Appeal Decision

Site visit made on 10 March 2017

by Andrew Dale BA (Hons) MA MRTPI

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

Decision date: 29 March 2017

Appeal Ref: APP/N5660/C/16/3152265
90 Woodbourne Avenue, London SW16 1UT

- 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 M Ahmad against an enforcement notice issued by the Council of the London Borough of Lambeth.
- The enforcement notice was issued on 4 May 2016 under ref. 15/00210/3COU.
- The breach of planning control as alleged in the notice is: "*Without planning permission, the unauthorised change of use of the premises from a single family dwellinghouse, to 4 self-contained flats ('the 4 unauthorised flats')*."
- The requirements of the notice are set out as follows:
  "*A. Cease the use of each of the 4 unauthorised flats and remove all internal doors and partitions which facilitate their unauthorised use;*
  B. Remove from 3 of the unauthorised flats, all kitchen units, kitchen appliances, shower, basin, toilet (sic) and associated fixtures and fittings and disconnect and remove all associated electrical and water services, plumbing and wiring;
  C. Remove all resultant rubble and debris 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) (c) and (d) of the Town and Country Planning Act 1990 as amended.

Decision

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

   (1) Deleting the text of paragraph 3 in its entirety and substituting therefor the following text: "Without planning permission, the making of a material change of use of a single dwelling house to use as a single dwelling house and three separate self-contained flats."

   (2) Deleting the text "4" from paragraph 5A and the text "3 of" from paragraph 5B and altering the text "shower, basin, toilet" in paragraph 5B to "showers, basins, toilets".

2. Subject to the correction and variations, the appeal is dismissed and the enforcement notice is upheld.

Background and matters of clarification

3. The appeal property, No. 90 Woodbourne Avenue, is a detached two-storey house. Attached to its eastern flank is a flat-roofed, single-storey structure

that was formerly in use as a domestic garage or workshop. The internal space provided by that single-storey structure and an adjoining ground floor room in the north-eastern corner of the house has been divided into three very small separate units of residential accommodation. The majority of the original floor space at the property remains as a single family dwelling house.

4. Even though no representative from the Council attended the site visit, I was able to inspect the internal layout of the whole property after the managing agent for the flats arranged for access. The site visit was carried out on a largely unaccompanied basis.

5. From my site inspection and from my reading of the written representations and section 55 of the 1990 Act as amended, I consider that the alleged breach of planning control could be more correctly put as the making of a material change of use of a single dwelling house to use as a single dwelling house and three separate self-contained flats. There would be minor consequential variations to the requirements. I would have had to make similar changes to the requirements in any event because the inclusion of numbers of flats there presents interpretational problems. It could allow some other number of flats. The appropriate requirements are simply to cease the use of the unauthorised flats and to remove the various items and services that facilitate the use as self-contained flats, noting that as each flat has a shower, basin and toilet, those items should be written in the plural so as to make proper sense of requirement B. I am satisfied that the intended correction and variations to the notice would not cause any injustice to the parties.

6. Although an appeal on ground (a) was not ticked on the appeal form, the appellant's "FACTS & GROUNDS OF APPEAL" statement provided a substantial amount of evidence in support of a ground (a) appeal. The appellant's agent subsequently confirmed in emails that ground (a) was not being pursued and that no fee would be paid. As such, there is no ground (a) appeal and no application for planning permission is deemed to have been made under section 177(5) of the 1990 Act as amended.

7. The same statement made on behalf of the appellant under the heading "GROUND C" presents evidence that falls under ground (d) – that the material change of use at No. 90 had become immune from enforcement action through the passage of time. It is assumed that the reference to ground (c) was a slip. I deal with ground (c) very briefly next and then focus on the arguments that correspond to a ground (d) appeal.

The appeal on ground (c)

8. The onus is squarely upon the appellant to show that, on the balance of probabilities, the matter in the allegation as corrected does not constitute a breach of planning control. No evidence has been submitted to show that there has not been a breach of planning control.

9. Section 55(3) (a) of the 1990 Act as amended declares the following: *For the avoidance of doubt it is hereby declared that for the purposes of this section the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used*. Planning permission is required for the material change of use as a matter of law, and it has not been obtained.

The matter alleged in the corrected enforcement notice constitutes a breach of planning control. Therefore, the ground (c) appeal must fail.

The appeal on ground (d)

10. In pursuing an appeal on ground (d), the onus is on the appellant to demonstrate on the balance of probabilities that at the time the enforcement notice was issued on 4 May 2016, it was too late to take enforcement action against the matter stated in the notice. Thus, the appellant must show that, by then, the appeal property had been used continuously as a single dwelling house and three separate self-contained flats for at least four years. The material date in this case is therefore 4 May 2012. The four-year period begins with the date of the breach commencing; it need not necessarily be the four years immediately prior to the notice being issued.

11. The judgment in Gabbitas v SSE and Newham LBC [1985] JPL 630 makes it clear that if the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss an appeal on ground (d), provided the appellant's evidence alone is sufficiently precise and unambiguous.

12. In deciding when the four-year period begins to run, it is necessary to look at when the physical works were completed at No. 90 to make the property capable of providing the viable facilities required for day-to-day private domestic existence in four separate residential units and at when the use actually commenced. Neither is decisive and it can be possible for the material change of use to have commenced prior to actual occupation provided the property was capable of being so used.

13. The gist of the appellant's case is that the three self-contained flats have been occupied since September 2009 and that the main dwelling at No. 90 has always been occupied as a family dwelling. The appellant's documentary evidence included various assured shorthold tenancy agreements, bank statements from tenants, Council Tax forms, EDF energy statements and rental completion statements. I have looked at this information in the round along with the Council's response and examples of contrary evidence.

14. No information is available in the form of receipts for conversion/building works or for kitchen, bathroom and plumbing fittings or for other materials. The appellant does not otherwise explain when the physical works that created the three self-contained flats were completed. This is a concern because the Council says that the matter was drawn to its attention via a resident who previously resided at the premises in December 2014 and because the third party to the appeal noticed structural changes to the single-storey structure at the site taking place within the last two years (from the letter that would be since 15 August 2014).

15. The tenancy agreements on their own are not a conclusive form of evidence of continuous residential use and occupation. Neither the length of actual occupation of each of the tenants nor whether there were periods of non-occupation is not at all clear. What was lacking was a comprehensive, comprehensible and corroborated list showing tenants' continuous occupation history for each separate flat over the requisite four-year period. Two of the tenancy agreements for "Flat 90C" commencing on 10 September 2009 and

1 October 2011 contain a clause at paragraph 5.29 to the effect that: "Not to use the garage or outbuildings for storing any of the Landlords' (sic) contents without prior permission from the Landlord or his Agent." I can only interpret this on the basis that the garage/outbuilding at the side was still in existence for storage purposes at those times. Those tenancy agreements may well have been made in relation to the letting of non-self-contained individual rooms within the main property, a possibility also offered by the Council in its response to the EDF energy statements.

16. The absence of statutory declarations from previous or existing tenants does not help the appellant. It is perhaps surprising that Mr Rensburg was not asked by the appellant to contribute to the appeal because it is said in the grounds of appeal at June 2016 that he was an ongoing tenant in "Flat 90A" from 3 September 2011. However, on the Council Tax Request for information form submitted by the appellant this tenancy status is contradicted because it is stated on that form that Hamidou Keita was the tenant of "Studio A" from 25 May 2015.

17. The bank statements from various tenants and the references from some of their employers appear to largely pre-date occupation and were presumably gathered to assess their suitability for occupation. I cannot identify any withdrawals for rent payments amongst the statements. The bank statements do not greatly assist the appellant's case.

18. The appellant's Council Tax Request for information forms were completed on 28 October 2015 and the three self-contained flats were first registered by the Council for Council Tax purposes on 1 October 2015.

19. The EDF energy statements for electric are noted but they are not the same as Energy Performance Certificates which require an internal inspection by an accredited assessor. The positions of the flats (numbered Flats 1, 2 and 3) are not made clear on the statements. As the Council says, it is also not clear how the meters have been used, for example, they may have been used in conjunction with the letting of non-self-contained individual rooms in the main property. The account names on the statements are not explained, Mr F Ahmed for Flats 1 and 2 and Ms Vivienne Christie for Flat 3. Some of the tenancy agreements state that the electric is to be paid for by the tenants but I cannot easily relate the energy statements to this assertion.

20. The rental completion statements produced by Zain Salman Business and Management record the earliest moving in date for 90B as being on 24 August 2013 and for 90C as being on 18 September 2013.

21. The Council's electoral roll records show that the only people registered at the property during 2010 to 2013 were Mian Ahmad and Aasia Ahmad. It is not until 2014 (around the time the matter was first drawn to the Council's attention and the third party observed conversion works to the single-storey structure at the site) that other persons begin to appear on the electoral roll.

22. The Council has referred to two applications that were submitted by Aasia Ahmad in the latter half of 2013 for a single-storey rear extension at No. 90, these being one for prior approval (ref. 13/03638/PDE) and one for a certificate of lawfulness (ref. 13/04442/LDCP). Amongst other things, the submitted plans for both applications showed that the single-storey structure at the side

was and would remain as a "workshop". The applications were made on the basis that the extension would be added to a single family dwelling. The appellant has not commented on these applications or explained their existence in the context of his ground (d) appeal. On the face of it, the applications appear to confirm the Council's stance that the three self-contained flats were not brought into being until after 2013.

23. On the balance of probabilities, I find that the appellant's evidence before me is not sufficiently precise or unambiguous to demonstrate that the appeal property had been occupied continuously as one dwelling and three self-contained flats for a period of four years before the notice was issued. The Council and a third party also provided information to make the appellant's version of events less than probable. The appellant has not discharged the onus of proof. The three self-contained units of residential accommodation at the side of the property were not therefore immune from enforcement action by reason of the passage of time when the enforcement notice was issued.

24. Accordingly, the appeal on ground (d) fails. In view of my findings, it is not necessary for me to consider whether there has been positive deception in the planning process and/or concealment of the breach such that the development has not gained immunity from enforcement action, having regard to established case law.

Andrew Dale

INSPECTOR