
Appeal Decision

Site visit made on 7 February 2017

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 16 May 2017

Appeal Ref: APP/V5570/C/16/3155068

Land at 149 Hornsey Road, London N7 6DU

- 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 Oguz Saat against an enforcement notice issued by the Council of the London Borough of Islington.
 - The notice was issued on 20 June 2016.
 - The breach of planning control as alleged in the notice is without planning permission the subdivision of the upper floors of the building on the land from two flats to more than two flats.
 - The requirements of the notice are:
 - i) Cease the use of the residential parts of the property as more than two flats.
 - ii) Remove all but two kitchens and bathrooms from the residential parts of the property - this should include the removal of the relevant cookers, sinks, toilets, showers, baths and associated appliances.
 - iii) Remove all but two utility cabinets and doorbells from the front of the property.
 - iv) Remove from the land all materials and debris resulting from the carrying out of steps i) to iii).
 - The period for compliance with the requirements is three (3) calendar months from the date this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) of the Town and Country Planning Act 1990 as amended (the "Act").
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Summary of Decision

1. The appeal is dismissed and the enforcement notice is upheld with a correction and variations.

The allegation of breach of planning control

2. The upper floors of No 149 have been subdivided into four self-contained flats. Flats A and B are, respectively to the front and rear of the first floor, Flat C is on the second floor and Flat D occupies the roof space. All are occupied save for Flat B. The reference to more than two flats in the allegation of the breach is vague and unsuitable as a basis for the deemed planning application associated with the appeal. It should therefore be corrected to reflect the current use of the property, namely as four flats.
 3. Secondly, the notice refers to a pre-existing condition, not in terms, a lawful use, of the upper floors of No 149 as two flats. Although the appellant was advised by the Council that the property should be converted "back to its lawful arrangement", whether it was ever in use solely for two flats is uncertain. I sought further information and comments from the parties about the existing lawful use so as to clarify the material change that has taken place.
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4. Planning permission Ref P2013/2693/FUL was granted in September 2013 for the "erection of a first floor rear extension, retention of rear roof extension, insertion of two rooflights in from roof slope and conversion of upper floors into two flats (2 x 1 bedroom)". The application form, dated 27 July 2013, stated that the then existing use of the upper floors was as a single dwelling shared by four people. In addition the existing plans showed five bedrooms with no separate living space apart from a first floor galley-style kitchen connected to a shower room with a wc. This layout might suggest a house in multiple occupation but in any event it would appear that the underlying use of the upper floors was a single dwelling.
5. The only tenancy information provided was for Flat C. Two tenancy agreements in respect of Flat C show it has been let as a single bedroom flat from 3 January 2013 and again from 29 October 2013 until the present. The appellant's property agent confirms that the first tenant left the property on 26 October 2013 and asserts that there has been continuous use over four years.
6. I accept that the short period of vacancy is not significant but there has been no appeal made on ground (d) that it was too late to take enforcement action in respect of the change from a single dwelling use. Moreover I am satisfied that an appeal on this ground would fail as enforcement action was taken within the end of the period of four years beginning with the inception of the tenancy of Flat C which is the earliest ascertainable date of the breach, in accordance with s171B(2) of the Act. It is well established that the four-year period applies to each flat where a house had been sub-divided into flats.
7. By October/November 2013 the premises were registered for Council tax for three flats (A,C and D). The 2013 permission was for operational development as well as a permitted use. However the premises were in use for three flats, not two. The permission has not been fully implemented because the use for two flats in accordance with the approved layout was never instituted. In addition the works to enlarge the approved first floor flat remain to be carried out. However a separate issue to decide is whether the permission was commenced by virtue of the operational development that had already taken place.
8. Flat B appears to have been formed more recently out of the 12m² floorspace constituting the pre-existing galley kitchen and shower room. The new build element of the 2013 permission that was to have increased the envelope of this space to provide a decent sized kitchen/diner/living space for the first approved flat, has not yet been built. However there is no dispute that the new rear dormer and loft conversion has been built in accordance with the approved drawing SAAT 149.12B HORNSEY PRO, although whereas it was to have been a diner/living room for the second permitted flat, it now comprises Flat D.
9. The effect of s56 of the Act is that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. In this case the material operation is either any work of construction in the course of the erection of a building, which includes part of a building, or any change in the use of any land which constitutes material development. The test under s.56 is objective and the intention of the developer is irrelevant. This is so even if the appellant always intended to convert the loft space into a separate flat.

10. There are clearly differences in the internal layout from what was approved, but the erection of the dormer and conversion of loft space is operational development that cannot be regarded as other than an unequivocal act pursuant to the permission. Flats A and C are substantially usable for the permitted development, subject to adding the residual space that has been hived off to create the additional flats and the work to increase the envelope of the first floor for one of the approved flats. Looking at what has been done as a whole and as a matter of fact and degree, I am satisfied that the 2013 permission was begun within the time period set forth in Condition 1.
11. So, the 2013 permission was for a change of use and operational development which was begun within the time limit for commencing development. However it has not been carried out in accordance with the approved plans. I take into account that the overall use of the premises has remained residential, and the works to the internal layout are not so fundamental that they cannot be reversed without undue difficulty. In my view the pre-existing use as a single dwelling has not, as a matter of fact and degree, been eclipsed by such a radical change in the nature of the building or use within the premises.
12. In terms of the allegation of the breach, there is no evidence of prior use solely as two flats. It would therefore be appropriate to correct it to refer to a material change of use of the upper floors of the building from use as a single dwelling by subdivision on the land to use as four flats.

The requirements of the notice

13. The aims of the notice appear to be to remedy the injury to amenity caused by the alleged sub-standard nature of each of the four flats, as well as to remedy the breach of planning control. It would therefore seem appropriate that the requirements of the notice should enable either reversion to the development granted by the 2013 permission or a reversion to the underlying use of the premises as a single dwellinghouse, which was the most recent use of the upper floors, as indicated on the application form and drawings approved in the 2013 permission.
14. I put it to the parties that, without prejudice to consideration of the appeal on ground (a), compliance with the 2013 permission would involve an increase in the works to be carried out. However an alternative requirement to revert to the underlying single dwelling use of the upper floors would not require the appellant to implement the rest of the physical works implicit in the permission. It seemed irrational for the Council to have required a simple reversion to "two flats" as that appears too vague to avoid other internal layouts that would perpetuate what the Council regard as the alleged sub-standard nature of the accommodation, that would not meet the aim to remedy the injury to amenity.
15. It is clear from the Council's reply that it intended the use of the upper floors of the property to return to use as two flats in accordance with planning permission P2013/2693/FUL. It would have no objection to the notice being varied to specify implementation of the development granted under that permission, or to use as a single dwellinghouse. The response on this issue from the appellant who was professionally represented, was simply that he would be "happy to accept the development as 2 flats".
16. Given the reasons for requiring the premises to revert to a state where they can be used as no more than two flats, the notice indicates that its purpose, in

accordance with s173(4)(a) and (b) of the Act, is to remedy the breach of planning control as well as the injury to amenity due to the existing flats failing to meet the Council's standards. To simply require cessation of the use of the property as more than two flats however, would mean future arrangements of the flats could remain sub-standard, contrary to the aims of the notice.

17. Therefore the notice should be varied to require compliance with Planning Permission Ref P2013/2693/FUL or alternatively to restore the premises to a condition where they can be used as a single dwelling and by adjusting the requirements as to removal of the fixtures and fittings accordingly. I am satisfied that no injustice would be caused by correcting the requirements of the notice to reflect its aim in remedying the injury due to the breach or by modifying the development to comply with an extant permission.

Ground (a) and the deemed application for planning permission

Main Issues and reasons

18. The main issues are firstly, the effect of the development on living conditions of present and future occupants of the flats, and secondly whether the development makes adequate provision for affordable housing.

Living Conditions

19. Policy DM3.3 of the Islington Development Management Policies 2013 (DMP) lists conditions which must be met for residential units to be converted into a larger number of self-contained units. Such conversion will normally only be permitted where the total floor area is in excess of 125m². It is undisputed that the total floor area of the residential upper floors is below 125m². Thus the subdivision is in conflict with Policy DM3.3.
20. DMP Policy DM3.4 and Table 3.2 set out minimum standards of gross internal floorspace that new residential development is expected to achieve, supported by Policy 3.5 of the London Plan¹ and based on a national standard. These include that a studio/bedsit/single bedroom flat should have a minimum gross internal area of 37m². It is undisputed that Flat D has a floor area of 24m² and Flats A and C have a floor area of some 25m². Flat B, vacant when I visited, is severely limited in size at around 12m² and lacks kitchen facilities.
21. All the flats fail to meet the required floorspace standards. I am not persuaded by the Council that the natural light to, or the shape and layout of the individual main rooms in Flats A and C are unacceptably adverse to living conditions. However I agree that they all lack adequate storage space. Nor is there any external amenity space for the occupants, whereas DMP Policy DM3.5 requires a minimum of 5m² to be provided for each unit in all new residential development, whether on an individual or cumulatively shared basis.
22. I note that the two-flat arrangement approved in 2013 provided no amenity space. However as amenity space can fulfil a desire for a change of scenery within a safe domestic environment, this would be more important to occupants of single aspect flats with internal floorspace as little as 12m², as opposed to the approved flats which would be larger and have a dual aspect.

¹ London Plan: Spatial Strategy for London Consolidated with Alterations Since 2011 (2015)

23. I have considered the appellant's statement but, although it asserts that the development complies with relevant policy, it provides no justification or explanation that contradicts my findings as described above. Therefore I conclude that each of the flats fails significantly to provide an adequate standard of living for present and future occupants contrary to DMP Policies DM3.3, DM3.4 and DM3.5 and Policy 3.5 of the London Plan.

Affordable Housing

24. The Islington Affordable Housing Small Sites Contributions Supplementary Planning Document (SPD) was adopted by the Council in 2012 and is a material consideration in this appeal. The SPD is based on a borough wide viability assessment that a £50,000 contribution per unit would be viable in most cases unless a lower sum is justified by a financial appraisal. It applies to subdivision of existing residential properties resulting in net additional units.²
25. The Written Ministerial Statement of November 2014 resists contributions where fewer than 10 units are provided, but I have particular regard to the high need for affordable housing in the borough and the fact (reasonably inferred from the SPD but apparently not expressly stated) that a significant number of residential developments in the borough are on small sites. I therefore give the SPD significant weight.
26. The SPD is underpinned by the Council's Core Strategy 2011, Policy CS12 which requires sites below the threshold of 10 units to provide financial contributions towards affordable housing provision elsewhere in the borough. As the appellant has not referred to an affordable housing contribution or given a viability appraisal, the development conflicts with SPD and CS Policy CS12.

Conclusion on ground (a)

27. The development is clearly not in accordance with the development plan, and no other material considerations such as national planning policy are advanced that indicate planning permission ought to be granted. There is no supporting evidence whatsoever for the assertions made by the appellant as to how the development complies with the relevant development plan policies. The appeal statement is elaborately drafted with details of the notice and quotes at length from relevant planning documents and policies. As regards each relevant policy it is "strongly contended", with no reasons, that the development meets its requirements in full. In all it does no more than identify the location of the premises, point out that they are not a listed building or in a conservation area, and express a belief that the development has no effect on the neighbours, all matters acknowledged by the Council in its earlier statement.
28. In reply to my request for comments concerning the use of the property the appellant added that in the immediately surrounding area there is a serious shortage of flats. That may be so but it does not provide a compelling reason to permit the use of the property as flats that significantly breach living standards as set out in the development plan.
29. After considering the appellant's statement I have not found any other considerations that would justify not applying these development plan policies. The appeal on ground (a) therefore fails and the deemed application is refused.

² Paragraph 4.0.3

Ground (g) - that the time given to comply with the notice is too short

30. Having regard to the requirements of the notice as varied, the work involved in removing the additional fixtures and fittings to restore the property so it is capable of use as a single dwelling, would not be excessive. The appellant wishes to allow for any tenancy issues to be resolved and has requested that a period of 11 months should be substituted for the 3 month period in the notice.
31. The appellant has also said that he would require a minimum of 6 months to vacate the flats. The tenancy for Flat C provides for a two month period of notice when the tenant is holding over after the initial period. Tenancy issues may always arise when seeking vacant possession of tenanted property which might be delayed for several reasons. It would not be appropriate to extend the compliance period for this generalised reason without further supporting evidence which was not provided. However due to the extra work involved and the implications for tenants, I consider that the compliance period for steps i) to iv) should be extended from three to six months.
32. In terms of complying with the 2013 permission, structural work would be needed to expand the space occupied by Flat B and relocate a window, as well as revising the internal layout. Flat B is vacant but the works would involve temporarily re-housing the tenant of Flat A, if it were envisaged that s/he should remain in possession, before Flat B is subsumed within the tenancy.
33. In practice I see no reason why more than one tenancy has to be determined if the permitted two-flat arrangement is to be pursued but I accept that the extent of disruption to other tenants in the second and first floor flats is uncertain. No information is given as to the personal circumstances of the tenants. I consider that the second and third floors can revert to the approved layout as a single flat within a period of six months and a further six months would be adequate to fully implement the permission in accordance with the approved plans. I shall therefore make the necessary variations in the notice under powers contained in s176(1)(b) of the Act. To this limited extent the appeal on ground (g) succeeds.

Other Matter

34. I have taken into account the European Convention on Human Rights, in particular the rights to respect for private and family life, home and the peaceful enjoyment of possessions included in Article 8 and Article 1 of the First Protocol. I acknowledge that to dismiss the appeal would interfere with the tenants' rights in this respect. However, this must be weighed against the wider public interest in redressing the harm to their living conditions as well as of future occupants. On balance, I consider that interference with such rights is justified and dismissal of the appeal is necessary as well as proportionate.

Overall Conclusion

35. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variations and refuse to grant planning permission on the deemed application.

Formal Decision

36. It is directed that the allegation of breach of planning control in the notice be corrected by deleting "the subdivision of the upper floors of the building on the

land from two flats to more than two flats” and substituting “the material change of use of the upper floors of the building on the land from use as a single dwelling by subdivision to use as four flats”.

37. It is further directed that the notice be varied by deleting the requirements of the notice and substituting the following: “

- i) Restore the property into a state where it is capable of being used as a single dwelling;
- ii) Remove all but one kitchen and bathroom from the residential parts of the property - this should include the removal of the relevant cookers, sinks, toilets, showers, baths and associated appliances;
- iii) Remove all but one utility cabinet and doorbell from the front of the property; and
- iv) Remove from the land all materials and debris resulting from the carrying out of steps i) to iii); **OR**
- v) Modify the second and third floors of the building on the land so as to comply with the terms of the planning permission Ref P2013/2693/FUL granted on 20 September 2013; and
- vi) Modify the first floor of the building on the land so as to comply with the terms of the planning permission Ref P2013/2693/FUL granted on 20 September 2013.”

38. It is further directed that the notice be varied by deleting the period for compliance and substituting the following: “In respect of steps i) to iv), six months from the date this notice takes effect; in respect of step (v), six months from the date this notice takes effect, and in respect of step (vi), twelve months from the date this notice takes effect.”

39. Subject to this correction and variations 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.

Grahame Kean

INSPECTOR