
Appeal Decision

Inquiry held on 16 May 2017

Site visit made on 15 May 2017

by K R Saward Solicitor

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

Decision date: 1 June 2017

Appeal Ref: APP/A1910/C/16/3145252

1 Airedale, Hemel Hempstead, Hertfordshire HP2 5TP

- 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 Aeron Mathers against an enforcement notice issued by Dacorum Borough Council.
- The enforcement notice was issued on 22 January 2016.
- The breach of planning control as alleged in the notice is without planning permission, the conversion of one three-bed dwelling house to seven independent flats.
- The requirements of the notice are:-
 1. Cease using 1 Airedale as seven independent flats.
 2. Return 1 Airedale to one dwelling house comprising three bedrooms, one lounge, one kitchen/diner and one bathroom.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b),(f)&(g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice upheld as corrected and varied as set out in the Formal Decision.

Preliminary matters

1. Originally, appeals were also brought on grounds (c) and (d), but those grounds were subsequently withdrawn prior to the Inquiry. The appellant emphasised at the Inquiry that withdrawal of the ground (d) appeal was in no way a concession on the merits of his case. Rather, it was prompted by a desire for a quick resolution of the appeal. The Council's key witness was unavailable on the re-scheduled Inquiry date and neither party wished to seek a postponement of proceedings. The appellant's decision to proceed on grounds (b),(f) and (g) only was taken with the benefit of professional representation.
 2. During the appeal process an application for costs was made by the Council against Mr Aeron Mathers. At the start of the Inquiry the Council confirmed withdrawal of this application on the basis that the appellant had withdrawn his ground (d) appeal.
 3. In the Statement of Common Ground the parties agreed that the second requirement of the notice could be varied under ground (f) to say "Remove all of the cooking facilities, except ONE kitchen." I return to this matter below.
 4. All oral evidence to the Inquiry was given on oath.
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5. I undertook an accompanied site visit the day before opening the Inquiry to facilitate the efficient running of the Inquiry and to familiarise myself with the internal layout of the appeal property before evidence was heard. The parties were given opportunity for a further site visit to take place at the end of the Inquiry, but confirmed another site visit was unnecessary.

Matters relating to the notice

6. In the heading of the notice it erroneously refers to 'operational development'. It is clear from the text that follows that the notice is directed to a 'material change of use'. The heading requires correction accordingly. It follows that a corresponding change should be made to the allegation to replace reference to the 'conversion' of the dwelling.
7. The enforcement notice seeks the cessation of the use of the property as seven flats. It was unnecessary to prescribe the number of flats in the requirement. As drafted, the notice can be interpreted to mean that it does not prevent the use of the property for any number other than seven flats. Clearly, that was not the intention. Whilst the parties considered a change in the wording to be unnecessary, no objection was raised to deletion of the word "seven" from the first requirement of the notice in the interests of clarity. I am satisfied the notice can, and should, be corrected in such manner to avoid any misunderstanding over its terms and effect.
8. It was agreed at the Inquiry that all of these changes can be made without causing injustice to either party.

Reasons

The appeal on ground (b)

9. This ground 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 change of use of the premises to seven flats, as alleged. The appellant has the burden of proof and the test of the evidence is the balance of probabilities. The wording of ground (b) is that the matters alleged have not occurred rather than the matters are not occurring. The relevant date is when the notice was issued i.e. 22 January 2016.
10. There is no dispute between the parties that the property was previously in residential use as a two-storey, three bedroom house and its lawful use is therefore that of a single dwellinghouse under Class C3 of the Use Classes Order¹ (UCO). Whilst not evident from his written submissions, it is the appellant's contention that following conversion works to create seven units of accommodation the use has been as a house in multiple occupation (HMO) rather than flats. For that reason, it is maintained that the allegation is wrong and the breach as alleged has not occurred. The appellant accepts that a change of use from a single dwelling to a HMO use for seven persons required express planning permission hence the ground (c) appeal being dropped.
11. A HMO with six residents or fewer falls into Class C4 of the UCO². For the purposes of Class C4, a HMO is interpreted as not including a converted block

¹ The Town and Country Planning (Use Classes) Order 1987, as amended

² The Council refers to Appeal Decision APP/T5150/C/14/3000461 dated 26 June 2015 in which the relevant test for a Class C4 HMO is summarised by the Inspector.

of flats to which section 257 of the Housing Act 2004 applies but otherwise has the same meaning as in section 254 of that Act. Section 254 sets out the criteria to be met if a building or a part of a building is a HMO. Those criteria are summarised in Appeal Decision ref: *APP/T5150/C/4/3000461*³ which has been produced by the Council.

12. In this instance, it is undisputed that there cannot be a Class C4 HMO as the number of residents exceeded six. Furthermore, each unit contained the "basic amenities" defined as a toilet, personal washing facilities and cooking facilities.
13. A "self-contained flat" is defined within section 254 of the Housing Act as a separate set of premises (whether or not on the same floor) which forms part of a building, either the whole or a material part of which lies above or below some other part of the building and in which all three basic amenities are available for the exclusive use of its occupants. If there were six or fewer residents the property would fall within the definition of "self-contained flats" for the purposes of the UCO and Housing Act.
14. The appellant argues that the use by seven residents constituted a large HMO. HMOs with more than six residents are not identified within a Class in the UCO and are therefore regarded as *sui generis*, being a use of their own kind. The appellant points out that none of the provisions within Class C4 and the Housing Act apply to large HMO's of seven or more residents. In consequence, it is maintained that there is no condition that the units must not be 'self-contained' and have some shared toilet, personal washing or cooking facilities.
15. Whilst the criteria for Class C4 apply to small HMO's only that is not to say that similar considerations are irrelevant when seeking to establish if there is a large HMO.
16. Reference is made by the appellant to the Communities and Local Government Circular 08/2010⁴ which accompanied the amendment of the UCO to allow changes of use between dwellinghouses and HMO's without the need for planning permission. The Circular explained that the criteria for determining whether the use of premises should be classified within C3 use include both the manner of the use and the physical condition of the premises. Premises can properly be regarded as being used as a single dwellinghouse where they are:
 - a single self-contained unit of occupation which can be regarded as a separate planning unit distinct from any other part of the building containing them;
 - designed or adapted for residential purposes containing the normal facilities for cooking, eating and sleeping associated with use as a dwellinghouse.

The Circular goes on to provide that such criteria would not include bed-sitting rooms where the planning unit is likely to be the whole building which would therefore be classified as a HMO.

17. However, the Circular has since been withdrawn following the launch of the

³ Dated 26 June 2015

⁴ Titled 'Changes to Planning Regulations For Dwellinghouses and House in Multiple Occupation' issued by the Department for Communities and Local Government in November 2010.

Planning Practice Guidance. As such, it no longer represents current Government guidance and weight cannot be attached to it.

18. Nevertheless, whether these are self-contained units is clearly relevant to the issue in point over whether at the relevant time there was a large HMO or flats. In considering whether or not there is occupation as self-contained flats regard is needed, in my view, to the physical layout, the facilities within each unit and the way in which the building is actually used. Such considerations will inform whether or not there remains a single planning unit or if a number of units have been created. Other factors such as the type and content of tenancy agreements and payment of bills may also assist in identifying the manner of occupation.
19. The ground (b) appeal is said to arise out of an email⁵ sent by the Council's Private Sector Housing Officer on 12 August 2015 in which the officer expresses the view that at least part of the property is in HMO use. The reason given is that as the three bedrooms on the first floor share an entrance door and communal stairway, they would be treated as an "unlicensable HMO". In contrast the four rooms on the ground floor would be treated as individual flats if each has its own access and egress. That view appears to have been given in respect of licensing matters. It is not a statement made in the exercise of planning functions which is a separate regime altogether. As a view given by one Housing Officer, I do not find it persuasive in determining the planning status of the units.
20. The accommodation is arranged over two floors with four units on the ground floor and three units on the first floor. Each unit has a lockable door. Inside, all of the units have one open plan room with a kitchenette and space for a bed and an en-suite bathroom with shower, toilet and wash basin.
21. The kitchenettes contain cupboards, kitchen sink with drainer and below counter top space for a fridge. By the time of my visit, some of the cooking facilities had been removed. However, it is not an issue between the parties that such facilities, comprised of a microwave oven with hob plates on top, were present in each of the units at the relevant date when the notice was issued.
22. There are no communal rooms. The only shared internal space is the hallway and stairwell used by the tenants of the three first floor flats. A layout plan produced by the appellant does not show a third front door. Tenants of the two ground floor rooms at the rear of the property have use of a small enclosed garden with patio area. This is suitable for use for domestic purposes and sitting out. Access to five of the units is via a small front garden where I saw several wheelie bins. Its size and exposed position is not conducive to much use beyond access and some forms of storage.
23. Thus, there is no shared internal living space, merely limited areas used for access purposes only. Such layout would typically be found in a property converted to flats. Indeed, the internal layout and facilities are entirely compatible with independent living for the occupants of every unit. It is common for tenants of flats to have use of communal outdoor space in the same way that occupants of a HMO may share such space and so the shared gardens do not assist one way or the other.

⁵ on 12 August 2015

24. There is a single postbox, but that is not enough to signify use as a HMO. It is merely a practical arrangement for the delivery of post. Flats could just as easily have one postbox especially in circumstances where it is a house conversion with restricted public access to individual front doors and restricted space to accommodate a number of postboxes.
25. In evidence, Mr Mathers suggested that the tenants know each other, borrow money from each other and sometimes fall out. There is no suggestion that they know each other in any capacity apart from living in the same building. Nor is it suggested that they share any facilities. There is no evidence of any communal living such as eating and cooking together. Indeed, there would be no reason for the tenants to do so when they have all the facilities needed for independent day-to-day living within their own unit of accommodation.
26. A large bundle of copy tenancy agreements has been supplied. These take a variety of forms and describe the units in terms of a "room", a "self contained room" or "bedsit". As fairly generic terminology, it does not shed much light on the position. The more recent rental agreements are headed up as being for a "furnished house or flat on an assured shorthold tenancy". This could suggest the lease is either for a house as a whole or a flat, but it is not sufficiently clear for me to place reliance on it.
27. To support his stance that this is a HMO, the appellant refers to bills being shared. Some of the older tenancy agreements provide that gas/electric, council tax and TV licence are included within the rent. More recent tenancy agreements from 2016 are silent on the issue of bills or explicitly say bills are excluded. Thus, it is unclear which bills are shared, how, and over what period of time. The Council produced evidence in the form of an electrical installation condition report dated 15 September 2015 indicating that each of the units (described as "flats") has its own electrical circuit. In itself, this is inconclusive, but it is the appellant who has the burden of proof and he has not submitted any substantive evidence to show bills were shared at the relevant time.
28. There is also a lack of clarity over what role the management company fulfils, when it was appointed and what makes the arrangement particular to a HMO as opposed to flats when such companies are commonly involved in the management of flats. Without more details, the involvement of a management company carries very little weight in supporting a HMO use.
29. In his testimony Mr Mathers suggested that the use perhaps falls somewhere between flats and a HMO. I do not agree. The layout, facilities and actual use all point firmly towards the creation of seven flats. On the evidence, the appellant has not discharged the burden of proof to demonstrate that they are anything other than flats. The original planning unit was a single dwellinghouse. That one planning unit has now been sub-divided into seven physically separate units, each unit being in use as a number of Class C3 dwellinghouses. The change of use has resulted in seven new planning units.
30. As a matter of fact, I find that the property has been converted and used as seven self-contained flats. Consequently, there has been a change of use from a single dwelling to seven independent flats as alleged.
31. The appeal on ground (b) fails.

The appeal on ground (f)

32. The ground of appeal is that the steps required by the notice to be taken are excessive. The starting point in a ground (f) appeal is to identify the purpose which the notice seeks to serve. 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)).
33. In requiring cessation of the unauthorised use, the notice is clearly seeks to remedy the breach. The reasons for issuing the notice also identify injury to amenity. Harm is said to arise to the occupiers from significant overdevelopment and associated impacts on living conditions along with negative impact on the prevailing character of the area and parking provision. It is plain that the notice is directed to both purposes.
34. As originally drafted, the requirements of the notice were firstly to cease using 1 Airedale as seven independent flats and secondly, to return 1 Airedale to one dwelling house comprising three bedrooms, one lounge, one kitchen/diner and one bathroom. I have dealt with the wording of the first requirement in my preliminary note.
35. Stipulating the type of rooms to be reinstated in the second requirement is overly prescriptive and would go beyond requiring remedy of the breach. It therefore needs amendment. This appears to have been recognised by the Council when in the Statement of Common Ground the parties submitted an agreed variation to the second step to say "Remove all of the cooking facilities, except ONE kitchen." This suggestion is appropriate in the circumstances and the notice should be varied accordingly.
36. In reaching this agreement, the Council emphasised that it was without prejudice to additional requirements that may be sought. The parties disagree on whether the notice should require removal of all but one bathroom.
37. 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 as held in *Somak Travel*⁶ and *Bowring*⁷. That is so even if the works on their own might not constitute development, or be permitted development or be immune from enforcement action. The key issue is whether or not the bathrooms were installed as integral to or part and parcel of the use as flats.
38. The appellant did not seek to advance a case that the bathrooms in each of the seven flats had been installed for some different lawful use. From the submissions, it is evident they were installed when the conversion to flats took place and solely to facilitate that material change of use. Those bathrooms are integral to the use as flats and were installed as an intrinsic part of that unlawful change of use.
39. In circumstances such as this where the bathrooms had not served a previous lawful use, an enforcement notice can legitimately require their removal so that the land is restored to its condition before the change of use took place.

⁶ *Somak Travel v Secretary of State for the Environment & Brent LBC* [1987] JPL 448

⁷ *Bowring v Secretary of State for Communities and Local Government* [2013] EWHC 1115 (Admin)

40. The appellant suggests that if the bathrooms are allowed to remain the property could be used as a small HMO for not more than six residents within the meaning of Class C4 of the UCO. Pursuant to Article 3(1) and Schedule 2, Part 3, Class L of the Town and Country Planning (General Permitted Development) (England) Order 2015⁸ planning permission is deemed to be granted for the change of use of a building from Class C3 to a Class C4 HMO. However, the current use of the property is unlawful. To benefit from this provision the property would firstly need to revert to a lawful use as a single dwellinghouse. Only then could permitted development rights be exercised to effect a change in use to a HMO. The parties agreed that to be the position.
41. A similar scenario was considered in the Denzil Road appeal⁹. In that case, the Inspector found that if he were to concede to the request to keep facilities in place where there had been a change of use from a single dwelling to four flats it would be tantamount to solving one breach (dwelling to four flats) by creating another breach (four flats to HMO in Use Class C4).
42. Since that decision, the Court of Appeal judgment in *Kestrel Hydro*¹⁰ has been handed down. The appellant cites this judgment as authority that even where works are 'integral' to a use which constitutes a breach of planning control, there may be circumstances in which the works, if retained, would be put to a lawful use in the future, and where the breach of planning control could be remedied without their removal. The appellant has invited me to exercise my powers accordingly.
43. It is maintained that even if the property is converted back to a single dwellinghouse, the appellant would subsequently make the changes to implement a Class C4 use. That being so, it is argued that it is excessive to require removal of the additional bathroom facilities. Whether the appellant would take that approach appears by no means certain. He had not obtained any costings for any works whatsoever and indicated that finding funds for the remedial works itself could prove difficult and may necessitate him borrowing. That is not a position which to my mind reflects a likelihood of creating a Class C4 HMO following conversion to a single C3 use as suggested.
44. In any event, it is clear from *Kestrel Hydro*¹¹ that there is no legal requirement for an Inspector to consider the possibility of the works that had been carried out on the site in association with the unlawful change of use being used in the future in association with lawful use. The simple question for the Inspector under ground (f) is whether the steps required by the notice exceed what is necessary to remedy the breach constituted by the matters stated in the enforcement notice.
45. I recognise that enforcement action is intended to be remedial, not punitive, but the bathrooms were not installed in connection with some former lawful use that could be revived. Moreover, if the bathrooms were allowed to remain there could not be a lawful Class C4 HMO use without reverting first to a single dwelling. If the appellant wishes to achieve a change of use from individual flats to a Class C4 HMO then he needs to apply for planning permission. I agree with the Denzil Road Inspector that the steps requested effectively

⁸ Article 3 and Schedule 2, Part 3, Class L.

⁹ Appeal Ref: APP/T5150/C/15/3069982 dated 15 February 2016

¹⁰ *Kestrel Hydro v Secretary of State for Communities and Local Government* [2016] EWCA Civ 784

¹¹ Paragraph 53 of the judgment

create another problem. Rather than address the breach of planning control it would facilitate a further breach if there were a change of use from flats to HMO.

46. It is not uncommon for a 3 bedroom house to have more than one bathroom, but this particular property had only the one bathroom before its conversion. The breach would not be remedied by allowing more than one to remain.
47. A local charity for the homeless by the name of 'DENS' was lined up to rent one of the rooms. The appellant stated in evidence that they would want to lease the property as a HMO with as many amenities as possible, including bathrooms. The demand for HMO accommodation has no bearing on the reasonableness of the measures when there is no ground (a) appeal. It is a matter that goes to the planning merits and it is clear from the judgment in *Miaris*¹² that a determination of the planning merits falls outside the scope of a ground (f) appeal. If the appellant wished such factors to be considered then he needed to have appealed on ground (a) whereupon a deemed planning application would be determined.
48. In the circumstances, I am satisfied that the removal of all but one bathroom is necessary and proportionate to remedy the breach. As such the revised requirement sought by the Council is not excessive; it does no more than seek to achieve the purposes of section 173(4)(a) and (b). Nothing in the requirements prevent the appellant from doing what he is lawfully entitled to do in the future after he has complied with the notice.
49. At the Inquiry, the Council submitted that it is readily apparent that three front doors have been installed as part of the change of use. The Council contends that to return the property to a single dwelling necessitates removal of the two front doors that were added. The appellant objects to such a step on the basis that it would be a new requirement not identified in the notice.
50. It is a well-established and well known principle of the *Miller-Mead*¹³ judgment that a notice must tell a recipient of it fairly what he has done wrong and what he must do to remedy it.
51. The original allegation is expressed in terms of the conversion of the dwellinghouse to independent flats with the second requirement seeking a return of the property to one dwellinghouse. In prescribing the layout that should be restored no mention was made of the additional front doors nor are they referenced anywhere in the notice. If I were to add a requirement for the two additional doors to be removed then the notice would become more onerous and place the appellant in a worse position. That being so, I am unwilling to add a further requirement concerning the front doors.
52. To this limited extent the ground (f) appeal succeeds. The notice shall be varied in the manner agreed between the parties. Otherwise, the ground (f) appeal fails with a revised requirement for removal of all but one bathroom.

¹² *Miaris v Secretary of State for Communities and Local Government* [2016] EWCA Civ 75

¹³ *Miller-Mead v Minister of Housing and Local Government* [1963] 1 All ER 4592

The appeal on ground (g)

53. The ground of appeal is that the time given to comply with the requirements of the notice falls short of what should reasonably be allowed. The appellant seeks 24 months instead of the 6 month period specified in the notice.
54. The appellant argues that 24 months is required partly because of the unexpired period left on the fixed term tenancies for four of the tenants. All of these tenancies were granted after the notice was served when the appellant knew there was a six month compliance period if his appeal failed.
55. The effect of the notice is to stop the clock. The notice only takes effect on the date of this appeal decision by which time two of the tenants will be approaching the end of their fixed term in July 2017. The remaining two tenants will have over a year remaining.
56. I have no reason to believe that 2 year fixed term tenancies were entered in a deliberate attempt to delay the inevitable whilst maximising rental income as suggested by the Council. However, it was at best naïve of the appellant to offer such long fixed terms in circumstances where the lawfulness of the use had already been challenged by the notice. This should have alerted the appellant to exercise caution in the terms agreed with tenants. The appellant is not inexperienced in property management having several other properties which are let out to tenants. The situation was entirely avoidable had either shorter fixed terms been entered, in the same way that many previous tenancies were granted, or included a break clause which at least one other tenancy contains. Tenants not being willing to accept a lesser period is inconsistent with the apparent high demand for the units.
57. That said, the situation is not of the tenants making who will now find themselves needing alternative accommodation. The Council suggested that as a landlord of other properties, the appellant is well-placed to assist in that task. That may be so, but it would depend on what accommodation was available and so it does not influence my decision on this ground.
58. Ultimately, whilst I can sympathise with the tenants there is no evidence that undue hardship would arise from termination of their tenancies. Furthermore, issues over housing supply, lack of affordable options, credit referencing and suchlike are generic factors. No specific evidence has been presented to indicate that any of these tenants are liable to experience particular problems finding somewhere else to live.
59. Until such time as the appellant gives notice to his tenants no-one knows whether eviction proceedings will need to be commenced in the County Court. It is purely speculative on the appellant's part and the same could be said by any landlord. It is not reason to justify a longer compliance period.
60. The Council's discretion under section 173A of the 1990 Act to extend the period of compliance is no substitute for ensuring a reasonable period is given at the outset. It is the reasonableness of the 6 months in the given circumstances with which I am concerned. However, section 173A does allow the Council to extend the period should insurmountable problems arise.
61. The remedial works can only be started once the tenants have vacated the property. The Council has agreed changes to the requirements which I intend to adopt which will no longer involve restoration of the internal layout. The

works are now confined to removal of six kitchens and six bathrooms. The work itself should not take long to execute. The appellant estimates up to 2-3 months are needed. I appreciate that good tradespersons are in high demand and that the appellants would wish to secure quotes. However, as the appellant has not yet checked the availability of suitable tradespersons, it is guesswork that it would take so long to arrange and undertake the works. I am not persuaded that up to 3 months is needed.

62. It seems to me that 6 months is a reasonable period of time taking into account the notice period required to be given to the tenants and the need to have the works completed following their eviction.

63. The appeal on ground (g) fails.

Formal Decision

64. It is directed that the enforcement notice be corrected by:-

- (i) deleting the words "Operational Development" from the heading of the notice and substituting the words "Material Change of Use";
- (ii) deleting the allegation in paragraph 3. in its entirety and substituting the words "Without planning permission, the material change of use of one three-bed dwellinghouse to seven independent flats";

and varied by:

- (iii) deleting the text in paragraph 5. in its entirety and substituting the following:
 - 1. Cease using 1 Airedale as independent flats.
 - 2. Remove all of the cooking facilities, except ONE kitchen.
 - 3. Remove all of the bathrooms, except ONE.

65. Subject to these corrections and variations, the appeal is dismissed and the enforcement notice is upheld.

KR Seward

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Matthew Dale-Harris	of Counsel, instructed by Charlotte McKay, IOP Consulting
He called	
Mr Aeron Mathers	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr Ben Du Feu	of Counsel instructed by Chris Gaunt, Legal Services
He called	
Mr Philip Stanley	Team Leader – Specialist Services

DOCUMENTS submitted at the inquiry

1. Letter from DENS, homelessness charity, dated 11 May 2017
2. Opening Statement on behalf of the appellant
3. Opening Statement on behalf of the Council
4. Council's Closing Submissions
5. *Miaris v Secretary of State for Communities and Local Government* [2016] EWCA Civ 75
6. Appellant's Closing Submissions