] JPL 630.

⁴ This description is given in a letter from Shattocks Associates to the Council dated 13 September 2010.

refurbishment of the basement was undertaken including the installation of a shower and kitchen.

10. On the evidence, therefore, it is likely that the condition of the basement before the breach took place was as empty and uninhabitable accommodation, without fixtures and fittings, kitchen or shower room. The shower and kitchen were installed as an integral part of the material change of use on balance of probability.
11. Thus the removal of the shower and kitchen is necessary to restore the land⁵ to its condition before the breach occurred. I find, therefore, that steps 2 and 3 are not excessive for the purpose of remedying the breach.
12. The appellant wishes to seek alternative uses for the premises. It is suggested that the shower room and kitchen would be needed in connection with such uses and that their removal would be wasteful. However, there is no planning permission presently in place for alternative use and the merits of what is being proposed is for the Council to determine in the first instance. This is not a consideration which would justify any lesser steps.
13. I have considered in the round whether there is any obvious alternative involving any other lesser steps that would avoid the need for removal of the shower and kitchen fixtures and fittings. However, there is none that I can identify in the circumstances of this case.
14. The appeal on ground (f) fails.

Other matter

15. As well as the basement flat the allegation covers the A1 shop use at ground floor level. However, there are no requirements in the enforcement notice concerning the shop and no suggestion that its lawfulness is in doubt.⁶ The use of the ground floor shop is not a matter that I need to address in the circumstances of this appeal.

Conclusion

16. For the reasons given above I conclude that the appeal should not succeed.

Susan Wraith

Inspector

⁵ In the interpretation given at S336 of the Act "land" includes a building; and "building" includes any part of a building.

⁶ S173(11) of the Act states that where an enforcement notice in respect of any breach could have required any buildings or works to be removed or any activity to cease, but does not do so; and all the requirements of the notice have been complied with, then so far as the notice did not so require, planning permission shall be treated as having been granted.