



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 March 2017

Appeal Ref: APP/A5840/C/16/3144591

Land at 163 Kimberley Avenue, London, SE15 3XD

- 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 Rosekey Limited against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The notice, reference: 14-EN-0507, was issued on 12 January 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised development comprising the construction of a single storey one bedroom flat in an area designated for refuse and cycle storage as approved under planning permission 07/AP/1050 ("Unauthorised Development") in the approximate area identified on the photograph attached to the enforcement notice and hatched blue on the enforcement notice plan.
 - The requirements of the notice are:
 - i. Cease the use of the unauthorised single storey one bedroom flat as a C3 dwelling; and
 - ii. Demolish the unauthorised single storey one bedroom flat located in the area designated for refuse and cycle storage to a height of 2 metres on the boundaries; and
 - iii. Replace with the refuse storage and cycle storage facilities in accordance with approved drawings as required by conditions 3 and 4 of planning permission 07/AP/1050; and
 - iv. Make good any damage cause arising from compliance with (i)-(iii) above; and
 - v. Remove from the Land all resultant debris and materials arising from compliance with (i)-(iii) above with the area to be left in a tidy condition.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in s174(2)(a), (f) and (g) of the Act. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under s177(5) of the Act.
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Decision

1. It is directed that the enforcement notice be corrected, in paragraph 3, by deletion of all the text following "Without planning permission ..." and substitution of "...the material change of use of a building to use as a single storey one bedroom flat (Class C3), positioned in the approximate area identified on the attached photograph and hatched blue on the attached plan."

It is directed that the enforcement notice, as corrected, then be varied, in paragraph 5, by deletion of steps ii-v and substitution of:

- ii **Either** demolish the single storey one bedroom flat to a height of 2 metres on the boundaries; and replace with the refuse storage and cycle
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- storage facilities in accordance with approved drawings as required by conditions 3 and 4 of planning permission 07/AP/1050;
Or remove from the single storey one bedroom flat the kitchen units, worktops and appliances and bathroom fixtures and fittings.
- iii Remove from the Land all resultant debris and materials arising from compliance with steps i and ii above.

Subject to this correction and these variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under s177(5) of the Act.

Preliminary matters

2. In the first paragraph of the notice, the breach is referred to as one falling within paragraph (a) of s171A(1) of the Act, that being the carrying out of development without the required planning permission.¹ Within the allegation at paragraph 3 of the notice the breach is described in terms of "the unauthorised development". At paragraph 4 the time period for taking enforcement action is stated as "4 years" that being the time period for operational development.² Whilst included in its steps are requirements to replace the building with refuse, recycling and cycle storage facilities as required by a planning condition, these requirements are matters for consideration under ground (f). The lack of on-site cycle and refuse storage (referred to in the "Reasons for Issuing the Notice") is a material consideration but it does not necessarily follow that the allegation is one aimed at breaches of conditions. I am satisfied that the notice, on its face, is one which is directed at the carrying out of development without the required planning permission rather than being a notice which seeks to attack a failure to comply with conditions. I shall deal with the deemed application and grounds of appeal accordingly.
3. There is no appeal made expressly on ground (b).³ However, there are matters of fact to be considered relating to the description of the breach. In particular, it is argued that the building was pre-existing and that what should have been alleged is a material change of use. I shall consider these matters under the heading "The implied appeal on ground (b)".
4. The appellant has proposed alternative refuse, recycling and cycle storage facilities. I am asked, under the appeal on ground (a), to consider a variation of the planning conditions. However, the scope of ground (a) and the terms of the deemed application derive directly from the allegation. The powers available to me in this appeal do not extend to making a determination on whether the development which was subject to the conditions (a different development to that which is before me) could have been carried out without complying with the conditions concerned.
5. There are unresolved matters between the Council and the appellant concerning the future use of the building. However, within the scope of this appeal, it is not

¹ S171A(1) of the Act distinguishes between two types of planning breach those being: (a) the carrying out of development without the required planning permission; and (b) failing to comply with any condition or limitation subject to which planning permission has been granted. S173(1)(b) places a statutory requirement that a notice states the paragraph of s171A(1) within which, in the opinion of the local planning authority, the breach falls.

² In the case of a notice directed at a breach of condition the relevant time period is ten years (s171B(3) of the Act).

³ An appeal on ground (b) of s174(2) of the Act is that the matter alleged in the notice has not occurred as a matter of fact.

for me to make any determination as to any use rights or to place limitations upon how the building may be used. These are matters for the appellant and the Council in the first instance.

6. Where, in an enforcement appeal, there is unclear, disputed or contradictory evidence on matters of fact the test of the evidence is one of balance of probability.⁴ The burden of proof is upon the appellant.

The implied appeal on ground (b)

7. The breach is described in terms of an operational development, i.e. "the construction" of a single storey building. Whilst the appellant accepts that there has been a change of use, it is argued that the building concerned already existed.
8. There is evidence of the "building" shown on a plan, dated December 2006, which accompanied a planning application for the redevelopment of the site [hereafter "the 2007 permission"].⁵ At this time the building was part of a larger building which appears to have been in residential use. There is a photograph taken in November 2010⁶ which shows that, by that time, much of the larger building had been demolished although it appears that part, being the appeal building, remained. What would have been an internal wall within the larger building was, by the time of the photograph, the front elevation to the appeal building including a door.
9. There are other photographs of the building⁷ some of which show the rooflights. Whilst the current existing plan (at Document 2 of the appellant's statement) appears to show the rooflights and rear wall in slightly different positions when compared to the 2006 plan, the photographs capture actual images at specific points in time and are, therefore, persuasive evidence of the longevity of the building and its form. I find, on the balance of the evidence, that the main structure of the building, including its external walls, roof, rooflights and doorway opening, as is seen today was in existence in 2010 and, for its most part, probably a number of years earlier.
10. As to when the building was first brought into use as a flat there is contradictory evidence. The appellant, in response to a request for comments, says that the building had been used as a residential flat from 2007. However, for the following reasons, I consider it more likely that the use commenced some time later.
11. The appellant in its statement of case (and contrary to the above claim) provides evidence that the first tenancy commenced 24 April 2013.⁸ Additionally, in response to the Council's Planning Contravention Notice the appellant states that

⁴ Balance of probability means likelihood. In other words, it means that the assertion made is more likely than not to be correct.

⁵ In 2007 planning permission was granted for the erection of a two storey building to form four residential flats with associated amenity space and bin and bike store. A plan which accompanied the application, annotated "Existing Plans and Elevations" and dated December 2006 (Appendix 1 to the Council's statement), showed evidence of the appeal building. At that time it formed part of a larger building shown to be in residential use. The plan also showed the position of the rooflights.

⁶ This photograph, dated 29/11/2010, accompanies the Geo-Environmental Desk Study undertaken by Sevenoaks Environmental Consultancy Ltd.

⁷ For example the photograph dated March 2004, the Allen & Smith Chartered Surveyors photograph of 15 March 2011 and the Google Map street view photograph of 2012.

⁸ In the list of documents accompanying the appellant's statement of case is a copy of an Assured Shorthold Tenancy Agreement, dated 22 April 2013, and titled "1st Let AST". The accompanying Deposit Protection Service correspondence states that the start date of the tenancy was 24 April 2013.

the building was occupied as a one bedroom flat from 22 April 2013, prior to which (it is claimed) the building was occupied by various businesses. The front elevation has been changed since 2011⁹. A window opening has been formed, a boiler flue installed and the door replaced. In a street view photograph, said to be taken from Google Maps and dated 2012, the site has the appearance of a building site rather than one suitable for domestic living.

12. For all these reasons I find, on the balance of the evidence, that the building was not in use as a one bedroom flat from 2007, and that such use probably did not commence until around the time of the first Assured Shorthold Tenancy in April 2013.
13. Given my findings on these facts, I conclude that the allegation of the "construction" of a building is incorrect as the building was already existing several years (or more) before it was brought into use as a flat. The breach should be described in terms of a material change of use of an existing building. To that extent I find in the appellant's favour on the implied appeal on ground (b).
14. It is important that the allegation is correctly framed as it is from the allegation that the terms of the deemed application and all other grounds of appeal flow. I shall, therefore, correct the allegation in this regard under the available powers of s176(1)(a) of the Act. I am satisfied that no injustice will arise to either party in me so doing.

The appeal on ground (a) and the deemed application

15. I shall consider ground (a) and the deemed application on the basis of the allegation in its corrected form i.e. the material change of use of the building to a single storey one bedroom flat.

Planning policies

16. I have been referred to a number of development plan policies. Saved policies 3.2 and 4.2 of the Southwark Plan seek to ensure that new residential development provides for good quality living conditions, including in terms of privacy, space and outlook and does not cause loss of amenity. Core Strategy policy 2 and Southwark Plan saved policy 5.2 encourage sustainable means of travel and seek to avoid adverse traffic impacts. Core Strategy policy 13 seeks to ensure development reduces pollution including by (amongst other things) increasing recycling.
17. Planning law requires that planning decisions are made in accordance with the development plan unless material considerations indicate otherwise.¹⁰
18. 2015 Technical Update to Residential Design Standards 2011 (Supplementary Planning Document) [hereafter "the SPD"] provides guidance for the standard of design expected of residential developments. It conforms with the Technical Housing Standards introduced by Government in 2015 and incorporates minimum internal space standards for new dwellings in line with the Nationally Described Space Standard. It states that the minimum floor area for a one

⁹ A photograph which accompanies a valuation letter, dated 15 March 2011, prepared by Allen & Smith Chartered Surveyors shows the elevation with door but without a window or flue as also appeared in the 2010 photograph.

¹⁰ S38(1) and (6) of the Planning and Compulsory Purchase Act 2004 and s70(2) of the Town and Country Planning Act 1990.

bedroom, two persons, single storey dwelling is 50 square metres. The SPD is a material consideration for the appeal.

Main issue

19. Having regard to the scope of the appeal, the planning policies, statutory requirement and submissions made by the parties I consider the main issue in ground (a) and the deemed application to be whether the single storey one bedroom flat provides for satisfactory living conditions for its occupiers with particular regard to privacy, outlook and internal living space.

Living conditions – privacy, outlook and internal living space

20. The flat is positioned immediately adjacent to the shared walkway to the office which passes the window to its kitchen and main living area. With clear glazing the flat would have a very poor degree of privacy. Similarly the outlook from the window, if clearly glazed, is across the shared walkway towards the side elevation of Ava House at close quarters and, thus, a very poor and obstructed outlook.
21. In terms of living space the floor area of the flat falls considerably short of 50 square metres, that being the minimum standard for one bedroom two person accommodation set out in the SPD. This shortfall in space gives rise to oppressive and cramped living conditions.
22. I find, on this first main issue, that the flat does not provide for satisfactory living conditions for its occupiers in terms of privacy, outlook and internal space contrary to the policies of the development plan and the guidance of the SPD.

Other matter

23. The appeal building is positioned in an area intended for refuse, recycling and cycle storage under the 2007 permission, the facilities being required by planning conditions. The appellant argues that adequate provision has already been made on the adjacent site where there are existing facilities shared by the residents of Ava House and Kashmir House. The appellant has offered a s106 unilateral undertaking which would, in effect, ensure that the adjacent land remains available for refuse and cycle storage in the event of a grant of planning permission.
24. The area is sufficiently convenient to Ava House and, from the evidence and what I saw at my site visit, I am reasonably satisfied that adequate refuse and recycling facilities can be provided, even when including the appeal flat, subject to further detailing of the capacity and positions of the various recycling and refuse containers.
25. In terms of cycle storage, the proposals which have been put forward do not appear to provide an adequate number of spaces¹¹ and some of the spaces would be awkward to access. However, I note that one of the flats has its own bike store. Overall, I do not rule out the possibility that a suitable solution for cycle storage could be found.

¹¹ When applying its standards the Council calculates that 14 spaces would be required for the residents of Kashmir House, Ava House and the appeal flat.

26. On balance, I consider that the loss of the refuse, recycling and cycle storage as originally proposed could, in all probability, be adequately compensated for by an alternative scheme and without offending the policies of the development plan. That being the case, this issue is not a decisive one. It weighs neither in favour nor against the development that is before me in this appeal. However, this finding does not lessen the harm that I have identified in my consideration of the main issue.

Conclusions on ground (a) and the deemed application

27. The development fails to accord with the development plan read as a whole. There are no considerations that indicate a decision other than in accordance with the development plan. For the reasons given above I conclude, on ground (a), that the appeal should fail. The deemed application shall be refused.

The appeal on ground (f)

28. 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 breach.¹² The words "as the case may be" indicate that the main purpose of the notice should fall within one or the other category.
29. The subject notice (in its corrected form) alleges a material change of use to a single storey one bedroom flat; and its first requirement is to cease the use as a single storey one bedroom flat. This is not a notice where the Council has under enforced to overcome harm to amenity. The main purpose of the notice is to bring about a complete remedy of the breach. The appeal on ground (f) must, therefore, focus upon whether the steps exceed what is necessary to achieve that purpose.
30. S173(4)(a) of the Act states that remedy of the breach can be achieved by making any development comply with the terms (including conditions and limitations) 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. I shall consider the specified steps with these provisions in mind.
31. Step i, to cease the use, flows directly from the allegation. It goes towards the steps needed for discontinuing the use. It is a necessary step for achieving the purpose of remedying the breach.
32. Steps ii and iii concern works necessary to make the development comply with the terms (including conditions) of a planning permission which has been granted. It is one of the ways in which the breach can be remedied and, to that extent, I do not find these steps to be outside of the provisions of s173(4)(a). However, the breach can also be remedied by lesser steps.
33. In respect of the lesser steps it is customary, where a breach concerns a change of use, to require the removal of works integral to and undertaken for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development or be immune from enforcement.¹³ Both parties have been given an opportunity to comment on the extent of alterations

¹² 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).

¹³ *Murfitt v SSE* [1980] JPL 598

undertaken to form the one bedroom flat. The appellant has stated that internal alterations were undertaken including merging the original dining and front bedroom to form an open plan kitchen/lounge and to the left of the rear bedroom a bathroom was fitted.

34. The evidence is confused as to when, exactly, the kitchen and bathroom were fitted. The appellant has referred to a photograph taken in 2006¹⁴ which shows a kitchen. However, the photograph is labelled "Typical internal – kitchen", and appears to be of a different kitchen which had a window. The appeal building was part of a larger building in 2006 and does not appear (from the 2010 and 2011 photographs) to have had a kitchen window until much later. Neither was there any kitchen or bathroom shown on the 2006 plan.
35. I conclude, on balance of probability, that the kitchen and bathroom were installed for the purposes of facilitating the change of use to a flat as has been said by the appellant, those being facilities necessary for everyday domestic living. It follows, therefore, that the removal of the kitchen and bathroom is necessary to ensure full discontinuance of the use and restoration of the building¹⁵ to its condition before the breach took place. I shall vary the notice by including these lesser steps, whilst still leaving in place the requirements of steps ii and iii as an alternative.
36. I have considered whether, within the lesser steps, I should include a requirement to remove the kitchen/living room window. A 2006 photograph¹⁶, referred to by the appellant as evidence of the pre-existence of the window, in fact appears to show a window within the larger building (since substantially demolished) that would have been on the land at the time. What is now the front elevation of the appeal building would, in 2006, have been an internal wall.
37. The window must have been installed after 2011 as it is not shown in the 2011 Allen and Smith photograph. The opening could well have been formed in order to provide light to the intended living quarters of the flat which, otherwise, would have been lit only by rooflights. On the other hand it is just possible that the window was installed in connection with some other previous use of the building or as a separate building operation. There is no evidence either way. I cannot conclude, on what is before me, that the window was installed solely to facilitate the change of use to a flat on balance of probability.
38. Nonetheless, I consider the (alternative) steps requiring removal of the kitchen and bathroom, together with the cessation of the use, will provide for a useful and effective notice.
39. In respect of the remaining requirements, I consider step iv lacks precision and is unnecessary. Step v is needed in the main to achieve a complete remedy of the breach, apart from its final part, i.e. "the area to be left in a tidy condition", which is imprecise and superfluous. I shall, therefore, vary the notice by deleting step iv and the final part of step v.
40. I have taken into account that the Council has said that it would be prepared to vary the notice by removing steps ii, iii, iv and v provided that the conditions of the planning permission for refuse and cycle storage are varied and that its

¹⁴ The photograph accompanies the Valuation Report of Edward Symmons dated June 2006.

¹⁵ In the interpretation given at s336 of the Act the term "building" is included within the definition of "land".

¹⁶ The photograph accompanies the Valuation Report of Edward Symmons dated June 2006.

concerns about the future use of the building are addressed. However, these are matters yet to be resolved between the appellant and the Council and are not matters I can decide upon in this appeal.

41. I cannot conclude, on what is before me, that the building can lawfully revert to another use requiring a kitchen and bathroom, such that the retention of these facilities could be justified at this time. I have considered in the round whether there is any obvious alternative involving other lesser steps. However, there is none that I can identify in the circumstances of this case.
42. The appeal on ground (f) succeeds to the limited extent of the variations I have set out above.

The appeal on ground (g)

43. On ground (g) it is argued that a period of 12 months for compliance would be more appropriate having regard to the needs of the residential occupiers of the flat. At my site visit it appeared that the building was no longer in use as a residential flat.
44. I acknowledge that a longer time period would have been helpful to the occupiers bearing in mind their needs to re-locate. On the other hand, in the wider public interest, timely compliance is desirable to remedy the identified harm. I consider the period of six months specified in the notice strikes the right balance between these two conflicting interests without placing a disproportionate burden on the appellant and occupiers should there be any.
45. I find that a variation of the time period is unjustified. The appeal on ground (g) fails.

Further matter

46. There is no appeal made on ground (d)¹⁷. In view of my findings on facts I am satisfied, on balance of probability, that the date of the breach was within the four year period leading to the issuing of the notice and that the enforcement notice was issued in time.¹⁸ This is not a matter which I need to take further.

Conclusion

47. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with correction and variations and refuse to grant planning permission on the deemed application.

Susan Wraith

Inspector

¹⁷ An appeal on ground (d) of s174(2) of the Act is that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.

¹⁸ S171B of the Act states that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after a period of four years beginning with the date of the breach.