

Appeal Decision

Inquiry held on 7 & 8 February 2017

Site visit made on 9 February 2017

by R J Perrins MA MCMI Arbor TechArborA

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

Decision date: 19 April 2017

Appeal Ref: APP/A5270/C/16/3149506

130 and 132 Gunnersbury Lane, Acton, London W3 9BA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Miss Nicola Christie against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice, numbered COM/2011/00227, was issued on 31 March 2016.
- The breach of planning control as alleged in the notice is material change of use of the premises to use as 10 self-contained dwellings consisting of
 - a) One self-contained unit within the outbuilding to the rear of 132 Gunnersbury Lane;
 - b) Eight self-contained units within 132 Gunnersbury Lane;
 - c) One self-contained unit within the roof space of the main building at 130 Gunnersbury Lane.
- The requirements of the notice are
 1. Cease the use of the premises as 10 self-contained dwellings;
 2. Remove the kitchen, bathroom and all internal partitions from the self-contained flat within the roof space of 130 Gunnersbury Lane;
 3. Restore the partition wall between the roof space of 130 Gunnersbury Lane and 132 Gunnersbury Lane;
 4. Remove all but one kitchen and drainage connection which facilitates the use of the main dwelling at 132 Gunnersbury Lane as 8 self-contained dwellings;
 5. Remove all but two of the bathrooms which facilitates the use of the main dwelling at 132 Gunnersbury Lane as 8 self-contained dwellings;
 6. Remove all bathroom, kitchen and drainage facilities which facilitate the use of the outbuilding as a self-contained dwelling;
 7. Remove all internal locks facilitating the use of the main dwelling at 132 Gunnersbury Lane as 8 dwellings; and
 8. Remove all resultant debris.
- The period for compliance with the requirements is nine months (six months for requirement 1 and three months for requirements 2-8).
- The appeal is proceeding on the grounds set out in section 174(2) (a) (d) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed on ground (d), and the enforcement notice is quashed.

Preliminary matters

1. All of the evidence to matters of fact was given on oath or by sworn affirmation.
 2. The appeal site has a planning history which included an appeal (ref:APP/A5270/C/14/2220504) in May 2015 concerning an enforcement notice
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dated 14 May 2014 which alleged: *without planning permission, the material change of use of the premises to use as 10 self-contained dwellings (the position of 9 of the dwellings indicated with an 'x' and the 10th dwelling in the outbuilding with a 'y' on the plan attached to the Notice and hereinafter collectively referred to as the 'Unauthorised Development')*. The previous Inspector's decision was challenged on a number of grounds and, following a permission to appeal hearing, the Planning Inspectorate submitted to judgement on the basis that the reasoning in respect of the outbuilding was insufficient. That appeal was set to be redetermined by way of an Inquiry.

3. Subsequently the Council issued the notice subject of this appeal and withdrew the first enforcement notice and the redetermination fell away. In that light the Council seek to rely on the 'second bite' provision within s171B(4)(b) of the Act. The appellant considers the provision cannot apply in this case because the first notice did not refer to both Nos 130 and 132, the judge at the permission hearing suggested there were issues with it, and it was in fact a nullity.
4. However, the previous notice is not before me to decide whether it was a nullity or not. Furthermore, even it were a nullity the purpose of the second bite provision of s171B(4)(b) is to stop the clock where LPAs have issued a faulty notice or need to issue another notice so as to protect their position. To accept that a nullity somehow trumps that would unnecessarily restrict that purpose. The wording of s171B(4)(b) is sufficiently wide to encompass the nullity situation in that the LPA has "purported" to issue an enforcement notice.
5. Moreover, I am satisfied given the flat in No 130 was physically separated from the rest of the property and only accessed from No 132 and that the notice was explicit in that it was enforcing against 10 units and described where they were, that the Council have purported to take action against the matters described in the current notice. In addition both properties were owned by the appellant and no prejudice has occurred. For these reasons I find that the second bite provisions apply in respect of the second notice.
6. With regards to the outbuilding the Council accepted at the Inquiry that it no longer sought to pursue the argument that it may have been a new build. The appellant would not be required to demonstrate a continuous use for 10 years under the ground (d) appeal.

The ground (d) appeal

7. In light of the above the onus is upon the appellant to demonstrate, on the balance of probabilities, whether the use of the premises as 10 self-contained units has continued substantially uninterrupted for the salient period. That is 4 years or more at the time the (first) enforcement notice was served, the relevant date being 14 May 2010. The judgment in *Ravensdale*¹ sets out that a ground (d) appeal must be determined by reference to the submitted evidence and that an appellant must take care to submit sufficient evidence to meet the balance of probabilities and to satisfy the burden of proof. An Inspector is entitled to reach a decision on the basis of the material put before him
8. The judgment also refers to the Planning Practice Guidance (PPG) which states that in the case of applications for an existing use, if a local planning authority

¹ *Ravensdale v SSCLG* [2016] EWHC 2374 (Admin)

has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. Under a ground (d) appeal arguments regarding the planning merits of the case cannot be considered.

9. The Inquiry heard that the property underwent extensive renovation sometime in 2009. Prior to that the appellant's managing agent agreed that all of the units were not self-contained. In general terms, and as evidenced by the appellant's builder both in a Statutory Declaration and on oath, in 2009 a loft conversion was carried out which resulted in three self-contained flats in the roof space of Nos 130 & 132. At the same time alterations were carried out to the remainder of the building to create the other flats. I will return to those works later but the Council accept, in any event, that the self-contained units were complete and tenanted after March 2011. It is the period before that upon which I shall focus initially.
10. In doing so I am mindful of the judgments and principles set out in *Thurrock*² and *Swale*³ which the Council point to in determining whether or not the use had continued uninterrupted. The thrust of the Council's argument being that between 2009 and March 2011 the flats were not being used for independent residential purposes such that they could be enforced against. After 2011 the Council say the evidence does not point to an uninterrupted use either and I will address that period in due course.
11. At the time of my visit I was able to see all of the units laid out as per the set of drawings submitted by the appellant, and drawn up by HFM Design, dated 10 February 2010. The appellant sets out that those units were completed and occupied before the salient date and points to a large amount of material supporting that including sworn statements and the oral evidence given at the Inquiry by a number of witnesses. It is to that evidence which I now turn.
12. The starting point for the evidence concerning the conversion works rests with the appellant's builder who, in the first instance, set out that the outbuilding was a brick built garage when he first visited the site in 2002 to carry out conversion works to it. In 2009 he converted the loft space to flats and then moved onto the other rooms. By the end of 2009 all the works he was contracted for were complete and there were 9 self-contained flats complete or ready for fitting out with bathroom facilities and electrics or 'final fit' where required and the outbuilding.
13. The appellant's builder also recollected a change in tenants in the summer of 2009, shortly after he had started the loft conversion, when Polish workers moved in. In his view they moved in all together and were living there with permission of the owner and in exchange for their labour. They helped with the loft conversion and carried out the 'final fit' to other flats as necessary. During that time he saw that some of the rooms were being used for living in but did not look in all of them. Although his overall view was that 'probably all' were being used. Whilst the evidence only takes us to the end of 2009, it was given on oath and must carry weight in terms of the chronology of events and the conversion process that was undertaken.

² *Thurrock BC v SSETR and Holding (CA)* [2002] JPL 12782

³ *Swale Borough Council v FSS and Lee* [2005] EWCA Civ 1568.

14. That timing of the change in occupiers was borne out by the evidence of Grzegors Sosnowski. His grasp of English was not good, such that some of the questions asked in cross examination remain unanswered, and the weight given to his evidence both written and oral should be tempered. Nevertheless he did state that he moved in to the premises in July 2009 and stayed there until September 2011. During his time there he worked occasionally, one or two days per week, doing what can reasonably be described as 'handyman work'. That was in lieu of paying rent although he did pay for electricity. Whilst he had difficulty describing who else was living in the premises at that time it was apparent that he worked in all the rooms and none, in his opinion, were empty.
15. Alongside that is the evidence of Lukasz Gudawjtys, who was a confident English speaker and appeared to understand all of the questions he was asked. I found him to be a forthright and credible witness. He remembered moving in to the premises in July 2009, he did so because that was when he met his wife-to-be who he then moved in with upon moving out in April 2011. He also worked one day per week in 2010 carrying out various 'snagging' and other tasks. Prior to that he followed behind the main builder tiling and fitting splashbacks. He was able to describe or name the other people living in the flats which were all occupied and finished in spring 2010. The evidence was on oath, he heard no other witnesses and it weighs in favour of the appellant's case.
16. In the face of that the Council point to a number of disparities or what they consider to be discrepancies in the evidence. To that end I accept there were no formal tenancy agreements or contracts between the appellant and the witnesses. The flats were dusty because of building works and there is no explanation why the witnesses and other workers remained at the premises for so long. Many of the receipts submitted by the appellant for building materials are inconclusive with no delivery address and the appellant did not appear at the Inquiry to explain them. There is also some merit in the view that there was a long period of time where the flats were seemingly occupied by workers paying little, if any, rent when the market value of completed flats would have drawn a large income.
17. In addition I accept that the flats, as per *Gravesham*⁴, would need to have had the facilities required for day-to-day living for the requisite period. However, it is not unusual, in the current property climate in London, for builders to occupy a development whilst it is being worked on. It is also reasonable to assume that those who work under such an arrangement would put up with more dust and other associated building activities than a tenant paying full market price. Whilst the appellant's builder points to a shared kitchen in 2009 that was well before the period in question.
18. Nevertheless I accept it is not clear how long each flat took to finish and as work was undertaken how each flat remained in use. Furthermore, the managing agent was unable to corroborate how the Polish builders were using the flats at that time as he had little need to visit the premises during that period. The Council also opines that the way in which the Polish builders occupied the premises was fundamentally different to that of rent paying

⁴ *Gravesham BC v SSE & O'Brien* [1983] JPL 306

tenants because the occupation was a fundamental part of the work and without the work the occupancy would finish.

19. However, we heard from the two Polish witnesses that there was in fact very little work from early 2010 onwards and they worked elsewhere; Mr Gudawjtys in particular found the arrangement satisfactory; when asked why the appellant allowed him to live there for not much work he did not know but was 'very happy' with the arrangement. I fail to see how letting someone stay in the premises in exchange for work rather than rent (regardless of the quantity or type of work) is any different in terms of the flats being 'occupied' by a rent paying tenant for the salient period. A tenant chooses to pay rent for a property, the builders chose to live at the premises whilst undertaking work there and elsewhere. The lack of any tenancy agreement does not negate any use that was being carried out.
20. Furthermore, I have not been directed to any case law or other evidence which supports that view or says that just because somewhere is only (in the view of the Council) capable of supporting private domestic existence to a builder, and no-one else, that the test of continuous occupation should cease. One person's expectation of what is required for day-to-day living can be at the extreme end of another's expectations. Indeed the dwellinghouse in *Gravesham* lacked both a toilet and shower.
21. In addition to this evidence there are Statutory Declarations from Dariusz Beszczynski, Soheil Sohrabian and Arash Zafari who set out each flat was being lived in separately in 2009 and 2010. Whilst I accept the reference to smoke alarms by Mr Beszczynski is at odds with what the Fire Brigade appear to have found in 2012, neither party was called so the accuracy of that statement goes untested as do the declarations. Nevertheless it is evidence that again weighs in favour of the appellant's case that the flats were in use between 2009 and 2010.
22. Moreover there is the statutory declaration from the Architect responsible for the drawings referred to above. He says that on 10 February 2010 he prepared the drawings following a site visit a week or two earlier where he entered each flat. At that time they were all being lived in and were fully constructed. The Council suggest the weight to those drawings be reduced given they were drawn up for tenancy agreements which did not come to fruition for more than a year afterwards. However, the managing agent was clear in that they were drawn up with a view to leasing the flats although that never came to fruition. It seems to me those drawings and statutory declaration corroborate the evidence heard at the Inquiry.
23. Therefore, from the evidence before me, and as a matter of fact and degree, I find that the conversion works had been completed and the units were being occupied independently prior to 14 May 2010. In coming to that view I note the previous Inspector was not convinced that the occupation by the builders was comparable to a tenant or that it was not clear when the flats in the roofspace were occupied. However, that Inspector did not have the benefit of hearing the evidence on oath as I have. Thus, what remains for me to consider is whether that occupation continued uninterrupted for four years or more. It is to that which I now turn.
24. I accept that there is limited documented evidence up until formal tenancies started in early 2011 for a continuous use. However, given the evidence

discussed thus far, I see no reason to find the flats weren't occupied as set out by the Polish witnesses for that period. From 2011 onwards the managing agent set out that the flats were continuously occupied save for very short periods when a vacant flat was being marketed although that was rare given the demand for rented accommodation. It was evident that he had an in depth knowledge of the property and his answers were expressed clearly and were easy to understand.

25. Nevertheless the Council take issue with the evidence that has been put forward; I accept that the tenancies submitted show the start but not the end of rental periods and there is no documentary evidence to show that the maximum time between tenants was one or two weeks. There are no bank statements showing rental payments or receipts for rent and other parts of the evidence are vague. In addition the Council set out that they only received complaints from 2012 onwards and the HMO team only identified the premises as self-contained flats in 2012 which is when the Valuation Office re-banded the property. In addition the 2011 photographs submitted in the inventory reports show very new facilities.
26. Dealing with that latter point first, the photographs submitted with a number of inventory reports do show very clean and tidy flats with what could be perceived to be new facilities. However, as I saw from my site visit the flats have been finished to a very high standard and, as was apparent from the two vacant flats that I saw, they are also cleaned and prepared to a very high standard. Given that, the fact that the photographs from 2011 show new looking facilities does not weigh in the Council's favour. In the same way I have no reason to doubt that there is a high demand for such well-kept units and turnover of tenants would, as explained in evidence, be very quick.
27. With regards to the adequacy of the evidence I accept that it is not all fully explained and there would have been a benefit to submitting full tenancy agreements and rent receipts. Nevertheless the Council have only evidenced one complaint and it seems that the property was re-banded following one of the tenants trying to register with the Council which alerted them to the change in use. These factors do not show that the use as ten separate units only started at that time. Moreover, the Council witness accepted that matters such as Council Tax not being paid, or tenancy agreements not being in place, or the Electoral Roll not being complete, does not point to a lack of tenants. Further, the date chosen by the Valuation Office to backdate Council Tax re-banding payments was arbitrary.
28. I've also considered the Council's view that there is disparity in the meter readings and that those tenants recorded as having a lower use (up to 200 units per month less than the highest user) could not have been in occupation for the periods shown. However, this argument carries no weight; we do not know the living habits of those who used more to compare to those who used less. Furthermore it was explained by the managing agent, on oath, that what was being compared was for different times of the year. There can be no doubt that a winter reading would show a far greater monthly usage.
29. Turning to the outbuilding the Council witness accepted under cross examination that the works carried out were a conversion and not a new build as they initially thought. It was therefore subject to the 4-year rule and the Council witness also acceded that it was used continuously for 4 years as a

separate self-contained unit prior to 2009. I see no reason to disagree; whilst access would have been via the main building it is clear, given the particular layout of the building, that access would have been via the communal doors and hallway/passageway used by the other tenants in any event.

30. Moreover, the Council have not produced any evidence of their own to contradict the appellant's submissions. No Council Officers inspected the premises during the salient period, no witnesses who had any knowledge of the premises during the disputed period were called by the Council. Furthermore, unlike the case in the *Ravensdale* judgment and the evidence before the previous Inspector, I have heard evidence on oath which is corroborated by other evidence put forward, and to which some weight, as set out above, must be attributed.
31. It is in that light the balance falls in favour of the appellant. Therefore I find, as a matter of fact and degree, and on the balance of probabilities, that the appellant has fulfilled the burden of proof in demonstrating the use of the premises, as 10 self-contained units, took place prior to the beginning of the relevant period and the use was continuous thereafter. It follows that no enforcement action could be taken against the change of use by the time the notice was issued and accordingly the appeal on ground (d) should succeed.

Conclusion

32. For the reasons given above and having considered all matter raised, I conclude that the appeal succeeds on ground (d). Accordingly the enforcement notice will be quashed. In these circumstances the appeals under ground (a) and (g) do not need to be considered.

Formal Decision

33. The appeal is allowed and the enforcement notice is quashed.

Richard Perrins

Inspector

APPEARANCES

FOR THE APPELLANT:

Miss E Lambert of Counsel	Instructed by direct access.
She called	
Mr Grzegors Sosnowski	Ex-Tenant and builder
Mr Lukasz Gudawjtys	Ex-Tenant and builder
Mr Peter Mansell	Builder
Mr David Farlow	Managing agent
Mr Simon Wallis MA	Planning Consultant
MRTPI	

FOR THE LOCAL PLANNING AUTHORITY:

Mr R Morton Solicitor	Instructed by Ealing Council
He called	
Mr Neil Whittaker	Enforcement Officer
BSc(Hons) MA MRTPI	

DOCUMENTS

- 1 Notice of Planning Decision Ref: 162673FUL dated 05.08.16
- 2 Copy of Priority 3 of the *Private Sector Housing Strategy*
- 3 Copy of an email dated 06.02.27 from S Wallis regarding Acton Gardens.
- 4 Copy of an email dated 11.11.15 from N Whittaker.
- 5 Copy of the judgment *Ravensdale*
- 6 Policies 7A and 7B of the Development Plan Document.
- 7 Policies 3A and 3B of the Development Plan Document.
- 8 Copy of extracts form the London Plan
- 9 Copy of extracts from *Fixing our broken housing market*
- 10 Planning Committee report ref 163893FUL dated 16.11.16
- 11 Delegated Draft notice in respect of 163760FUL dated 10.11.16
- 12 copy of SPD 4 *Residential Extensions*