
Appeal Decision

Inquiry held on 21 February 2017

Site visit made on 22 February 2017

by Graham Dudley BA (Hons) Arch Dip Cons AA RIBA FRICS

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

Decision date: 24 March 2017

Appeal Ref: APP/N5090/C/16/3153156

Land at The Spinney, 22 Hendon Wood Lane, London NW7 4HR

- 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 G M P Fitzgerald against an enforcement notice issued by the Council of the London Borough of Barnet.
 - The enforcement notice, numbered ENF/00048/16, was issued on 24 May 2016.
 - The breach of planning control as alleged in the notice is 1. The construction of a single storey side/rear extension to the pre-existing timber structure for use as additional dwellings 2. The construction of a building consisting of three new dwellings and 3. The stationing of five cabins for use as separate dwellings and the erection of courtyard canopy and decking.
 - The requirements of the notice are 1. Demolish the single storey side and rear extension 2. Demolish the single storey building consisting of three dwellings, 3. Demolish the courtyard canopy and decking 4. Remove the five cabins from the site and 5. Permanently remove all constituent materials resulting from the works above, from the property.
 - The period for compliance with the requirements is 5 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, 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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Procedural Matters

1. At the inquiry the names and numbers of the various units were confirmed as those marked on appendix 10 in the appellant's proof. These will be used in this decision along with the colour coding used on the enforcement notice. The Council has now accepted that units 1 and 2 of 26 Hendon Wood Lane (part of yellow) should be removed from the allegation and requirements, which will be amended accordingly. The appellant also confirms that he is not now contesting the enforcement notice in relation to 20 Hendon Wood Lane (part of green).
2. It was also common ground between the parties that because of the various works to the 'yellow' units these are operational development and not a use of land as identified in the enforcement notice. The appellant has approached the appeal on this basis and confirmed there would be no prejudice in amending the enforcement notice allegation and requirement. The relevant period for consideration of lawfulness through the passage of time is 4 years.
3. The appellant withdrew the appeal on ground (f).

Decision

4. I direct that the enforcement notice is to be corrected by: Deletion of allegation 3 and replacement with the following: The construction of 3 cabins for use as separate dwellings (16 Hendon Wood Lane and 24 Hendon Wood Lane units 1 and 2 coloured yellow on the plan attached to the enforcement notice and excludes 26 Hendon Wood Lane units 1 and 2). Requirement 3 is to be deleted and requirement four is to have '5' deleted and substituted with '3'.
5. The appeal is allowed on ground (g), and the enforcement notice is to be varied by the deletion of 5 months and the substitution of 9 months as the period for compliance. Subject to the corrections and variation the enforcement notice is upheld.

Reasons

Ground (d)

Part of Green Building (18 Hendon Wood Lane)

6. While there is a substantial amount of documentation submitted, the appellant acknowledges that most of it is not directly relevant to the appeal as it mainly relates to the units which are not in contention. The relevant period for consideration of lawfulness is a 4 year period prior to 24 May 2016.
7. The appellant notes that this building was converted to residential use around 2007 by the original occupier, who left around 2012. The appellant indicates that this building has been here for more than 4 years. However, his evidence as set out on the plan in appendix 004407 shows the building to have been originally on the line of the access drive to the scaffold area and then reconstructed in 2012/2013 and this was confirmed in oral evidence. Prior to the new arrangement, vehicles had to pass around the building. Moving the building allowed the drive to go straight in. Two walls of the original building remain either side with the roof over.
8. One of these walls now forms the end wall of the 'green' unit. There was nothing on the site in the current position of the unit prior to the change, and this is confirmed by looking at the 2013 aerial photograph provided by the Council. The appellant questions the usefulness of the aerial photographs on the basis of the distance they would have been taken from, the clarity of the image and the shading over parts of the land. I acknowledge that identifying small details would not be reasonable from the photograph, but large objects are generally readily discernible and when looking at whether a unit is or is not in place is generally reasonable to discern on the balance of probability.
9. The units involved are operational development and not a use of land where movement of a unit may not itself be development. Here, even on the appellant's evidence, effectively the original building has been mostly demolished moving internal accommodation and two of the external walls. The unit at 18 is effectively a new building and simply using one of the old walls does not affect that. The different position on the site outside of the original footprint of the building is a material change to the development on the site and planning permission is necessary. Even if the original building was rebuilt, Section 55(1A)(b) notes that for the purpose of the Town and Country Planning Act building operations include rebuilding.

10. The appellant confirmed at the inquiry that preparation for the change was made around 2012 when the occupant was preparing to return to Poland, but that the building was not completed until 2014, well after May 2012, the start date for the period to demonstrate lawfulness. I conclude that on the balance of probability the appellant has not demonstrated that no 18 achieved lawfulness through the passage of time and the appeal on ground (d) fails in relation to it.

Blue Units – 3, 5 and 6 Hendon Wood Lane

11. The appellant's evidence is very varied in relation to these units, with some significant conflict between the submitted material and oral evidence.
12. In relation to flat 6 the appellant argued at the inquiry that this flat is a conversion of a conservatory that was located here. However, the table of constructions provided by the appellant to show when units were constructed notes the building to be 'altered and reconstructed' in 2012/2013. The evidence of Mr Sheeran submitted by the appellant notes that he installed electrics and plumbing to Flat 6 in August/September 2012 which was an extension just built.
13. The appellant's annotated plan indicates April 2012 for construction, while Mr Argue's letter notes works were being carried out around October/November 2012 and it being seen to be complete when visited in March 2013. The aerial photograph submitted by the Council does not show a building in this location. There are very definite bushes in the position of unit 6 and no suggestion of a roof. While there may be some shadows given the prominence of the roof to the lawful units, I consider that on the balance of probability the roof of the building of unit 6 would be discernible in the aerial photograph. In any case, completion late 2012 as suggested by the appellant's table of constructions and other witnesses would not allow the required period for lawfulness to have been achieved.
14. In coming to this conclusion I have taken into consideration the evidence of others. There was also some conflict here, with Mr Boateng indicating in one letter the existence of the building marked blue in 2010, which appears to conflict with appellant's case of reconstruction in 2012/13. Mr Kulak initially indicated in written evidence that it was completed around May 2012, but in cross-examination changed this to December 2012, which would accord more with the electrician and plumbers evidence.
15. The appellant provides a letter that he says are the original dimensions of the building and that if these measurements are transferred to the current building the depth would be to the back of the current building including flats 5 and 6. However, I place little weight on this, as there is little to demonstrate that what was proposed at that time was in fact constructed and nothing to show the layout of the building involved and the evidence from the aerial photographs does not indicate a building in the location of flat 6, but shows what appear to be some plants and perhaps an enclosed garden area.
16. While the Council tax situation is not decisive it is odd that when the Council Tax was being considered for flats following their separation evidence only referred to 3 flats and this was during 2012 with a letter in July 2012. At that time if the other flats were in position I would have expected the Council Tax to have taken the actual number of flats into consideration, particularly as these

would have been seen to have been newly provided. Given the aerial photograph and conflicting evidence, I conclude that on the balance of probability unit 6 has not been in place for 4 years and there is not sufficient evidence to indicate that this was the conversion of a conservatory.

17. Part of flat 3 has been in existence for a considerable time, but the appellant notes that it was extended in March 2012. It was later confirmed at the site visit that the end part of 'flat 3' is in fact a bedroom for flat 5. Tenant's at the site gave some evidence in relation to the unit. Mr Boateng had written in twice, but the evidence was not consistent, indicating that it was extended in 2010 and then March 2012 and at the inquiry indicated that he was not sure of when it was extended. Mr Sheeran indicated he carried out works to the extension in November 2013 and Ms Olariu said she moved into the extended flat in July 2012 visiting it previously in Easter 2012. The appellant when questioned about Mr Sheeran's evidence explained he did not recall what was noted and was not responsible for the work as he was out of the country at the time as he spends quite a lot of time overseas.
18. The extension was seen at the site visit to have a similar roof covering to the adjacent lawful parts of the unit and the roof is level with these parts. The aerial photograph provided by the Council, shows in 2013 some dark shadow in the area of the extension. While it may be difficult to see what is in the shadow, what is clear is that there is a very hard edge between the shadow and the edge of the original part of flat 3. This would not be there, if the extension were in place, given the similar material and level roof surface between the two parts. To my mind given the conflicting evidence and the aerial photograph on the balance of probability I conclude that the extension to flat 3 was not in place in 2013 and therefore had not achieved lawfulness by the time of the enforcement notice.
19. The appellant notes that flat 5 was built in the 1980s in the table of constructions. The aerial photograph for this part of the building shows a grey area that could be the roof of a building and the appellant has a photograph in the yard that he says shows the building in the background, although identification of the position in terms of adjacent structures is not clear. What is clear is that flat 5, includes part of the extension considered above, which was not constructed until at least sometime in 2013, and not visible in the 2013 aerial photograph. I therefore find it hard to see how this flat could have been completed until the extension had been completed. The appellant's evidence is not clear and unambiguous in this respect and the appellant has not demonstrated on the balance of probability that flat 5 was in place for the required time.
20. I conclude overall that the appellant's evidence is not sufficiently precise and unambiguous and the Council has evidence that contradicts the appellant's and other witnesses recollections of the times of construction such that I conclude on the balance of probability the units have not gained lawfulness through the passage of time. The appeal on ground (d) fails for these units.

Yellow Units – 16 Hendon Wood Lane and 24 Hendon Wood Lane (2 units)

21. The Council has acknowledged that the two units forming 26 Hendon Wood Lane have been in place for the relevant period and clearly that is the case with these two units being very discernible in the 2013 aerial photograph.

22. The appellant indicates in the table of constructions that the units at 24 Hendon Wood Lane were in place by 2013, under 4 years, and a note on a plan marked up by the appellant indicates they were in place in 2013. The plan was prepared for the appeal. It was put that by 2013 could mean they were in place in 2012, but under 4 years to my mind acknowledges they had not been in place for the required time. The Postman's evidence notes the 4 units (24 and 26) to have been in place since 2008/2009 which is agreed not to be the case so his recollections are not reliable.
23. The appellant's evidence from Mr Sheeran confirms him doing electrical work in units at 26 Hendon Wood Lane in 2009 and works to the two units at 24 Hendon Wood Lane in approximately November/December 2012 and completed in February 2013, which accords with the table of constructions. There is still some potential discrepancy with the Council's aerial photograph of 2013, which does not show the units to be in place. However, even taking the construction to be late 2012/13, these units would not have gained lawfulness through the passage of time.
24. Other evidence such as the recollections of Mr Boateng cannot be heavily relied on given he suggested the 4 units had been in place in 2010 (004419), which is not even the appellant's case. Mr Kulak acknowledged at the inquiry that he was not sure about the number of units in 2012 but suggested it might be 2 or 3. Mr Beal recalls the 4 units to have been in place prior to 2012, which again does not accord with the appellant's recollections. Ana Olariu also notes in her letter of 13 January 2017 she was living at 24 Hendon Wood Lane in July 2011, again before the appellant indicated the two units were constructed.
25. The aerial photograph of 2013 is clear that the units at 24 Hendon Wood Lane are not in place. While again there are some shadows, given the size of these units and that the other units at 26 are clearly visible I conclude on the balance of probability the units at 24 would be readily discernible if they were in place. I consider the appellant has not demonstrated on the balance of probability that these units have been in place for the required period to gain lawfulness through the passage of time.
26. 16 Hendon Wood Lane is indicated in the table of constructions to have been in place since 2003. However, the plan annotated by the appellant indicates that the unit was in place in February 2012 and Mr Beal, Mr Boateng and Mr Kulak support this, but in cross examination some indecision about some dates were expressed by Mr Boateng and Mr Kulak. There is some suggestion of it being moved around, but as agreed at the beginning of the inquiry unit 16 changed at some point after moving from use of land to operational development and it is that operational development that is being considered.
27. The Council's aerial photograph of 2013, does not suggest the mobile unit was in the current location at that time. While there is shadow in this position of the photograph, some smaller lighter objects can just be made out. I consider that if the unit was in that location in 2013, it would be reasonably discernible in the aerial photograph. I have also taken into consideration the reliability of the other recollections in relation to the other buildings in considering the weight to be given to the supporting declarations. I consider that the appellant has not demonstrated on the balance of probability that this unit has gained lawfulness through the passage of time and the appeal on ground (d) in relation to 16 and 24 Hendon Wood Lane fails.

Ground (g)

28. The Council notes that the appellant could get the people out from the accommodation within five months, but the appellant notes that there are tenancy agreements that could be appealed if tenants are asked to be removed.
29. I have also taken into consideration the Human Rights Act 1998 and the European Convention on Human Rights and I recognise that dismissal of the appeal would interfere with rights under Article 8 and Article 1 of the First Protocol of those living in the accommodation. However, given the harm, the action is in accordance with the law and pursues legitimate aims of protecting the environment and is proportionate to the situation. Nevertheless, it is necessary to ensure those tenants have a reasonable time to find alternative accommodation. I consider that given the number of people involved it could be difficult to find accommodation and therefore it would be reasonable to extend the compliance period to 9 months.
30. The appeal succeeds on ground (g).

Graham Dudley

Inspector

APPEARANCES

FOR THE APPELLANT:

Caroline Daly	Of Counsel
She called	
James Gould	Planning Officer, London Borough of Barnet

FOR THE LOCAL PLANNING AUTHORITY:

Simon Williams	Of Counsel
He called	
Gerald Fitzgerald	Appellant
Peter Kyte	Agent
Kamil Kulak	Tenant
Sebastian Orwat	Old tenant
Mr Boateng	Old tenant
David Beal	Professional golfer
Maurice Fitzgerald	Brother of appellant
Mr Pedethris	Neighbour
Adina Olariu	Tenant
Tony Purcel	

INTERESTED PARTIES:

Mona Kalantar

DOCUMENTS

Document	1	Notification letter
	2	Appellant's list of appearances and bundle of letters
	3	Enlarged aerial photographs
	4	Opening submissions on behalf of the appellant
	5	Opening submissions on behalf of the Council
	6	Aerial photograph with colours of various parts identified
	7	Email of 27 January 2017 from Stan Nwaka
	8	Sage v Secretary of State for the Environment, Transport and Regions and A N Other
	9	Photographs from the appellant of planting
	10	Closing submissions on behalf of the Council
	11	Closing submissions on behalf of the Appellant