
Appeal Decision

Site visit made on 23 November 2016

by George Mapson DipTP DipLD MRTPI

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

Decision date: 17 February 2017

Appeal Ref: APP/T5150/C/16/3153158
1 Charterhouse Avenue, Wembley, HA0 3DH

- 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 Miss Raini Patel¹ against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice (Council's reference E/16/0284) was issued on 18 May 2016.
- The breaches of planning control as alleged in the notice are: *Without planning permission, the material change of use of the premises to five dwellings* AND *Without planning permission, the erection of [a] single storey rear and side extension adjacent to Eton Avenue (as shown hatched in red on the attached Plan A).*
- The requirements of the notice are: *STEP 1 Cease the use of the premises as more than one dwelling and its occupation by more than one household and remove all kitchens and cooking facilities, except ONE, from the premises and all bathrooms, except three, from the premises. STEP 2. Demolish the single storey rear and side extension adjacent to Eton Avenue (as shown hatched in red on the attached Plan A), remove all items and debris arising from that demolition and remove all materials associated with the unauthorised development from the premises.*
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 as amended. An appeal was made on ground (a), but it lapsed because the prescribed fees were not paid within the specified period. Therefore 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 enforcement notice is corrected:
 - 1) by substituting Plan B annexed to this decision for Plan A attached to the enforcement notice; and
 - 2) by inserting within Schedule 3 ('Reasons for issuing the notice') the words *"It appears to the Council that the above breach of planning control has occurred within the last four years."* before the words *"The unauthorised use"*.
2. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld.

¹ The appeal was made on behalf of the appellant, Miss Raini Patel of No.1 Charterhouse Avenue, by her planning agent, *Planview Planning Limited*. The company has submitted two supporting documents; the 'Grounds of Appeal' and 'Final Comments'. However, since October 2015 the Council's dealings with this property have been conducted with Mr Ravi Riyat. Mr Riyat says he is *"the agent for the owner"* but he also appears to be the director of several companies, existing and dissolved, that use No.1 Charterhouse Avenue as their correspondence address. Mr Riyat submitted a response to a Planning Contravention Notice which the Council issued on 15 December 2015. He attended the appeal site visit and subsequently provided floor plans of the building.

Procedural matters

Plans attached to the enforcement notice

3. Two plans are attached to the notice; a location plan and Plan A, which shows hatched in red a single storey rear and side extension. Schedule 4, Step 2, of the notice requires this extension to be demolished.
4. The appellant's agent says that the appeal property has benefitted from a number of extensions over the years and it is not clear which elements must be demolished in order to comply with the notice².
5. Following my site visit on 23 November 2016, sketch plans of the existing ground and 1st floors of the appeal property were submitted on behalf of the appellant. The Council contends that these plans do not accurately show what has been erected at the site. They fail to show the full extent of the rear extensions, namely the projecting roof located at the rear of the conservatory and the side flat on the rear elevation.
6. Based on the appellant's ground floor plan, on 27 January 2017 the Council submitted another plan (annexed to my decision as Plan B), which shows, shaded yellow, the projecting roof that is located at the rear of the conservatory and the side flat. The area hatched in red on this plan is a very close match for the area hatched in red on Plan A (which is also shown on Plan B for comparison). The Council has also submitted a photograph, dated 4 February 2016, which shows the rear elevation of the unauthorised extension (annexed to my decision as Photograph 1).
7. I propose to correct the enforcement notice by substituting Plan B for Plan A. This will ensure that the appellant has certainty as to the unauthorised operational development to which the notice relates. I am satisfied that this correction would not cause injustice to any party.

Schedule 3 of the notice: 'Reasons for issuing this notice'

8. The DCLG's web-based '*Planning practice guidance*' (6 March 2014) sets out an '*Example enforcement notice for operational development*'³. There is no compulsion for a local planning authority to adopt the format of the example enforcement notice, but one benefit of using it is that it sets out in order the matters that an enforcement notice must contain, as derived from sections 173(1)-(10) of the 1990 Act.
9. The Council's enforcement notice does not follow the format of this example. Section 4 of the example enforcement notice begins with the sentence: "*It appears to the Council that the above breach of planning control has occurred within the last four years*". This is missing from the Council's notice.
10. The Council's notice alleges the material change of use of the premises to five dwellings. As with the operational development, the time limit for enforcement action for such a breach of planning control is four years.
11. However, a complication arises because in October 2015 Mr Riyat (see footnote 1) informed the Council that the property was being rented as a House in Multiple Occupation [HMO], and in his Planning Contravention Notice response of 5 January 2016 he stated that the property is the subject of an HMO Licence application.
12. Were this to be the case, it would have a bearing on the time limit for enforcement action. There is a difference between a self-contained unit that has all the attributes to which the four-year rule applies, and a situation where basic facilities are shared with other households, as is the case with an HMO, where the ten-year rule applies.

² The gist of the argument is that an enforcement notice should be so drafted as to tell the recipient fairly, what he or she has done wrong and what must be done to remedy it. The appropriate test is derived from the Court of Appeal judgment in *Miller-Mead v. MHLG* [1963] 2QB 146.

³ Paragraph: 019 Reference ID: 17b-019-20140306.

13. When considering the correct time limit for enforcement action, the matter to be addressed is whether the building, or the relevant part of the building, has been used as a single dwelling house (i.e., a self-contained unit of accommodation). This description applies to a flat but not a bedsit.
14. The appellant's planning agent makes no claim of an HMO use of the appeal property and no appeal is made on ground (b), that the matters alleged in the notice have not occurred as a matter of fact. There is no clear evidence, as opposed to assertion, of an HMO use.
15. I find that the relevant time limit for enforcement action against the material change of use is four years. I shall correct Schedule 3 of the notice to include a reference to this time limit. I am satisfied that this correction would not cause injustice to any party.

The appeal on ground (d)

16. An appeal on ground (d) is that at the date the notice was issued it was too late to take enforcement action against the matters stated in the notice. The relevant date is 16 March 2012; that is, four years preceding the date of issue of the first enforcement notice⁴. It was on that date that the Council first purported to take enforcement action against the unauthorised material change of use and operational development⁵.

The appellant's case

17. In a document entitled 'Grounds of Appeal', dated June 2016, the appellant's planning agent asserts that at least one of the studio flats has been lived in for over four years. He says that initial evidence is included in Appendix B to that document and that additional evidence of occupation will be provided at the 'Statement of Case' stage. Appendix B contains copies of Zoopla website advertisements that indicate that a flat at No. 1 Charterhouse Avenue was first offered for rent in May 2009.
18. In the same document the appellant's agent asserts that parts of the side and rear extension have been in-situ for over four years. He says that supporting evidence is provided in Appendix A and that this will be added to at the 'Statement of Case' stage. Appendix A contains a series of Google Earth and Google Streetview images of the appeal property dating from 9 September 1999.
19. No 'Statement of Case' and no additional supporting evidence have been submitted. In a document entitled 'Final Comments', dated November 2016, the appellant's agent states that due to the ill health of the appellant, additional information could not be provided at the 'Statement of Case' stage. The 'Final Comments' are, in essence, a rebuttal of specific points made by the Council in its statement.

The Council's case

20. The gist of the Council's case is that Council officers visited the property in April 2005 and established that it was being occupied by one household only. Visits carried out in October 2015 and December 2015 confirmed that it was being used as five flats.
21. The property continues to be valued as a single dwellinghouse for Council Tax purposes.

⁴ Council Reference E/15/0613, issued on 16 March 2016. An appeal was made by Miss Raini Patel against that notice on grounds that included a claim that it was unclear as to which elements must be demolished in order to comply with the notice. In an email to the Planning Inspectorate of 13 July 2016, the Council confirmed that it had decided to withdraw that notice to "ease the administration process for all concerned", having issued on 18 May 2016 a replacement notice, the subject of this appeal.

⁵ Section 171B(4)(b) of the 1990 Act provides that if within the appropriate four or ten-year period the local planning authority has taken or "purported to take" enforcement action in respect of a breach of planning control (for example, by serving a notice which has had to be withdrawn), it has a further four years in which to issue a second or subsequent notice, provided always that the first notice was not already out of time and the matter constituted a breach of planning control.

22. The extension facilitates the unauthorised use of the appeal property as five flats. No evidence has been provided to show when the operational development was carried out or when the dwellinghouse was converted in five flats.
23. The Google Earth and Google Streetview images show that in 2008 there was a single storey rear extension, but by June 2013 this had been demolished and replaced by a new single storey rear extension. The June 2010 aerial photograph shows a small conservatory roof which does extend beyond the rear elevation of the house, whereas the June 2013 aerial photograph shows an extension with a solid roof structure projecting some 3 metres from the rear elevation of the house.
24. There is no photographic or other evidence to show that the works that appear on the June 2013 photographs were carried out before 16 March 2012. Despite the fact that all the building work and facilities, such as additional bathrooms and kitchens, would have required building regulations approval, no approvals have been sought or granted.
25. The Zoopla marketing details are not proof of occupation. There is no corroborating evidence to support the claim that the use of the appeal property as five flats began more than four years prior to the date of issue of the first enforcement notice.

Reasons and conclusions on the ground (d) appeal

26. Dealing first with the alleged material change of use, establishing the start of the use as five flats involves a two-stage process. The first stage is to look at the physical works that were carried out to bring about the use as five flats. The second stage is to establish when the use actually commenced and whether there was a continuous residential use of five flats thereafter, to the extent that the Council could have taken enforcement action against that use at any time⁶.
27. On the matter of continuous use, there is a difference between an established dwellinghouse or self-contained unit of accommodation, where an occupier does not have to be continuously or even regularly present in order for it to remain in use as a dwellinghouse or self-contained unit of accommodation, and where there is no established use. In the latter case, the use has to be "*affirmatively established*" at the start of the four year period⁷.
28. In the case of the appeal property, I share the Council's view that the marketing of a flat on the Zoopla website provides insufficient evidence that the appeal property has been used as one self-contained flat, let alone as five flats, continuously for the requisite period to demonstrate immunity from enforcement action.
29. There are no details of rental agreements, or names of tenants, or testimonies from occupants of the flats, to support the appellant's claims. There are no copies of rent books, deposit or rental receipts or separate utility bills that might indicate that the appeal property (the lawful use of which is as a single dwellinghouse) contained any separate self-contained units of accommodation within it over the immunity period.
30. Turning to the unauthorised operational development, there is nothing to show that these works were carried out before 16 March 2012. There are none of the necessary building regulations approvals for any of these works. There are no builders' or

⁶ *Impey v SSE & Lake District SPB* [1981] JPL 363, [1984] 47 P&CR 15 and *Backer v SSE* [1983] JPL 167. In *Impey*, the Court held that it was necessary to look at both elements of development involved on the basis that both (i.e. physical state and actual/ intended/attempted use) are important, but neither is decisive.

⁷ The Court of Appeal judgment in *Swale BC v FSS & Lee* [2005] EWCA Civ 1568, [2006] JPL 886 established that the correct approach is to ask whether there was any period during the four years when the building was not physically occupied, even though available for occupation, when the local planning authority could not have taken enforcement action against the use. It is also necessary to make a finding as to whether the periods of non-occupation were *de minimis* or not. Even though a building might be fitted out for residential use the question was whether it had been actually used as a dwelling for a continuous period, apart from *de minimis* breaks.

suppliers' invoices or receipts for the costs of the materials or the labour involved in carrying out these works.

31. Even if such evidence had been produced, the judgments of the courts in *Murfitt*⁸ and *Somak Travel*⁹ provide authority for the view 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, or be permitted development, or be immune from enforcement, so that the land is restored to its condition before the change of use took place.
32. I find that insufficient relevant, clear and unambiguous evidence has been produced by the appellant to demonstrate, on the balance of probability, the truth of the assertions made that the matters alleged in the enforcement notice are immune from enforcement action. The appellant has failed to discharge the burden of proof placed upon her and accordingly, the appeal on ground (d) fails.

The appeal on ground (f)

33. An appeal on ground (f) is that the steps required to comply with the notice are excessive and lesser steps would overcome the objections.
34. The requirements of an enforcement notice are governed by sections 173(3)-(7) of the 1990 Act. Section 173(3) states that: "*An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes*".
35. Section 173(4) sets out the two purposes for issuing a notice. These are: "(a) *remedying the breach by [1] making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, [2] by discontinuing any use of the land or [3] by restoring the land to its condition before the breach took place*; or (b) *remedying any injury to amenity which has been caused by the breach*."

The appellant's case

36. The gist of the appellant's case is that an obvious alternative to removing all five flats would be to reinstate the use as a single dwellinghouse and retain two of the flats. In support of this argument, my attention is drawn to the judgments in *Tapecrowns, Moore and Ahmed*¹⁰ which highlighted, among other things, the need for an Inspector to consider whether there is "*obvious alternative*" which would overcome planning difficulties, at less cost and disruption than total cessation of an unauthorised use.

Reasons and conclusions on the ground (f) appeal

37. The purpose of the requirements of the notice constrains the way ground (f) can be argued, particularly where the planning merits are not being considered as part of an appeal on ground (a). The Council has confirmed that the purpose of the notice is to remedy the breach of planning control as set out in section 173(4)(a).
38. Where a notice is directed at remedying the breach and amenity is not an issue, the normal requirements are to discontinue the unauthorised material change of use, and remove any equipment or materials brought onto the site to sustain it, or demolish the unauthorised operational development and remove the resulting materials. In such a case, my concern under ground (f) is whether the steps required exceed what is necessary to achieve that purpose.

⁸ *Murfitt v SSE* [1980] JPL 598.

⁹ *Somak Travel v SSE* [1987] JPL 630.

¹⁰ The cases referred to are: *Tapecrowns Ltd v FSS and another* [2006] EWCA Civ 1744 [2007] 2 P&CR 7; *Moore v SSCLG* [2012] EWCA Civ 2101, [2013] JPL 192; and *Mahfooz Ahmed v SSCLG and LB Hackney* [2014] EWCA Civ 566.

39. I have three points to make about the appellant's ground (f) case. The first point is that the suggestion that the property should be permitted to be used as a single dwellinghouse and two flats is not an obvious alternative to unauthorised use. It would be tantamount to permitting three self-contained units instead of five and no reasoned argument has been put forward to support this contention.
40. The second point is that even if planning merits of the appellant's suggested alternative had been advanced, they could be considered only where ground (a) has been pleaded and the fee has been paid. As an appeal has not been brought under ground (a) it is not appropriate to introduce arguments on the planning merits in the context of an appeal on ground (f).
41. The third point is that the power available under section 176(1) to vary the terms of the notice cannot be used to attack the substance of the notice. A notice that requires the recipient to cease a use and return the land to its condition before the breach took place cannot be turned into a notice requiring something less by reliance on that section.
42. On the facts and circumstances of this case I find that the requirements are proportionate. They seek nothing more than is necessary to remedy the breach of planning control that has occurred. No lesser steps would give effect to the notice and accordingly, the appeal on ground (f) fails.

The appeal on ground (g)

43. An appeal on ground (g) is that the time given to comply with the notice is too short. The appellant argues that the compliance period should be extended from six months to twelve months. This amount of time would be needed to relocate the tenants and carry out the required demolition work.

Reasons and conclusions on the ground (g) appeal

44. No tenancy agreements have been submitted for consideration in support of the appellant's argument. There is no evidence to show that any such tenancy agreements would not be completed before the end of the six month compliance period, or that the required demolition work and restoration of the land could not be carried out within that period.
45. The Council points out that it has discretionary powers under section 173A 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.
46. On the facts and circumstances of this case, I find that six months provides adequate time to comply with the requirements of the notice. Accordingly, the appeal on ground (g) fails.

Overall conclusions

47. I have taken account of my observations at the site and the surrounding area and 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, as corrected.

George Mapson

INSPECTOR



Plan B

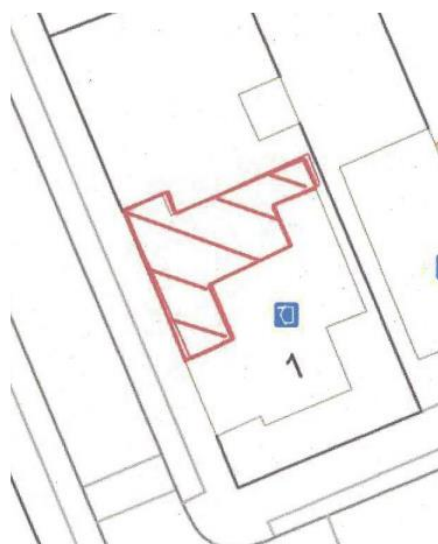
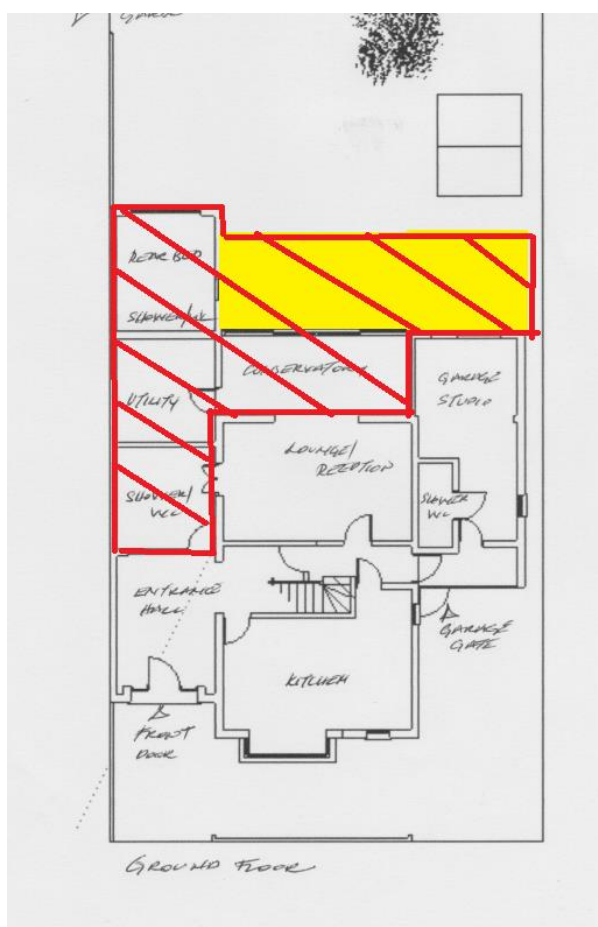
This is the plan referred to in my decision dated: **17 February 2017**

by **George Mapson DipTP DipLD MRTPI**

Land at: 1 Charterhouse Avenue, Wembley, HA0 3DH

Reference: APP/T5150/C/16/3153158

Scale: NTS



This plan was submitted by the Council of the London Borough of Brent on 27 January 2017.

George Mapson

INSPECTOR

Photograph 1

This is the photograph referred to in my decision dated: **17 February 2017**

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