

Appeal Decision

Inquiry held on 11 April 2017

Site visit made on 11 April 2017

by K R Saward Solicitor

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

Decision date: 26 April 2017

Appeal Ref: APP/G5750/C/16/3153044

75 Meanley Road, Manor Park, London E12 6AP

- 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 Lokman Hossen against an enforcement notice issued by the Council of the London Borough of Newham.
- The enforcement notice was issued on 22 April 2016.
- The breach of planning control as alleged in the notice is without planning permission the material change of use to a house in multiple occupation (HMO).
- The requirements of the notice are:-
 1. Cease the use as a house in multiple occupation.
 2. Remove all fixtures and fittings that solely facilitate the use as a house in multiple occupation, including (but not limited to) all internal locks on bedroom doors and any additional mattresses and beds.
 3. Remove from the site all debris arising from compliance with steps 1 and 2.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a),(b) & (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under s177(5) of the Act.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld as varied.

Applications for costs

1. Both the Council and Mr Hossen have made an application for costs against each other. These applications are the subject of a separate Decision.

Preliminary matters

2. All oral evidence to the Inquiry was given on oath or sworn affirmation.
 3. Originally, boxes were ticked in the Appeal Form to indicate that the appeal was being brought on grounds (a),(b),(c) and (f). When clarification was sought by the Planning Inspectorate, the appellant confirmed that he wished to pursue grounds (a),(b) and (f) only. However, arguments have been raised by the appellant under ground (b) to the effect that express planning permission is not required for a use of the property as a six person house in multiple occupation (HMO). Such arguments are more pertinent to ground (c) which applies where the matters alleged in the notice do not constitute a breach of planning control.
 4. Furthermore, ground (b) is that the breach of control alleged in the notice has
-

not occurred. In order to succeed on this ground it would need to be demonstrated that there has not been a material change of use of the premises to a HMO, as alleged. It is common ground between the parties that the property was in use as a HMO¹ when the notice was issued. It is also agreed that it was used as a single dwelling prior to its conversion to a HMO.

5. Notwithstanding that agreed position, the appellant maintains there has been no material change of use because occupation has been limited to no more than six residents at any one time. The notice does not specify the size of HMO and it did not need to do so. It merely alleges a change of use to a HMO. If there were more than six residents it would still be a HMO. A ground (b) appeal would therefore be bound to fail. The number of residents can have implications in establishing if a HMO use is permitted development or amounts to a material change of use. The parties agreed at the Inquiry that whether the use required planning permission in this case is a matter that should be properly addressed under ground (c). It was further agreed that no injustice would arise in my proceeding to deal with the arguments raised on that basis.
6. Since the date of issue of the enforcement notice the Council has adopted Newham's Local Plan, Detailed Sites and Policies Development Plan Document (DPD) in October 2016. Upon adoption, policies H17 and EQ45 of the Council's Unitary Development Plan, as referenced in the enforcement notice, were cancelled and no longer apply. The appeal on ground (a) and the deemed planning application fall to be considered against the current development plan and I have therefore applied the newly adopted DPD policies.
7. The Council confirmed that it mistakenly listed in the enforcement notice the Planning Policy Statement on Green Belt and intentional unauthorised development (August 2015). I have disregarded it accordingly.
8. The appellant lodged amended Grounds of Appeal which I have taken into account.

Reasons

The appeal on ground (c)

9. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control. Under ground (c), the appellant has the burden of proof and the test of the evidence is the balance of probabilities.
10. The appeal property is a terraced house. Prior to becoming a HMO its lawful use was a dwellinghouse within the meaning of Class C3 of the Town and Country Planning (Use Classes) Order 1987 (UCO) as amended. It is the appellant's contention that when the notice was issued the dwelling was in use by not more than six residents as a small HMO falling within use Class C4².
11. A change of use of a building from Class C3 to C4 benefits from deemed planning permission pursuant to Article 3(1) and Schedule 2, Part 3, Class L of the Town and Country Planning (General Permitted Development)(England) Order 2015 (the 2015 GPDO). This is subject to certain limitations and such rights not having been removed.

¹ As defined in section 257 of the Housing Act 2004.

² Being a use of a dwellinghouse by not more than six residents as a "house in multiple occupation".

12. A HMO with more than six residents falls outside Class C4 of the UCO and is considered to be a *sui generis* use. In such circumstances, Class L of the GPDO will not apply and express planning permission is required for a change of use from Class C3 to a large HMO.
13. Notwithstanding the provisions of Class L, the Council had made a Direction³ under Article 4(4) of the Town and Country (General Permitted Development) Order 1995, as amended (the 1995 GPDO). Article 4 allowed a local planning authority to give a direction that the permission granted by Article 3 shall not apply to all or any development of a Part or Class if the authority was satisfied that it was expedient that such development should not be carried out unless planning permission is granted for it on application.
14. The Direction made by the Council under this provision was to remove permitted development rights for a change of use of a building from a use falling within Class C3 to a use falling within Class C4. The Direction came into force on 31 July 2013. It applied to most of the borough including the appeal site.
15. Thus, with effect from 31 July 2013 it was no longer possible to change from a use as Class C3 single dwellinghouse to a Class C4 small HMO without the grant of planning permission on an application.
16. The appellant maintains that the Article 4 Direction did not have effect in this instance. The 1995 GPDO was not in force at the time that the change of use took place having been revoked by the 2015 GPDO on 15 April 2015. In these circumstances, the effect of section 17 of the Interpretation Act 1978 is that anything done under the revoked Article 4 now has effect as if done under Article 4 of the 2015 GPDO which has provisions to similar effect.
17. Therefore, the Article 4 Direction continues to have effect as if made under the 2015 GPDO. It makes no difference that the use as a HMO commenced after the 1995 Order was revoked.
18. It is the appellant's evidence that he contacted the Council's "Licensing Department" on or around 14 October 2014 about renting the property out "room by room". Prior to that time, the property had been let out for single family occupation. The family Licence was subsequently revoked and the appellant applied to the Council's Licensing Department to use the property as a HMO. It was the sworn evidence of the appellant that the use as a HMO began at the beginning of 2015 with four occupants. The property was licensed for the first time as a HMO on 7 April 2016.
19. When the change of use occurred, the Article 4 Direction was already in force.
20. The appellant argues that the Article 4 Direction does not apply because it is contradicted by the Licence issued on 7 April 2016. This contains a note to say "Any HMO for more than 6 people will also require planning permission." As the Council pointed out, it does not explicitly say that planning permission is not required for a lesser number. However, it is not difficult to see how the conclusion could be drawn by implication that a HMO for 6 people or less did not require planning permission. By the time the Licence was issued most new HMO's in the borough required express planning permission regardless of size following the Council's Article 4 Direction.

³ Made on 31 July 2012

21. The appellant argues that due to the inconsistencies between the planning and licensing position, the appellant is entitled to rely upon the document which most favours his position. The appellant's advocate referred to the Licence in terms of it being a Council policy. However, it is clearly not a policy but a note within a licensing document. It is not a planning policy document. Nothing in the HMO Licence is capable of amounting to planning policy which is formed of the Council's adopted development plan. Nor can it negate or take precedence over the Article 4 Direction. The Licence may provide an explanation as to why the appellant thought he did not need planning permission, but it does not obviate the need for planning permission.
22. Much of the evidence given at the Inquiry concerned the number of occupants in the HMO. Irrespective of the number, the fact remains that there has been a change of use from a single dwelling to a HMO which occurred after the Article 4 Direction took effect. Even if the appellant is right and there were no more than six people in occupation, he still needed to apply for planning permission. No application was made or granted and the change of use to a HMO was in breach of planning control.
23. For all those reasons I conclude that the development enforced against does not have the benefit of deemed planning permission. It therefore constitutes a breach of planning control. The appeal on ground (c) fails.

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

Main Issue

24. The main issue is whether the use as a HMO is in accordance with the development plan. If not, whether there are material considerations that indicate the change of use should be allowed otherwise than in accordance with the development plan.

Reasons

25. The appeal property is a two storey mid-terrace period property. There is a primary school opposite, but the road is otherwise residential in character.
26. Before it was a HMO, the property was a 3 bedroomed house. The reasons for issuing the notice concern: the loss of a family home; the low quality of the accommodation for occupants and the effect on neighbouring occupiers with reference to noise and disturbance.
27. In written submissions, the appellant raised no arguments to counter the policy objections raised by the Council. Upon my seeking clarification of the appellant's position at the start of the Inquiry, the appellant's advocate initially stated that the appellant had no evidence to contradict the use being contrary to the development plan. In opening submissions, the appellant's position was clarified further to be one of acceptance that the HMO use is contrary to planning policy, but there are other considerations which warrant the grant of planning permission. However, in closing submissions the appellant sought to suggest that the Council had failed to demonstrate that the use is contrary to the development plan. Opportunity was given to adjourn to another date if issue was being taken over compliance with the development plan so that further evidence could be heard from both sides. The appellant declined. For completeness I address each policy issue raised by the Council.

28. The Article 4 Direction does not mean that planning permission cannot be granted, merely the application must be assessed in the same way as any other planning application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires development to be determined in accordance with the development plan unless there are material considerations that indicate otherwise.

Loss of family home

29. Policy H4 of the Council's Core Strategy⁴ (CS) provides that the Council will specifically seek to protect family housing and will resist the loss of all family dwelling houses through subdivision or conversion to flats or HMOs unless exceptional circumstances prevail. The Council has drawn my attention to various appeal decisions⁵ for sites in the borough where Inspectors have upheld CS Policy H4 in cases where there has been a change of use from a single dwelling to flats or a HMO. Whilst noting the need for consistency in applying the policy if its aims are to be achieved as emphasised in Appeal Decision Ref: APP/G5750/C/11/2161161, each case must be determined on its individual merits to establish if exceptional circumstances exist.
30. The appellant is aggrieved that throughout his numerous dealings with the Council's Property Licensing department and despite the payment of various licence fees, no mention was ever made of the need to obtain planning permission. It is argued that the Council is a single body and was under a duty to advise the appellant if planning permission was required. If the appellant believes that the Council has acted unfairly or improperly then that may give cause for complaint, but it is not reason to grant planning permission.
31. The fact remains that housing and planning are different regimes. The notes at the end of the HMO Property Licence attempt to explain the position by stating that "The property licence and conditions do not imply or grant by inference or otherwise any approval or permission for any other purposes including those for Building Control and under the Regulatory Reform (Fire Safety) Order 2005." Confusion could though have been caused when the Licence goes on to say "Any HMO for more than 6 people will also require planning permission."
32. Whilst I can sympathise with how the situation may have arisen, ultimately a mistaken belief that planning permission was not required carries very little weight in a consideration of the planning merits.
33. The appellant raises a number of other issues under the heading "Breach of Natural Justice" which he asked to be considered in the context of his ground (a) appeal.
34. The appellant is aggrieved that Council planning enforcement officers undertook an unannounced site visit to the premises on 4 April 2016 and spoke to a tenant, Mr Mahadi, without the appellant being aware or having chance to comment before the enforcement notice was issued.
35. There is no requirement for a council to forewarn a landowner of an intended site visit when undertaking an investigation as to whether there has been a breach of planning control. Indeed, giving advance warning could defeat the

⁴ Titled 'Newham 2027, Newham's Local Plan – The Core Strategy', adopted January 2012

⁵ Appeal refs: APP/G570/C/11/2161161 dated 20 March 2012; AA/G5750/C/14/3000837 dated 5 August 2015; APP/G5750/C/14/2225862 & 3 dated 8 September 2015 & APP/G5750/C/15/3004821 dated 25 September 2015.

- very purpose of obtaining an accurate picture of the activity being undertaken.
36. There is nothing to suggest that the Council officers acted improperly in requesting and gaining entry to the property. Both Miss White and the appellant referred in their testimony to at least one telephone discussion they had shared following the Council's written warning that an enforcement notice would be likely to be issued. The appellant was thus clearly aware of the pending action if not the details on which the Council would rely.
37. Those details were contained in the Council's Statement of Case which was sent to the appellant during the course of the appeal leading up to the Inquiry as provided by the rules⁶. The appellant suggests that he was not able to add to his statement and was deprived of the opportunity of responding to the Council's conclusions. By email sent to the appellant's solicitors on 26 October 2016 the Planning Inspectorate acceded to their request to extend the deadline for the appellant to make final comments after receipt of the Council's proof of evidence. Not only was the appellant thereby afforded an extension of time in which to formulate a response to the Council's case, he took the opportunity to do so when his solicitors submitted a response on 17 November 2016.
38. Further opportunity to respond to the Council's case was taken at the Inquiry. Thus, it is difficult to see where any unfairness has arisen in the process contrary to the principle established in *Porter v Magill [2002] AC 119* or how it might justify the grant of planning permission.
39. The appellant claims that the Council acted irrationally and contrary to the principle of reasonableness set out in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* by taking payment for and issuing a HMO Licence only a matter of days after the Council's site inspection which prompted the planning enforcement action. The HMO Property Licence is a private rented property licence issued for a maximum of seven persons living as six households issued under section 64 of the Housing Act 2004. This is a completely separate regime from the Council's role as local planning authority where different considerations apply. It does not follow that a use which meets the criteria to be licensed for housing related purposes must also be acceptable in planning terms.
40. The appellant also alleges that the Council took into account irrelevant matters in accordance with the decision in *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759* and failed to provide intelligible reasons and failed to explain their conclusions. He has further cited *R(Alconbury Developments Ltd) v Secretary of State for the Environment and the Regions [2001] UKHL 23* and *R v Parliamentary Commissioner for Administration ex parte Balchin [1998] 1 PLR 1*. How any of these judgments justify the grant of planning permission in this case is unclear.
41. The appellant considers that the Council officer came to a wholly wrong conclusion on the number of occupants and therefore failed to establish the true position. Yet, it is agreed that the use is as a HMO. As set out above, a change of use must have occurred given the previous use as a single dwelling. The exact number of occupants made no difference as to whether planning permission was required.

⁶ The Town and Country Planning (Enforcement)(Determination by Inspectors)(Inquiries Procedure)(England)Rules 2002

42. In circumstances where the Council considered it unlikely to grant planning permission there would be no reason for it to invite a planning application. Moreover, the way to ensure cessation of a breach of planning control would be to issue an enforcement notice.
43. To my mind, none of these factors either individually or collectively amount to 'exceptional circumstances' under CS Policy H4 to warrant the loss of a family sized dwelling. Therefore, the use is in breach of that policy along with CS Policy H1 insofar as it seeks to promote 3 bedroom homes for families. There is also conflict with the provision within DPD Policy H5 that large and small HMO's should be purpose-built or converted from premises other than family-sized dwellings. In addition, there is conflict with the strategic aim of Policy 3.8 of the London Plan 2016 for different sizes and types of dwellings, given the borough's identified need for family sized homes.
44. The Council has also identified various other policies in the notice where it considers there to be conflict from the loss of a family dwelling. CS Policies S1 and S6 are overarching policies identifying certain development proposals which will be supported. CS Policies SP1, SP2 and SP3 broadly concern high quality development, healthy neighbourhoods and quality urban design. None of these appear to be of direct relevance in this respect.

Living conditions

45. The numbers could potentially have relevance in terms of living conditions for both the occupants of the property and impacts on neighbouring residents. However, the appellant did not seek to advance a case that the living conditions were acceptable to the tenants or that there was no harm to neighbouring occupiers. Having visited the property, it was patently clear that whether there were six occupiers as claimed by the appellant or nine occupiers as alleged by the Council, the accommodation is cramped.
46. The main differences between the parties are that the appellant says the front ground floor room is in communal use whereas the Council recorded it as being occupied by two individuals. The appellant maintains the loft rooms are occupied by two rather than three individuals. The appellant is supported by his tenant, Mr Mahadi who attended the Inquiry to give sworn evidence.
47. They both said the communal room is kept locked and the key retained by the appellant, as landlord, who does not live on site. If that is so, the room does not provide readily available communal living space. The bedrooms are not very large with limited circulation space. Both kitchen and bathroom facilities are shared between a number of occupants with adverse implications for privacy which will exacerbate the poor living conditions.
48. In all the circumstances of the case I am satisfied that irrespective of the precise number of occupiers, the change use to a HMO does not provide satisfactory living conditions for the occupiers. This is contrary to CS Policy SP1 which seeks high quality development, CS Policy SP2 which, amongst other things, seeks to create healthier neighbourhoods including improved housing quality, CS Policy SP3 insofar as it promotes high quality living conditions for all and CS Policy H1 in seeking high standards of design and quality for all new housing developments along with the similar aims of policy 7.1 of the London Plan, 2016. There is also conflict with paragraph 17 of the National Planning Policy Framework which promotes a good standard of amenity for all existing

and future occupants. Reference is also made by the Council to CS Policies H4 and S1 and Policy 3.8 of the London Plan, but it is unclear how they are engaged in this particular regard.

Noise and disturbance

49. By its very nature, a HMO use will be liable to create more comings and goings than a house in single family occupation given the high intensity and manner of occupation even if limited to six occupants. Whether or not there have been complaints, there is potential for more noise and disturbance than may be typically be anticipated with a family home occupied as one household.
50. I conclude that regardless of the precise number of occupiers there is likely to be an adverse effect on the living conditions of neighbouring occupants with reference to noise and disturbance. This is contrary to CS Policies SP2, SP3 and paragraph 17 of the Framework, as aforesaid. There is also conflict with CS Policy SP8 which seeks neighbourly development and Policy 7.15 of the London Plan which seeks to manage noise impacts from development.

Planning balance

51. The use as a HMO is not in accordance with the development plan by reason of the loss of a family home and the adverse effects on living conditions for occupants and neighbouring residents. The main thrust of the appellant's arguments focus on the conduct of the Council and the issue of the HMO Licence. They are not arguments on the planning merits and I attribute them very little weight. Even if the Council had acted unreasonably in how it handled the matter procedurally, the appellant has not produced any authority to indicate that would be reason to grant planning permission when weighing up the planning merits.
52. Upon careful consideration of all the matters raised by the appellant I do not consider that they outweigh the harm arising for a decision to be made otherwise than in accordance with the development plan.

Conclusion on ground (a) and the deemed planning application

53. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal on ground (a) and the application for deemed planning permission should fail.

The appeal on ground (f)

54. The ground of appeal is that the steps required by the notice to be taken are excessive.
55. In considering a ground (f) appeal, it is important to identify the purpose for which the notice was issued. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These are either to remedy the breach of planning control which has occurred (section 173(4)(a)), or to remedy any injury to amenity that has been caused by the breach (section 173(4)(b)).
56. The Council maintains that the notice serves both purposes. In requiring cessation of the use and restoration of the property, the steps are consistent with seeking to remedy the breach. The reasons for issue of the notice as cited therein refer to low quality housing for occupants and an adverse impact on

general amenities of the area from an increase in noise and disturbance. The notice is thus clearly aimed at remedying injury to amenity also.

57. The appellant had suggested that the HMO Property Licence could be amended to allow up to six rather than seven occupants as currently licensed. It is beyond the scope of this planning enforcement appeal to amend a Licence issued under the Housing Acts. Even if the Property Licence were so limited, it would not place any restriction on the use as a HMO for planning purposes.
58. I have considered whether a lesser step would be appropriate to vary the requirements of the notice to cease the use for more than six occupants as raised by the appellant at the Inquiry. The effect of so doing would be to under-enforce so that planning permission would be granted pursuant to section 173(11) of the 1990 Act following compliance with the terms of the notice.
59. However, that would not overcome the identified planning harm as set out under ground (a) above and there are no other obvious alternatives which would address the planning difficulties. Given that the notice does no more than seek to achieve the purposes of section 173(4)(a) and (b), it is not excessive.
60. Step 2 of paragraph 5 of the notice requires removal of internal locks on bedroom doors and additional mattresses and beds. Although not raised as an issue under the ground (f) appeal, I have a duty to ensure that the enforcement notice is in order. Where, as in this instance, a notice concerns a material change of use it may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use so that the land is restored to its condition before the change of use took place. That is so even if the works alone might not constitute development.
61. From the Council's submissions I am satisfied that the internal locks are an integral part of the unauthorised use as a HMO and facilitate that use. However, in answer to my questions over the clarity and enforceability of the requirement to remove additional beds and mattresses, the Council Officer suggested there would be an element of discretion for the landowner over how many were removed. The breach is capable of being remedied by requiring cessation of the use without this additional provision. It also lacks the level of precision required to enable the appellant to know exactly what is required.
62. I shall therefore exercise my powers under section 176 of the 1990 Act to delete reference to the beds and mattresses. Given the uncertainty that would otherwise arise, I am satisfied that no injustice would occur to either party from such a variation. In all other respects, the appeal on ground (f) fails.

Formal Decision

63. It is directed that the enforcement notice be varied by deletion of the words "and any additional mattresses and beds" from Step 2. of paragraph 5. Subject to that 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.

KR Seward

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Zakaria Khan
(assisted by M F Islam)

Universal Solicitors

He called:

Lokman Hossen

Appellant

Md Imam Mahadi

Tenant

FOR THE LOCAL PLANNING AUTHORITY:

Isabella Crowdy

of Counsel, instructed by Mr O'Sullivan

She called:

Connaire O'Sullivan

Planner

Laura White

Planner

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Appellant's 'consolidated proof of evidence'
- 2 Notice of appeal dated 19 August 2016
- 3 Draft conditions
- 4 Council's closing submissions