
Appeal Decision

Site visit made on 21 February 2017

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 24 April 2017

Appeal Ref: APP/T5150/C/16/3153811 50 East Lane Wembley HA9 7NS

- 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 by Mr Fredon Raei of Raei & Co against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice, ref. E/16/0253, was issued on 21 June 2016.
- The breaches of planning control alleged in the notice are:
 - A. without planning permission the material change of use of the premises to a sui-generis House in Multiple Occupation (HMO) ('the unauthorised change of use'); and
 - B. breach of condition 3 (the extension hereby approved shall be used solely in connection with the existing house as a single family dwelling) of planning application no. 06/0563 dated 9 June 2006 ('the unauthorised change of use').
- The requirements of the notice are to:
 - STEP 1 Cease the use of the premises as a sui-generis House in Multiple Occupation (HMO) and its occupation by more than one household; and,
 - STEP 2 Carry out the alterations to the internal layout of the premises so that it reflects the approved ground and first floor plans attached to planning permission no. 06/0563 dated 9 June 2006 as listed below (copies of which are attached to the notice):
 - Drg. no. eastlane – 50/1 – Proposed ground floor plan
 - Drg. no. eastlane 50/3 – Proposed first floor plan.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the ground set out in section 174(2)(a), (b) and (d) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.

Preliminary matters

1. The appellant's arguments on ground (b) imply that he considers the change from use class C3 – use as a dwellinghouse - to use as a 5-bedroom HMO should be seen as permitted development. This is essentially an appeal under ground (c) – that the matters alleged, if they occurred, do not constitute a breach of planning control. This might be for reasons such as those matters being permitted development, or having already been granted planning permission.
 2. Furthermore, the appellant has argued that the use of the house could be restricted to occupation by not more than 6 people, rather than by not more than one household in the required STEP 1, and that no physical changes to the property are necessary. This argument is effectively an appeal on ground (f) –
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that the required steps are excessive, and lesser steps would overcome the Council's objections.

3. I have therefore treated this appeal as including 'hidden' grounds (c) and (f)

Background matters

4. The appeal property is a semi-detached house standing on the northern side of East Lane, which the appellant had bought in December 2005. In 2006 planning permission was granted for the demolition of a garage and erection of a part single and part two-storey side and rear extension to the dwellinghouse¹. This was subject to a number of conditions, including Condition no. 3, which states that 'The extension hereby approved shall be used solely in connection with the existing house as a single family dwelling'.
5. An application for a Certificate of Lawful Use or Development (LDC) for the property for use as a 9-bedroom HMO was submitted in March 2016, and refused in June of that year².

The appeal on ground (b)

6. This ground is that the alleged material change of use has not occurred as a matter of fact. The appellant argues that the appellant's purpose in buying the house was to rent it out as a HMO, and that it was rented out as a 5 room HMO from January of 2006.
7. The appellant says the extension was completed in October 2009, and that from then on it was let as a 9-bedroom HMO. As a result, it is argued that the use of the building has remained the same, and no material change of use has occurred.
8. Prior to the 2010 amendments to the UCO there was no class defined for HMOs, which were all regarded as *sui generis* uses. The amendment that came into force on 6 April 2010³ introduced Class C4 – Use of a dwellinghouse by not more than six residents as a "house in multiple occupation". The 2010 amendment to The Town and Country Planning (General Permitted Development)(England) Order⁴ introduced permitted development rights for changes of use from small HMOs to dwellinghouses and vice versa.
9. It appears to me that as a matter of fact and degree the use as a HMO was materially different from the previous existing, and lawful, use as a family dwellinghouse within Use Class C3. At that time there were no rights under the GPDO permitting such a change. It is clear that at some point there was a material change of use of the property from a single family dwellinghouse to a HMO. The material change of use alleged in the notice has occurred as a matter of fact, and the appeal on ground (b) must fail.

The 'hidden' appeal on ground (c)

10. The appellant argues that the use has existed without interruption since 2005/06, first as a 5-bedroom HMO, and then as a 9-bedroom HMO. However, as noted above, there were no permitted development rights for a change from

¹ Decision notice ref. 06/0563, dated 9 June 2006.

² Application date 15 March 2016. Decision notice ref. 16/1115, dated 7 June 2016.

³ The Town and Country Planning (Use Classes) (Amendment) (England) Order 2010.

⁴ The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010. In force: 1st October 2010.

Use Class C3 to a HMO at the time it is claimed the change occurred. In any case, the description as a '5-bedroom HMO' provides no evidence as to the number of occupants on which to judge whether it would have been within Use Class C4, had that existed at the time. Had an appeal been made under ground (c), it would not have succeeded.

The appeal on ground (d)

11. This ground is that when the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. In a case such as this the burden of proof is on the appellant to show that on the balance of probabilities the alleged use took place and was continuous for a period of 10 or more years before the notice was issued.
12. The appellant has provided two tenancy agreements, dated 20 and 25 December 2005, which purport to show the building started in use as a HMO at that time. These differ from information in the agent's letters of 5 July and 12 September 2016, where the start date is given as 10 January 2006. Furthermore, the tenancy agreements refer to two ground floor rooms, but give no indication as to how the building as a whole was used, little indication of what shared facilities were included, and no evidence of continuity of use. If the occupation of the living accommodation did not constitute the only use of that accommodation, the building would not have met the standard test for the meaning of a 'house in multiple occupation' in respect of s.254(2)(d) of the Housing Act 2004.
13. The appellant's recent evidence indicates that the use from 2006 onwards was as a 5-bedroom HMO, and that in about 2009 it became a 9-bedroom HMO. This in spite of the fact that the appellant's response to a Planning Contravention Notice (PCN) in July 2011 states that the property was extended to form a 5-bedroom family dwelling, which was turned into a HMO after it had failed to sell as such. It is also stated that the extension works were completed in 2009, as well as that use as a HMO for 8 occupants had started on 1 October 2007.
14. I have been provided with virtually no evidence about the nature and duration of tenancies after the two claimed initial tenancies. However, the appellant indicates that the two initial tenants stayed in the property until the works started, and one returned following completion. It appears therefore that the building was not occupied during the period of the works.
15. Even if the building had been in HMO use from 2005/06, the extension works would have interrupted that use for a period of some 2 years, between 2007, when Building Control records show that the extension had been built up to DPC level, and 2009 when the appellant says the extension was completed. In my view there was a distinct change in the planning circumstances of the building when it was vacated at the start of the building works.
16. The Courts have held that in appeals that raise legal issues – such as enforcement appeals on grounds (b) to (e), if a local planning authority 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 appeal, provided the applicant's evidence alone is sufficiently precise and unambiguous. In this case the uncertainties about the stated tenancy start dates, and about the use of the building as a whole, give me considerable

concerns about the appellant's evidence, which is far from precise or unambiguous.

17. The appellant's description of the building as a single family dwelling in his 2011 PCN response, his conflicting description that it was a HMO for 8 occupants, and his current assertion that it was in a *sui generis* HMO use at that time also give me significant concerns about the reliability of the evidence. This is particularly so in the light of his further assertion in the PCN response that the extension works were carried out in 2006/07
18. Furthermore, the Council previously instigated enforcement proceedings in 2010⁵, following a visit by a Council officer who confirmed the building was being used as a *sui generis* HMO with 9 bedrooms occupied by 9 people. Subsequently, an e-mail from the appellant to the Council on 1 December 2010 confirmed that the number of residents was to be reduced to 6 in order to comply with the Council's guidelines on HMO use. On this basis the enforcement case was dropped. Again, this contrasts with his PCN statement some 8 months later that the house was occupied as a HMO by eight people.
19. In summary, I have not been provided with precise and unambiguous evidence as to use of the building from 2005/06. The extension works resulted in a very significant break in occupation, after which, as a matter of fact and degree the property effectively became a different building, with a different level and character of occupation. It appears to me that on the balance of probabilities use as an HMO has not subsisted continuously for a period of 10 years before the enforcement notice was issued. The appeal on ground (d) therefore fails.

The appeal on ground (a) and the deemed planning application

20. This ground is whether, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the conditions or limitation concerned ought to be discharged.
21. The appellant's arguments on ground (a) are to a great extent the same as those put forward in his ground (b) appeal – that there has been no material change of use since 2005/06. However, I have considered those matters elsewhere.
22. The Council argue that the HMO use has caused loss of a large family dwelling for which there is a significant demand in the Borough, as identified in Policy CP21 of the Council's Core Strategy of 2010, which seeks to provide a balanced housing stock. Shortage of family size accommodation has been exacerbated by the trend towards building 1-2 bed units for many years, and an increase in average household size. The Council do not reference this policy, or the effect on provision of larger family dwellings in the reasons for issuing the notice.
23. Nevertheless, these are matters that may have significant planning consequences, and to which the appellant has had the opportunity to respond. I note that it is argued in his LDC application that the property provides much needed accommodation for single people working in the Borough or in the City, and the need for such property is demonstrated by the fact that no. 50 has been fully occupied since it became available to let, and occupants tend to stay

⁵ Enforcement case ref. E/10/0435.

for long periods. I do not consider the appellant has been significantly prejudiced by inclusion of this aspect of the Council's arguments.

24. In the light of this, from my inspection of the appeal site and its surroundings, and from all that I have read, I consider the main issues to be:
- The effect of the alleged breaches on residential amenity and character of the area in terms of the provision of vehicle and cycle parking, the provision of refuse arrangements, and the occurrence of noise and general disturbance,.
 - The effect of the alleged breaches on the housing stock of the Borough.
25. Occupation of the property by 9 unrelated individuals has consequences that are different from those of a family house. In particular, vehicle parking will be of a different nature, as will provision of facilities for refuse disposal and recycling, and for cycle storage, and there will be a propensity for increased general activity.
26. In this case there is parking for 5 vehicles at the front of the house, where the entire forecourt is laid to hardstanding. Although it is claimed in the LDC application that this is more than enough for the occupants, I have no specific evidence on this. Even if that is the case, it could be that in the future all occupants could be car-owners. This would increase pressure for on-street parking in the area. Furthermore, I note that the Council's *Design Guide for New Development - Supplementary Planning Guidance (SPG 17)* adopted in 2001 includes advice discouraging parking to the front of developments, and on-site parking that may be in conflict with the existing character of residential areas – which I consider to be the case here. Also, SPG17 includes the recommendation that normally, development will be expected to provide adequate provision for cycle parking, in this case none is provided.
27. As regards refuse disposal/recycling, I saw a number of refuse bins on the forecourt, and I note that there have been complaints about overcrowding of the premises, particularly in relation to inadequate refuse arrangements. SPG17 includes aims for new development to provide facilities to enable effective recycling of household waste, and will be expected to provide an adequate and attractive area for bin storage, as well as additional adequate internal or external space for the separation and storage of recyclable material. While the forecourt was reasonably tidy at the time of my visit, in my experience premises used by this number of individuals are likely to become unkempt, and the accumulation of bins detracts significantly from the appearance of residential areas. Furthermore, I saw no facilities for the proper separation and storage of recyclable material, either external or internal.
28. There are a significantly greater number of occupants of the house than might be expected for what is essentially a four-bedroom dwelling. The number of trips to and fro is likely to be correspondingly greater, by whatever mode of transport - and the amount of general activity similarly more. I consider this is likely to cause harm to nearby residents in terms of increased noise and disturbance.
29. Turning to the second main issue, while the property may well have been desirable for occupants for several years, this does not take account of the historic shortage of larger family dwellings, or the population growth of the area, particularly with regard to the increase in household size. I infer from

the Council's argument that HMO-type accommodation is properly catered for. In this case there has been the loss of a four-bedroom house. This does not assist in creating the required balance, and contributes in a small way to diminishing the stock of the house type the Council seek to maintain, contrary to the aims of Core Policy CP21. This adds weight to my conclusions on the first main issue.

30. I conclude that the development causes significant harm to the residential amenity and character of the area in terms of noise and general disturbance, the provision of vehicle and cycle parking, and the provision of refuse arrangements. The development fails to accord with the development plan, notable as regards London Plan Policy 3.5, which aims to promote quality and design in all housing developments, and to protect and enhance London's residential environment and attractiveness as a place to live. Furthermore, the development fails to contribute to the provision of larger family houses in the Borough, to the detriment of the housing stock. The appeal on ground (a) does not succeed, and I intend to refuse planning permission on the deemed application.

The 'hidden' appeal on ground (f)

31. The appellant suggests that if the enforcement notice is upheld, the use of the building as a HMO should be allowed to continue, but restricted to 6 occupants, and without making any physical changes to the property. He believes this would be similar to the situation in an appeal case put forward by the Council⁶.
32. In that earlier case the house had a total occupation of up to 13 people. The enforcement notice was upheld but as a result of an appeal on ground (f) a requirement to cease occupation by more than *one household* was varied to require cessation of occupation by *more than six people*. I understand the house in question had six lettable rooms, and that the appellant had thought that the HMO definition was based on the number of rooms, rather than the number of occupants. Furthermore, the requirement was varied on order to align with the allegation in that notice.
33. In this case the house has nine lettable rooms, and if restricted to six occupants it is not apparent how the remainder of the building would be used. If it were for other purposes, then it would be a mixed use, and would not be within Use Class C4. Furthermore, the appellant has previously stated that he was restricting occupancy to six, but did not do so. The suggested change to the requirement would not achieve the Council's aim for the building. Had the appellant appealed on ground (f), he would have failed in this respect.
34. As to the physical layout of the building, I saw on my site visit that the internal layout is similar to that shown in the 2006 approved scheme. Apart from relatively minor changes to the arrangement of the ground floor circulation areas, the main differences are that the room shown on the approved plans as an extended lounge is now a communal kitchen, and the room shown as the extended kitchen is now a lettable room – albeit much reduced in size.
35. I consider the differences between the approved plans and the actual layout are relatively slight, and that alterations to conform with the approved plans would achieve very little indeed. Had the appellant appealed on ground (f), he

⁶ Appeal decision ref. APP/T5150/C/16/3142499, dated 10 august 2016.

would have succeeded in this respect. In the light of this I intend to vary the enforcement notice by omission of the second requirement.

36. For the reasons given above I conclude that the second requirement of the notice is excessive, and I am varying the enforcement notice accordingly, prior to upholding it. Had the appeal been made under ground (f), it would have succeeded to that extent.

Formal decision

37. The appeal is allowed to a limited extent on ground (f), and the enforcement notice is varied by :

DELETION of STEP 2 from Schedule 4 of the enforcement notice.

Subject to this variation the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Stephen Brown

INSPECTOR