

Appeal Decision

Inquiry held on 21 and 22 December 2016 and 3 and 10 February 2017

Site visit made on 2 February 2017

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 19 April 2017

Appeal Ref: APP/A5270/C/16/3145183

144 Avenue Road, Acton, London, W3 8QG

- 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 P Benmax against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice, numbered COM/2016/00012, was issued on 2 February 2016.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises at 144 Avenue Road to use as 11 self-contained residential dwellings ("Unauthorised Development").
- The requirements of the notice are:
 - a. Cease the use of the premises as 11 self-contained residential dwellings;
 - b. Remove the kitchen and drainage connections from each of the 11 self-contained residential dwellings;
 - c. Remove the bathroom and drainage connections from each of the 11 self-contained residential dwellings;
 - d. Remove all forms of subdivision for (sic) the premises which facilitate the use as 11 self-contained residential dwellings; and
 - e. Remove all resultant debris from the land.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(b),(c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal succeeds in part and the enforcement notice is upheld as varied in the terms set out below in the Decision.

Application for costs

1. At the Inquiry an application for costs was made by the Council against the Appellant. This application is the subject of a separate Decision.

Procedural Matters

2. All witnesses who gave oral evidence to the Inquiry did so after they had either taken the oath or made an affirmation.
 3. Mr Benmax was not well and he only attended the Inquiry on the morning of 21 December 2016 (the first day) and on 3 February 2017 (the third day) when he gave evidence. In addition, because of illness the Council's advocate for the first two days, Ms Visagie, was unable to attend the resumed Inquiry and Mr Morton was the Council's advocate for the sitting days in February.
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4. The appeals by the Appellant on the various grounds of appeal were so intertwined and dependent on the evidence that I will, unusually, set out the evidence in the first instance before considering it in respect of each ground of appeal. In doing so I note that the Appellant said in his closing remarks that with regard to ground (b) he would have no objection to a variation of the notice to allege a change of use to 10 residential units and one live-work unit and a separate planning unit of an office¹ although the Council says that the office and the shop are ancillary uses to the residential use. The Appellant also said with regard to ground (c) that if the use of the first floor as two self-contained flats is lawful this also gives rise to the ground (f) appeal².
5. At the request of the Appellant the Council suggested amendments to the requirements of the notice and provided a plan for attachment to the notice showing the interior layout of the premises³. I consider that it would be helpful to attach a plan to the notice showing the interior layout of the premises and I will vary the notice accordingly by inserting a reference to the plan attached to this decision marked 'A'. I will take the suggested amendments to the requirements into account in my consideration of the appeal.
6. In the Council's closing submissions there was a reference to the Appellant's standing and whether he had a legal interest in the land and, therefore, in effect challenging the Appellant's locus to make the appeal. S.172 of the 1990 Act affords the local planning authority the power to issue an enforcement notice and a copy of the notice shall be served on the owner and the occupier of the land to which the notice relates and 'any other person having an interest in the land, being an interest which in the opinion of the authority, is materially affected by the notice'. The service of the notice on him means that in the opinion of the Council Mr Benmax is a person who is either the owner or the occupier or a person with an interest that is materially affected and therefore pursuant to s.174 of the 1990 Act he has a right of appeal against the notice.

The appeal property

7. 144 Avenue Road is a two storey property with a 'shop', a front door and a garage facing the street. At the back there is a single storey extension running the length of the boundary; a narrow paved open area; and a single storey building at the rear. At the time of my visit the 'shop' was empty and it was accessed from a door in the front. The 'shop' was separated from unit 1 by a locked door and the garage was being used for miscellaneous storage. The ground floor comprised eight separate units all of which were occupied save for unit 3 which was being decorated and which was also being used for storing building and decorating materials, together with the Appellant's office and a plant room. On the first floor there were three separate residential units.
8. The appeal site has a limited planning history comprising planning permissions for the erection of two single storey link extensions to form a garage block and use of retail shop granted in July 1975⁴; conversion of the first floor into two self-contained residential units granted in April 1983⁵; retention of rear extension at first floor level to residential accommodation granted on

¹ Document D Appellant's closing submissions paragraphs 4 and 7

² Document D Appellant's closing submissions paragraph 15

³ Documents 12 and 13

⁴ 15002/2

⁵ 15002/3

26 September 1995⁶; retention of rear extensions at first floor level and continued use of residential accommodation above the shop as two self-contained flats granted in June 1997⁷; and a lawful development certificate for use of the rear warehouse as ancillary offices to shop granted in February 1998⁸.

The evidence from the Appellant and on his behalf – main points

9. Mr Solomon, formerly Mr Wayne Edwards⁹, had not provided any written evidence. He told the Inquiry that he had been homeless in 2005 and he had contacted Mr Hoffman who gave him accommodation in unit 1 at No 144; he later moved into other units, such as unit 3 for quite a few years and unit 7, as they became available. He left the property in 2008 by which time he was managing the property and he returned three or four months ago to stay in unit 1. He had been asked by Mr Benmax to find documents relating to the tenancies and these were attached to Mr Benmax's proof. These were scanned versions which were later signed by the tenants who kept them; some were kept by the agents who let the flats; it was difficult to find signed copies at that earlier time but he produced on the first day of the Inquiry a number of license agreements for units A, AA, B, 1, 2, 4, 5 and 6 with signatures by the licensees which had been subsequently found in Mr Benmax's flat and his own flat¹⁰. Mr Solomon also produced a letter dated 14 March 1996 from S&Q Estates to Mr Benmax relating to an instruction to let No 144¹¹.
10. Mr Solomon said that when he was in unit 1 he used the shop as his office, that is, as a live-work unit. The units were never empty for more than a week or two, maximum three weeks, because once a tenant was moving out there was someone waiting to move in.
11. Mr Solomon did not work for Mr Benmax as an employee but he helped him rent out the properties for which he obtained commission from Mr Benmax. There was a written agreement to this effect and he has a letter of authority for dealing with the Council, the Police and other authorities; he did not produce any of these documents. He knew all the tenants personally; he collected the rent in cash; and paid it to Mr Benmax. He agreed that there are no agreements for units 3 and 7 but did not explain why. Mr Kalabov was a sub-lessee of some of the units. The rents charged are kept low because people stay if it is cheaper, they don't move; the national average is four tenants in a ten year period and that is the case at No 144.
12. Mr Solomon was unable to explain the two agreements in respect of unit 1, that is, one dated 1 May 2012 between Mr Kalabov and Rachel Panares for twelve months less one day¹² and the other dated 10 July 2012 for one year less one day between Wayne Edwards and Rachelle Comia Panares¹³. The difference in the rents for each unit was because some were larger than others and some were more modern than others. Other discrepancies in the agreements provided by Mr Solomon and those submitted by the Council were explained as duplication; errors in printing; fraudulent agreements supplied to

⁶ 15002/5

⁷ 15002/7

⁸ 15002/8

⁹ He changed his name by deed poll in 2014

¹⁰ Document 11

¹¹ Document 5

¹² In Document 11

¹³ Page 56 of the Appendices to Mr Whittaker's supplementary proof Document 2

- the Council for housing benefit contraventions; different tenants moving from one unit to another; tenants never moving in; one tenant renting both units A and AA on the upper floor; and not having enough time to prepare documents properly because they were let down by Mr Benmax's previous agent.
13. It was Mr Solomon's evidence that what is described as the warehouse was a garage with an office behind it although it had been used as a flat and an office but because it had no window it now had a sole office use. With regard to unit 1, no area is specified; Ms Panares occupied unit 1 from May 2012 and in July 2012 she also had the shop but after she was evicted the unit went back to the flat only.
 14. There had always been problems with rubbish because the area outside the garage was used by people who did not live in No 144 for dumping rubbish. The Council had been contacted and CCTV had been installed. There had been no change in the amount of rubbish and black sacks in 2015 as alleged by local residents.
 15. Mr Solomon said that the previous tenant of unit 6 wanted to come to the Inquiry to give evidence but she did not attend on the first two days. I was told on the third day of the Inquiry that she could attend on that day if I would hear her. I agreed to her giving evidence but as no written statement was available despite an adjournment of over one month, the tenant would have to return for cross-examination, if necessary, on the final day of the Inquiry. In the event the tenant did not give evidence.
 16. Mr Christie is a builder and he used to do labouring work for Mr Peppiatt until Mr Peppiatt finished in 2002/2003. Mr Christie did not know why Mr Peppiatt no longer worked for Mr Benmax. Mr Christie started his own business and he did work on his own behalf for Mr Benmax. It was his evidence that the building in 2001/2002 was 90% as it is now and that, so far as he is aware, there has been no change to the floor layout.
 17. Mr Christie provided some invoices for work done dating back to 2005¹⁴ which were all he could retrieve from his computer although he had done more work than shown on the invoices. The invoices refer, among general unspecific references, to the top floor unit right of stairs; first floor unit; top right hand flat; top left hand flat; rear garden unit; and back ground unit. There is no reference to works by Mr Christie on any other unit at No 144. He said that two to three years ago all the units had pre-paid card electricity meters fitted and those units that had gas had similar meters fitted.
 18. Mr Christie has nothing to do with letting the units but he does take payments for the prepaid electricity and gas meters. He is not the only builder who does work for Mr Benmax; he also sub-contracts work for which Mr Benmax pays him and he then pays the sub-contractor; and there is no paper work in respect of these transactions.
 19. Mr Peppiatt is a retired builder and he provided a written statement¹⁵. He did minor repairs for Mr Benmax's father at No 144 in 1989/90 and he continued to do work on the property until Mr Benmax took over in the mid-1990s. His statement goes on to say that the works he did for Mr Benmax in 1988, 1989 and 1990 included refurbishment of unit 8; fitting replacement kitchens and

¹⁴ Document 7

¹⁵ Document 9

- bathrooms to units 5 and 6/7, the latter being one unit at that time; units 1, 3 and 4 also had work done to them, as did the flats on the upper level although Mr Peppiatt could only remember two flats. Mr Peppiatt became ill and the last he knew of the site, prior to any visit associated with the Inquiry, was in 2002.
20. In his oral evidence-in-chief Mr Peppiatt confirmed that unit 8 was occupied and that units 5, 6 and 7 and the office were 'falling down'. He stripped them back and rebuilt them like for like and he finished this work in 1996/1997. The layout of units 1, 2, 3 and 4 is the same now as when he completed the works. He could not remember whether there were three units upstairs and he retired in 2000.
21. In cross-examination he said that a surgical supplier and then a commercial artist used the shop and someone also lived in the room behind. Unit 2 was present and he referred to the rest of the property having different walls and doorways and he could not remember units 6 and 7. Mr Peppiatt confirmed that Mr Hoffman used unit 8 for live/work and that he had put a new toilet into the unit.
22. Mr Turvey said he has lived in unit 5 since 2011; he was looking for somewhere to live and he knew Mr Solomon and that was how he found out about the unit. Mr Turvey did not have a signed copy of any of his license agreements. Although he is Mr Turvey he is known as Jim Bowloom because he works for Bowloom, a carpet fitting firm, and he drives a van with that name on and wears shirts with the name on and that was why the license agreements are in that name. Copies of agreements signed by J Turvey had been submitted by Mr Solomon which named Mr Kalabov as the licensor but Mr Turvey said that he had no contact with Mr Kalabov and he paid his rent in cash to Mr Solomon. He kept himself to himself and did not know the other tenants except those he saw in passing.
23. Mr Turvey did not know either Mr Benmax or Mr Kalabov but he has seen Mr Benmax around the property and he has bought electricity tokens from him. He considered Mr Solomon as his landlord. He could not remember signing the first license agreement but said that Mr Solomon brings them around and he signs them; he occasionally receives receipts for rent, the amount of which has not changed in the years he has lived there.
24. Mr Benmax told the Inquiry that in the 1980s the property was a furniture warehouse and shop and that there were residential units upstairs. He also said that unit 8 (the single storey building at the rear) was in residential use as were units 5, 6 and 7 which comprise most of the single storey extension. His office was 'pretty much where it is now'. In 1988 the road system was changed and his father's furniture business collapsed and he decided to refurbish the dilapidated units. Mr Peppiatt did the refurbishment works and Mr Hoffman occupied unit 8 and managed the property. Mr Solomon was Mr Hoffman's tenant and because Mr Hoffman had other things to do Mr Solomon managed the property for him from about 2000. Mr Benmax had many business interests, in this country and abroad, and he often worked away and that was why he left the management of No 144 to Mr Hoffman and then to Mr Solomon.
25. Mr Benmax produced a number of documents with his proof of evidence. In a letter dated 4 March 1998 from Mr Benmax to the Council's Planning Services

Manager¹⁶ he writes that 'I have not implemented the works [to convert the upper part into 2 self-contained flats] as I will be leaving the layout as existing 2x1 bed self-contained flats and 1 self-contained studio' and he encloses a plan, which was not submitted, showing '7 self-contained units and 1 live/work unit on the ground floor the existing office will remain and is the subject of a lawful development certificate granted in February 1998'.

26. A copy of the lawful development certificate referred to above for 'use of rear warehouse as ancillary offices to shop' is attached¹⁷ but not the submitted plan. The Council provided the plan¹⁸ and document sworn in support of the lawful development certificate in 1997¹⁹ by Mr Benmax. He agreed that the signature was his but it was so long ago he didn't remember it. This lawful development certificate relates to what is now unit 8.
27. A planning permission for 'retention of rear extension at first floor level to residential accommodation' dated September 1995²⁰ refers to an application dated June 1995 however the plan that follows in the bundle, which shows three units, has the date August 1995²¹. A grant of planning permission for 'retention of rear extensions at first floor level and continued use of residential accommodation above shop as two self-contained flats' dated June 1997 has also been provided²². The grant of planning permission dated July 1975 for 'erection of two single storey link extensions to former garage block and use of the whole in connection with retail shop' has no plan²³.
28. An application for a house in multiple occupation grant for flats 1-11 ground floor communal parts is dated May 1994²⁴ and other documents relate to this grant and its approval. A plan dated September 2016 named 'existing with existing floor plans and elevations' shows the layout as it is now save for no access between unit 1 and the shop²⁵. Mr Benmax denied that the property had been a house in multiple occupation and he did not think there were any common parts and he appeared unsure about what the grant in 1997/8 was for. He said that the use of the property had not changed over the years and his family had never lived there.
29. With his proof Mr Benmax provided copies of license agreements for units A, AA and B on the upper floor and units 1, 2, 3, 5 and 6 on the ground floor. The documents have the names variously of Mr Benmax, Mr Edwards and Mr Kalabov as the licensor; some are not signed by the licensor; some are signed on the licensor's behalf; those that are signed are not witnessed; and none are signed by the licensee. Mr Benmax said that unit 1 had always been a live-work unit; the garage was a warehouse; and that ever since he was involved in 2000, insofar as he was involved, each unit has been in residential use.
30. All licenses are dated the first of the month because that is when rents are paid, he prefers it that way for cash flow purposes and Mr Benmax checks the

¹⁶ Page 1 of Mr Benmax's appendices

¹⁷ Page 3 of Mr Benmax's appendices

¹⁸ Page 21 of Mr Whittaker's appendices

¹⁹ Page 22 of Mr Whittaker's appendices

²⁰ Page 6 of Mr Benmax's appendices

²¹ Page 7 of Mr Benmax's appendices

²² Page 4 of Mr Benmax's appendices

²³ Page 9 of Mr Benmax's appendices

²⁴ Page 11 of Mr Benmax's appendices

²⁵ Page 21 of Mr Benmax's appendices

rental sheets each month. The rents do not change because he does not like voids and that is why he does not seek high rents. The amount he receives is the amount on the license agreement but if Mr Solomon wants to sub-let that is up to him and he may charge more. Mr Benmax had no knowledge of Council Tax

31. Mr Benmax explained that there was only one agreement for Mr Hoffman because they had known each other for years and the agreement rolled on; Mr Benmax allowed Mr Hoffman to stay overnight on occasions. He did not know why Mr Hoffman referred to flat 9 in his statement because it was always known as the rear garden flat by Mr Benmax. He said that the Council had asked the units to be numbered and he had never referred to them as such.
32. There was no written agreement relating to Mr Hoffman managing the property because Mr Benmax trusted people; nor did he have any written agreement with Mr Solomon. Mr Benmax had no day-to-day knowledge about the units or No 144 and everything was left to Mr Solomon. If repairs are needed the tenant tells Mr Solomon who instructs Mr Christie and Mr Benmax pays. Mr Benmax had nothing to do with the drafting of the agreements. Mr Kalabov was someone that Mr Solomon knew and Mr Benmax agreed to him helping Mr Solomon; there had not been any change to his revenue stream. He understood that there was an agreement between Mr Solomon and Mr Kalabov.
33. Mr Hoffman had provided a written statement but he did not attend the Inquiry. He writes that he helped Mr Benmax with secretarial and accountancy issues and in 1999 he was asked, and in 2000 he agreed, to act for Mr Benmax who granted him a license for the live/work flat 9 for his management and accountancy practice; he occupied this unit from 2000 until 2009/2010. Mr Benmax offered to share the license income from unit 9 and in 2011/2012 Mr Hoffman refurbished the unit at his own cost for sub-licensing. Mr Hoffman, in addition to managing all the individual flats and live-work flats at No 144 until 2005/6 also managed some of Mr Benmax's other properties. The plan and layout of numbered flats was not attached and Mr Hoffman in his written statement does not refer to how many self-contained units there were at No 144 during his involvement with the property.
34. Mr Hoffman's licence with Mr Benmax is dated 2 January 2000 and was for a period of one year less one day; there is no plan but the schedule refers to 'ground floor end end (sic) rear studio 144 Avenue Road' which Mr Benmax explained was what is now unit 8. Mr Hoffman as licensee undertook at clause (h) 'not to do or permit or suffer the premises or any part thereof to be used for any purpose other than for office or warehousing purposes and overnight stays'. The document is signed but not witnessed.

The evidence on behalf of the Council

35. Mr Harris is a Housing Benefit Officer and he provided a table of housing benefit claimed and paid in respect of No 144 and the supporting agreements held by the Council²⁶. He described the process of how the claim was made by the claimant who had to supply a considerable amount of information including a copy of the agreement, income, national insurance number, proof of identity and who rent is paid to. If the claim is accepted payment is made to the tenant or to the landlord. It was rare that properties were checked but if there

²⁶ Appendices 1 and 2 to Mr Whittaker's supplementary proof Document 2

were concerns they were referred to the audit team. The licence agreements provided were the only ones that were on the housing benefit's system. Mr Harris accepted that there were discrepancies in the system and that two of the agreements in respect of No 144 did not appear to be correct.

36. Mr Whittaker had no knowledge of No 144 until he became involved in the enforcement investigation and visited the site when a warrant was executed on 19 January 2016. At the time of his visit the layout of the property was largely as it is now although he accepted that some works have been done since January 2016 in compliance with building regulations. At the time of the visit the shop at unit 1 was being used for storage. Mr Whittaker appended to his proof all the documentary evidence that the Council had about No 144. He drew attention to the difference between the drawing dated August 1995 provided by Mr Benmax entitled 'proposed alterations to bathroom and conservatory to relocate bathroom and conservatory and provide additional bathroom'²⁷ which shows units A, AA and B and the Council's stamped version of the drawing²⁸ which only has units A and B.
37. Council Tax records record that only two units on the ground floor were registered from July and August 2012 and only units A and B were registered upstairs, unit A from May 2015 and unit B from February 1996²⁹. A canvasser for the electoral roll visited the property in November 2010 and was told by the occupier of unit A that there were two flats in the upper floor³⁰. A Council Tax Officer visited in July/August 2012 and records that he was told by the occupier of unit 1, Ms Panares, that she had been told by the landlord that there were three flats. A visit, again by a Council Tax Officer in August 2015 records unnumbered units 'some being used to live in' and a plan identifies five units on the ground floor³¹.
38. In July 2012 in response to a complaint about a possible unlawful eviction a member of the Council's Houses in Multiple Occupation Team contacted Rothschild Estates who at that time were advertised in the shop window and spoke to a gentleman who said that there were four flats at the property – two on the ground floor and two upstairs with two office spaces; each flat was a compact one bed occupied by no more than 1-2 persons but over the last six months one of the flats, occupied by the person who lodged the complaint, had been sublet to 8-9 people; they were removed following a court injunction³².
39. In October 2013 Ms Panares in unit 1 made a complaint about cockroaches and Mr Edwards, as he then was, is reported as saying that for the majority of her tenancy Ms Panares had use of the office³³. In July and October 2014 complaints were received about no ventilation/no windows in the property but no unit was identified and the complainants did not pursue the complaints³⁴.

The evidence by the interested persons

40. Mr Nicol has lived in the area of No 144 for 37 years and he knows Mr Benmax has been involved in the property since the 1980s; he also recognised

²⁷ Page 7 of Mr Benmax's appendices to his proof

²⁸ Document 4

²⁹ Appendix 11 to Mr Whittaker's proof

³⁰ Page 71 of Mr Whittaker's appendices

³¹ Pages 75 and 76 of Mr Whittaker's appendices

³² Page 78 of Mr Whittaker's appendices

³³ Page 84 of Mr Whittaker's appendices

³⁴ Pages 88 and 91 of Mr Whittaker's appendices

Mr Solomon as a person who visited the property. He recalls No 144 as a furniture shop and its use by Rothschilds Estates up to about two years ago. There were no problems associated with No 144 and nothing to draw attention to it but about two years ago things started to happen and instead of little activity there were people hanging about and many of them caused a disturbance and rubbish, some 50 to 60 black bags, started to accumulate in front of the garage. Mr Nicol had never been inside the property.

41. Written representations and a petition received prior to the Inquiry were neither sworn nor tested at the Inquiry but I note that complaints to the Council were first recorded in 2015 when local residents saw bunk beds being moved into the premises and levels of comings and goings and rubbish increased. I also note that when the premises were inspected by the Council in January 2016 three bunk beds were seen in both units 1 and B; a double bed and a single bed were in unit A; two single beds were in unit AA; unit 8 was occupied by two persons; two beds were in unit 7; two beds were in unit 6; one bed was in unit 5; one bed was in what is now the garage and which was then unit 3; and a double bed was in unit 2³⁵.

The appeal on ground (b)

42. In an appeal on ground (b) the Appellant has to prove that the matters alleged in the notice have not occurred and the Appellant's case is that there is in fact 10 residential dwellings and one live-work unit (unit 1) with separate office and storage units. The Council maintain that any office or other use is ancillary to the main residential use.
43. The evidence is that the shop has been used in the past for commercial uses because Mr Peppiatt recalls prior to 2000 a furniture shop use by Mr Benmax's father, a surgical supplier, and a commercial artist. Mr Solomon says he used it as an office when he first lived at the property in 2005 but his evidence was that he moved around in different units until he left in 2008 and he did not return until 2016. For that period of time, if Mr Solomon was using the shop as an office he was not necessarily living in unit 1 or living at the property at all and it was therefore not being used as a live/work unit.
44. Photographs in 2008 and 2012³⁶ show what appears to be an estate agents' use; this use is also referred to by the investigating officer in July 2012³⁷; and by Mr Nicol. Mr Benmax is also involved in the estate agents business with Mr Solomon and it has been established he has never lived at No 144. Ms Panares' residential occupation of unit 1 included use of the shop and she was in receipt of housing benefit for the period 15 July 2012 to 3 August 2014. In addition, at the time of Mr Whittaker's first visit in January 2016 the shop was being used for storage. The shop was empty save for some chairs at the time of my visit but I noted that there was a door, which was locked, leading from the shop to the residential unit behind and that the only natural light in unit 1 came from a glass block wall that separated the shop from the unit.
45. Taking the above reasons into account I find as a matter of fact and degree that unit 1 was not a live-work unit at the time the notice was issued as submitted by the Appellant.

³⁵ Pages 29-31 of Mr Whittaker's appendices

³⁶ Page 107 of Mr Whittaker's appendices

³⁷ Page 78 of Mr Whittaker's appendices

46. There was no dispute that the use of the warehouse/garage for water tanks and storage was an ancillary use to the residential use.
47. The Appellant maintains that the office is a separate planning unit because Mr Benmax does not live at No 144 and he uses the office for his business purposes, not all of which are associated with No 144. The evidence was that No 144 is the registered office for his companies and he receives business post to the address at No 144 and also that the records relating to No 144 are kept there. Mr Christie has limited access to the office but Mr Solomon only goes into it when invited by Mr Benmax.
48. In my opinion this ground of appeal is somewhat academic given that the Appellant does not object to a variation of the notice to 10 residential units and one live-work unit and the requirements do not require the office or indeed any retail use to cease.
49. The case of *Burdle*³⁸ establishes the tests to determine a planning unit. Firstly, when there is a single main purpose of the occupier's use of the land to which secondary activities are incidental or ancillary the whole unit of occupation should be considered as the planning unit; secondly, where the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to the other and the different activities are not confined within separate and physically distinct areas of land there is one planning unit in mixed use; and thirdly, where within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes, in which case each area used for a different main purpose ought to be considered as a separate planning unit.
50. Applying those tests to the use of No 144 it seems to me that the first is the most appropriate given that the main purpose of the occupier's use of No 144 is residential and, although not specifically confined to No 144, the business use is incidental or ancillary to the residential use. The office use is physically separate from the residential use and the second test does not apply and with regard to the third test I do not consider as a matter of fact that the office use is so substantially unrelated to the residential use that it can be considered as a different main purpose so as to establish it as a separate planning unit.
51. The notice is not in need of variation and the appeal on ground (b) fails.

The appeal on ground (c)

52. In an appeal on ground (c) the Appellant is saying that the matters stated in the notice do not constitute a breach of planning control. The Appellant's case in this ground of appeal was confined to the upper floor where he contended that pursuant to s.75(4) of the 1990 Act the upper floor could be used as two self-contained dwellings and on this basis the ground (c) appeal was partially successful. He also submitted that the use of the upper floor as two flats was a fall-back position and as such gave rise to a ground (f) appeal.
53. The breach of planning control alleged is the material change of use of the premises at No 144 to use as 11 self-contained residential dwellings. Whether the use of the upper floor as two flats is lawful is matter for the ground (f) appeal; I am not aware of, nor was I referred to any authority for the

³⁸ *Burdle and Another v SSE and Another* [1972] 1 WLR 1207

proposition that there can be a 'partial success in a ground (c) appeal' as submitted by the Appellant.

54. The Appellant has made no case that the use of No 144 as 11 self-contained flats is lawful and there is no grant of planning permission for the material change of use of the premises to 11 self-contained flats.

55. The appeal on ground (c) fails

The appeal on ground (d)

56. In an appeal on ground (d) the Appellant has to prove on the balance of probability that at the date when the notice was issued no enforcement action could be taken in respect of the breach of planning control alleged in the notice. As agreed by both the Appellant and the Council this means in this appeal that the Appellant has to prove that the change of use of each of the 11 units took place on or before 2 February 2012 and that each unit has been in continuous residential use for four years since that date. The Appellant accepts that unit 3 has not been in continuous residential use of four years³⁹ and there are no license agreements for units 7 and 8.

57. A large number of license agreements were produced before the Inquiry by Mr Benmax that were not signed by the tenants and on the first day of the Inquiry some agreements were produced by Mr Solomon that had been signed⁴⁰. All the agreements are dated the first of the stated month; the explanation for this from Mr Benmax and Mr Solomon was that originally Mr Hoffman and then Mr Benmax wanted agreements to start on that date but from Mr Solomon's evidence it was apparent this did not always reflect what actually happened because if a person moved in later in the month rent would not be paid for that earlier part of the month; also as all the agreements follow on immediately from each other in respect of each flat they do not account for any vacancy whatsoever, or early departure by a tenant and although I appreciate that voids are not encouraged, Mr Solomon said that there were some periods when tenants left early and other times when the units were empty.

58. Mr Benmax said that he continued to receive rents from the units and although he said he had written records of rental income and that all his income was properly declared for tax purposes no documentary evidence was produced by him in this respect.

59. The Council accepts that there are some discrepancies in the housing benefit records but with regard to unit 1, there is a Council record of Ms Panares being paid housing benefit for the period 15 July 2012 to 3 August 2014⁴¹ pursuant to a licence agreement for the property described as 144 Avenue Road dated 10 July 2012 for twelve months less one day for £1,075 per month. This document is between Wayne Edwards and Rachelle Comia Panares and has been signed by them⁴². Mr Solomon produced three license agreements between Krassimir Kalabov and Rachel Panares dated 1 May 2012, 1 May 2013 and 1 May 2014 for Ground Floor Front Shop Flat 1 at a rental of £650 per month; these agreements appear to have been signed by Mr Solomon (as

³⁹ Document A Appellant's opening remarks paragraph 13

⁴⁰ Document 11

⁴¹ Appendix 1 to Mr Whittaker's supplementary proof Document 2

⁴² Page 65 of Document 2

- Mr Edwards) on behalf of Mr Kalabov and the signature 'R Panares' bears no resemblance to the signature on the Council's document which is 'Rdcomia'.
60. Similarly with regard to Flat A, housing benefit was paid for the period 6 April 2015 to 27 March 2016 pursuant to an agreement between Mr Benmax and Joao Emanuel Rodrigues Alves dated 23 December 2014 with a rental of £1,300 per month. The unsigned license agreements dated 1 June 2014 and 1 June 2015 produced by Mr Solomon for Flat A are between Wayne Edwards and Joao Alves for a rental of £500 per month.
61. Mr Solomon said that he was paid commission for acting for Mr Benmax and that he had a written agreement with Mr Benmax but Mr Benmax said there was no written agreement between them; in any event, no document was produced. Mr Benmax said he received the rental amount stated on the license agreement but he acknowledged that if Mr Solomon sub-let for a higher price he kept the difference, which in the case of unit 1 would have been £425 per month and for unit A £800 per month.
62. The Council's records indicate that Mr Solomon (as Wayne Edwards Landlord) was paid the sum of £12,844.72 for the period 8 April 2011 to 12 July 2012 in respect of Mr T Sumner's occupation of Flat A pursuant to an assured shorthold tenancy agreement dated 7 April 2011. No license agreement to Mr Sumner was produced by Mr Solomon. Mr Solomon's explanation in evidence-in-chief was that Mr Sumner was in and out of prison; unit A was not available for him; he moved into unit 3 for 6 months; and then the garden flat for a about a year. However, in cross-examination he said that the signature on the document was not his; the document was not one that he used; and he could not answer whether he had received the sum of £12,844.72 or not.
63. Mr Solomon's inability to remember whether he was paid that not inconsiderable sum or not in contrast with his apparent complete recollection of all other tenancy matters including every tenant who had ever occupied No 144 and which unit they occupied since 2005 and the names of all the agents and others who had been involved in letting the flats was not credible. Taking that and all other matters into account, including the many discrepancies between his evidence- in-chief and in cross-examination and between his evidence with other witnesses, I consider that Mr Solomon's evidence, despite it being on oath, was unreliable and I give it extremely limited weight.
64. Despite the Appellant indicating that tenants and former tenants would be giving evidence only Mr Turvey did so. I have no reason to question that Mr Turvey is currently living in unit 5 but I do question the veracity of the five license agreements dating back to March 2011 in the name of Jim Bowloom and their appearance on the first day of the Inquiry signed by J Turvey. Mr Turvey was not an impressive witness and his explanations of the name on the agreement; how and when he signed the agreements; and receiving receipts for his rent were not credible. I give Mr Turvey's evidence very limited weight.
65. License agreements do not in themselves provide evidence of occupation; there were a number of discrepancies in them particularly the rent stated thereon in respect of unit 1 and unit A; the practice whereby every agreement was dated and began on the first day of the relevant month and there are no gaps in the licenses does not record what actually happened given that there were voids and occupiers did not always move in on the first of the month. I was not

- persuaded by the accuracy or the veracity of the license agreements and I give them no weight.
66. Mr Kalabov is a shadowy figure whose name appears on license agreements but I have seen none that he has signed. In the original bundle of agreements produced there was one for unit B dated 1 October 2015 between Wayne Edwards as licensor and Mr Kalabov as licensee. Mr Solomon explained that Mr Kalabov needed the flat for his own purposes at that time. Mr Benmax said that Mr Solomon had given a lease to Mr Kalabov to ease his (Mr Solomon's burden). Mr Benmax was not happy about this arrangement but as his revenue stream was not affected he did not object. He did not know whether Mr Kalabov was still involved with No 144. Whilst I accept that Mr Benmax may not have day to day dealings with No 144 his lack of knowledge and interest in who was running what was in effect his business is not credible.
67. Mr Hoffman's statement was not sworn or declared and he did not attend the Inquiry for his evidence to be tested. I therefore give his evidence very little weight.
68. Most of the documentary evidence presented by Mr Benmax was historical and showed that the property had undergone considerable changes in both layout and use over the years. Among other things, what is now unit 8 was granted a lawful development certificate in February 1998 as ancillary offices to the shop on the sworn evidence of Mr Benmax that No 144 had been occupied by various business interests of his and his family for at least twenty years and that one of the office areas used was the rear section of the warehouse unit⁴³. Also in the letter dated 4 March 1998 he refers to the existing office, the subject of the lawful development certificate, remaining. Yet Mr Peppiatt's written evidence, confirmed in his oral evidence to the Inquiry, was that unit 8 was set out as an old fashioned dwelling which he refitted in about 1988.
69. Mr Solomon referred to the warehouse as being a garage with an office behind it and then as a flat and office and it is now solely an office because it has no windows. At the time of my visit the rooms behind the garage comprised unit 3 (one room) and a bedroom for unit 4; Mr Benmax's office was located further beyond unit 4. It therefore appears that the location of the office, and indeed the number of offices, may have changed over the years.
70. It is also of note that Mr Hoffman makes no mention of the number of units at No 144 and the letter from S&Q Estates dated March 1996⁴⁴ refers to No 144 as 'a property' with no suggestion that it is divided into separate units.
71. Mr Benmax denied that the property was ever a house in multiple occupation but in the application for a grant, first made in April 1994 and apparently pursued in February 1997 and approved in March 1997, was clearly in respect of common parts to a house in multiple occupation⁴⁵. I was not persuaded by Mr Benmax's evidence that he could not remember what the grant was for given it was approved for the sum of £10,467.25 which is a substantial sum now and was even more so in 1997.
72. For similar reasons to that for Mr Solomon, I consider that Mr Benmax's evidence was not reliable and I give it very limited weight.

⁴³ Page 22 of Mr Whittaker's appendices

⁴⁴ Document 5

⁴⁵ Pages 12 -18 to Mr Benmax's proof

73. Mr Peppiatt recalled that what are now units 6 and 7 was one unit⁴⁶ and the investigating officer in August 2015 showed them as one unit (marked 2 on his plan)⁴⁷. It has to be noted that Mr Peppiatt only had knowledge of the premises until 2000/2002; he mentioned some tenants but did not give evidence of actual use of the premises; and it was apparent from other evidence to the Inquiry that the layout and circumstances had altered significantly since Mr Peppiatt's time. In addition a considerable period of time has elapsed since his involvement, during which time he was very ill, and I give his evidence little weight.
74. The evidence with regard to the layout of the upper floor is confusing. Mr Benmax said that up to 1997 there were two flats upstairs and that Mr Peppiatt converted unit A into two units known as unit A and unit AA. Mr Peppiatt in his written statement says that he only remembered two flats at the time he left in 2002. Mr Christie's invoices refer to top floor right and top floor left units only. The drawing for the conversion of first floor into two bedsits (the previous use is not mentioned) dated November 1982 shows two bedsits⁴⁸. The drawing for a proposed alteration to bathroom and conservatory dated August 1995 shows two residential units; it is stamped by the Council with the reference number and the date of 26 September 1995⁴⁹. This drawing is virtually identical to a drawing date stamped by the Council on 17 February 1997⁵⁰ but a drawing produced by Mr Benmax with the same date and title but not stamped by the Council shows units A, AA and B⁵¹. In the circumstances as this later drawing is not date stamped I give it very little weight.
75. It is not at all clear to me when unit AA came into existence. I do not consider that the evidence relating to units A and AA is sufficiently precise and unambiguous to prove to the required standard that they have been in existence for four years.
76. It seems to me likely that there has been some residential use of No 144 for a considerable period of time and that this residential use comprised a number of self-contained units. However, the evidence provided by and on behalf of the Appellant was anecdotal and inconsistent and there were discrepancies in the evidence given by each witness resulting it in being unreliable. With the exception of Mr Peppiatt none of the witnesses were independent in that they all had an interest, including a financial interest, in the residential use of the premises and the notice being quashed. I therefore find that the Appellant has not proved to the required standard of precision and certainty that the change of use of any of the 11 units took place on or before 2 February 2012 and that each unit has been in continuous residential use for four years since that date.
77. The appeal on ground (d) fails.

The appeal on ground (f)

78. In an appeal on ground (f) the Appellant is saying that the steps required by the notice to be taken exceed what is necessary to remedy the breach of

⁴⁶ Document 9

⁴⁷ Page 76 of Mr Whittaker's appendices

⁴⁸ Page 17 of Mr Whittaker's appendices Ref 15002/3

⁴⁹ Page 18 of Mr Whittaker's appendices Ref 15002/5

⁵⁰ Document 4

⁵¹ Page 7 to Mr Benmax's proof

planning control. In the Appellant's original grounds of appeal he said, among other things, that the requirements were vague because it did not refer to where in the property the alleged unauthorised uses were taking place and that the requirement to remove partitions was excessive. The Council suggested variations to the requirements⁵² and provided a plan showing the current layout of the property⁵³. The Appellant accepted that the plan was correct and that the proposed varied requirements would deal with the excessive requirement to remove sub-divisions. As no prejudice can therefore be caused to the Appellant I will consider the ground (f) appeal on the basis of the requirements as varied by the Council which are:

- a. Cease the use of the premises as 11 self-contained residential dwellings;
- b. Remove the kitchens from each of the 11 self-contained residential dwellings;
- c. Remove the bathrooms from each of the 11 self-contained residential dwellings;
- d. Remove all partition walls enclosing the bathrooms from each of the 11 self-contained residential dwellings;
- e. Remove the partition wall enclosing the kitchen from flat 1 and the partition wall enclosing the bedroom from flat 8; and
- f. Remove all resultant debris from the land.

79. Planning permission was granted in 1983 for the 'conversion of first floor above retail shop into two self-contained flats' and the plan for the approved layout clearly shows two self-contained units⁵⁴. In 1997 planning permission was granted for the 'retention of rear extensions at first floor level and continued use of residential accommodation above shop as two self-contained flats' and the plan for the approved layout shows the extension and the re-arrangement of the living accommodation⁵⁵. Mr Benmax wrote in a letter dated 1 March 1998 that he had not implemented the latter permission⁵⁶ but given my finding that Mr Benmax's evidence was not reliable I give this comment very little weight. I note, however, that the extension was built and therefore it appears to me that the permission was implemented.

80. S.57(4) of the 1990 Act provides that 'where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which it could lawfully have been used if that development had not been carried out'. The lawful use of the upper floor is as two self-contained flats and thus any requirement that does not permit that lawful use is excessive.

81. I have found that the material change of use to eight self-contained residential units on the ground floor and the use of the upper floor as three self-contained units is not immune from enforcement. It is established 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

⁵² Document 13

⁵³ Document 12

⁵⁴ 15002/3 at page 17 of Mr Whittaker's appendices

⁵⁵ 15002/5 at page 18 of Mr Whittaker's appendices

⁵⁶ Page 1 of the appendices to Mr Benmax's proof

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 place⁵⁷. In my view the bathrooms and kitchens in the units facilitate the unauthorised use because the units could not be self-contained without bathrooms and kitchens. The requirement to remove the bedroom partition in unit 8 is not excessive because it is integral to the residential use in that it provides for a bedroom in the unit.

82. I note the Appellant's contention that the bathrooms could be used for any number of uses at the premises but I have not been provided with any information about any such proposed use and the likelihood of any such use being implemented is uncertain. It is relevant in this context that compliance with the requirements of a notice does not prevent an owner/occupier undertaking lawful development in the future. I therefore consider that the requirements in respect of units 1-8 and the use of the upper floor as three self-contained units are not excessive.
83. I will make the variations to the requirements that result from the provisions of s.75(4) as set out above and to this extent the ground (f) appeal succeeds.

The appeal on ground (g)

84. A ground (g) appeal is on the basis that the period for compliance falls short of what should reasonably be allowed. The Appellant relies on the residents' need to find alternative accommodation and for the works to be undertaken and he submits that a period of nine months is reasonable.
85. At the time of my visit all of the units were occupied but, given my finding in respect of the license agreements produced to the Inquiry, I do not know the terms under which the units are occupied. The Appellant has given no indication of what period of notice has to be given to the occupiers or when any of the current occupancies come to an end by the passage of time. The works required when the units are vacated to remove the kitchens, bathrooms and partitions are not, in my opinion, onerous or time consuming.
86. In the circumstances I consider that three months is a reasonable period but I remind the Council of its powers in s.173A of the 1990 Act to extend the period for compliance should it prove necessary to do so.
87. The appeal on ground (g) fails.

Conclusions

88. For the reasons given above I conclude that the requirements are excessive and I am varying the enforcement notice accordingly, prior to upholding it. The appeal on ground (f) succeeds to that extent.

Decision

89. It is directed that the notice be varied by the insertion of the words 'as shown on the interior layout plan attached' after the words '11 self-contained dwellings' in part 3 of the notice. [A copy of this plan marked 'A' is attached to this decision.]

⁵⁷ *Murfitt v SSE* [1980] JPL 598, *Somak Travel v SSE* [1987] JPL 630

90. It is directed that the appeal is allowed on ground (f) and the enforcement notice is varied by the deletion of requirements 5 a. - e. in their entirety and the substitution of the following requirements 5 a. – k.

- a. Cease the use of the ground floor of the premises as 8 self-contained residential dwellings;
- b. Remove the kitchens from each of the 8 self-contained residential dwellings on the ground floor;
- c. Remove the bathrooms from each of the 8 self-contained residential dwellings on the ground floor;
- d. Remove all partition walls enclosing the bathrooms from each of the 8 self-contained residential dwellings on the ground floor;
- e. Remove the partition wall enclosing the kitchen from flat 1 and the partition wall enclosing the bedroom from flat 8;
- f. Cease the use of the upper floor as three self-contained residential dwellings;
- g. Remove the kitchen from unit AA on the upper floor;
- h. Remove the bathroom from unit AA on the upper floor;
- i. Remove all partition walls enclosing the bathroom from unit AA on the upper floor;
- j. Restore the upper floor to its use as two self-contained residential dwellings; and
- k. Remove all resultant debris from the land.

91. Subject to these variations the enforcement notice is upheld.

Gloria McFarlane

Inspector

APPEARANCES

FOR THE APPELLANT

Mr J Parker	Counsel
He called	
Mr W Solomon	Associate of the Appellant
Mr D Christie	Builder
Mr P Benmax	Appellant
Mr D Peppiatt	Retired builder
Mr J Turvey	Tenant of No 144

FOR THE LOCAL PLANNING AUTHORITY

Ms I Visagie	Solicitor
[Days 1 and 2]	
Mr R Morton	Solicitor
[Days 3 and 4]	
He called	
Mr N Whittaker	Planning Enforcement Officer
BSc(Hons) MA MRTPI	
Mr P Harris	Housing Benefit Officer

INTERESTED PERSONS

Mr S Nicol	Local resident
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DOCUMENTS SUBMITTED AT THE INQUIRY

Document 1 - The Council's letter of notification and list of persons served

Document 2 - Mr Whittaker's supplementary proof

Document 3 - Email from GP's Surgery to Mr Benmax dated 21 December 2016

Document 4 - Drawing No 95/8/169/2 submitted by the Council

Document 5 - Letter from Estate Agent to Mr Benmax dated 14 March 1996

Document 6 - Plan of the units, submitted by the Council

Document 7 - Bundle of invoices submitted by Mr Christie

Document 8 - Statement of Common Ground

Document 9 - Mr Peppiatt's witness statement

Document 10 - Extract from Mill Hill Park Conservation Area Appraisal, submitted by the Appellant

Document 11 - Bundle of license agreements relating to Flats 1, 2, 4, 5, 6, AA, A and B

Document 12 - Plan showing layout of flats (amended), submitted by the Council

Document 13 - Email proposing variation to the requirements, submitted by the Council

Document 14 - Bundle of Building Control documents, submitted by the Council

DOCUMENTS SUBMITTED BY THE ADVOCATES AT THE INQUIRY

Document A - Opening statement on behalf of the Appellant

Document B - The Council's closing submissions

Document C - Transcript : *Ravensdale Limited v SSCLG* [2016] EWHC 2374(Admin)

Document D - Closing submissions on behalf of the Appellant

Document E - Transcript : *Kestrel Hydro v SSCLG and Spelthorne BC* [2016] EWCA Civ 784

Document F - Transcript : *Bowring v SSCLG and LB Waltham Forest* [2013] EWHC 1115 (Admin)

Document G - Transcript : *Ozyurekliler v SSCLG* [2013] EWHC 2648 Admin

Document H - Transcript : *Doncaster BC V SSE and Dunnill* *Van Dyck v SSE and Southend-on-Sea BC* 66 P & CR 61

Plan

This is the plan marked 'A' referred to in my decision dated:

by Gloria McFarlane LLB (Hons) BA(Hons) Solicitor (Non-practising)

Land at:144 Avenue Road, Acton, London, W3 8QG

Reference: APP/A5270/C/16/3145183

Scale: Not to scale

