The Planning Inspectorate

Appeal Decision

Inquiry held on 18 July 2017

Site visit made on 17 July 2017

by K R Saward Solicitor

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

Decision date: 28 July 2017

Appeal Ref: APP/Z5060/C/16/3163006
27 Eric Road, Chadwell Heath, Romford, Essex RM6 6JJ

- 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 Ghazanfar Ejaz against an enforcement notice issued by the Council of the London Borough of Barking & Dagenham.
- The enforcement notice was issued on 14 October 2016.
- The breach of planning control as alleged in the notice is without planning permission, the unauthorised subdivision to four independent residential units.
- The requirements of the notice are:-
  - Return the property to a single family dwelling.
  - Remove all alterations and fixtures related to the four independent residential units.
  - Remove all subsequent waste material from the four independent residential units.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b)&(d) of the Town and Country Planning Act 1990 as amended.

Decision

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

Preliminary Matters

2. Originally, appeals were brought on grounds (a),(c) and (e). Grounds (a) and (e) were withdrawn prior to the Inquiry. The appellant subsequently withdrew his ground (c) appeal at the Inquiry having clarified that his case on this ground was that the appeal property is in use as a house in multiple occupation (HMO) which he believes to be lawful. Use as a HMO is not the matter which is alleged in the notice to be a breach of planning control. Whether or not such a use would have been lawful is therefore outside the scope of this appeal. The appeal proceeds on grounds (b) and (d) only.

3. All evidence to the Inquiry was given on sworn affirmation.

4. I undertook an accompanied site visit the day before opening the Inquiry to facilitate the efficient running of the Inquiry and to see the appeal property before evidence was heard given that the parties' evidence differed over the internal layout. The parties were given opportunity for a further site visit at the end of the Inquiry, but confirmed another site visit was unnecessary.

5. There is a separate outbuilding in the rearmost part of the garden which the appellant acknowledges has been in residential occupation. There was no sign

of occupation when I visited and it was in a state of internal dismantling. The use of this outbuilding is not included within the enforcement notice.

Matters relating to the notice

6. The notice alleges the unauthorised subdivision to four independent residential units. 'Subdivision' does not amount to development for the purposes of section 55 of the 1990 Act. When read as a whole, it is evident that the notice is directed at the use of the property as four independent residential units. The agreed use prior to its conversion was a single dwellinghouse. The notice should therefore have alleged a material change of use. I have considered the appeal on that basis.

7. The steps in paragraph 5 of the notice fail to require the unauthorised use to cease. By restoring the property to a single dwelling as required by the first bullet point of paragraph 5 it would in effect bring about the cessation of the use. In fact, requiring the property to return to a single dwelling is excessive because it goes further than is necessary to correct the breach by surplanting a different use. Had I not gone on to quash the notice then it would have been capable of correction by replacing the first bullet point of paragraph 5. with a requirement to (i) cease the use as more than one residential unit and (ii) restore the property to its condition before the breach took place.

Reasons

The appeal on ground (b)

8. This ground is that those matters alleged in the notice have 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 property to four independent units. 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. 14 October 2016.

9. There is no dispute between the parties that the property was previously in residential use as a two-storey end of terrace house and its lawful use is therefore that of a single dwellinghouse within the meaning of Class C3 of the Town and Country Planning (Use Classes) Order 1987 (UCO) as amended.

10. The appellant's case is that on the relevant date of 14 October 2016, the property was not in use as four self-contained residential units, but as a HMO.

11. At the Inquiry the appellant submitted that he acquired the property in 2002 as a 6 bedroom house and began occupation along with his parents and two brothers. The appellant was already married as was another brother with children. In 2004 internal changes were made to adapt the property to the needs of the large family in occupation. The parents and brothers each had a separate kitchen, but they all lived together as a single household.

12. As family members moved out, the appellant started to rent out their rooms. The appellant remained in occupation and the rest of the property was rented out from 2009 or 2010. He refers to the other occupants as his 'lodgers.'

13. Both parties filed floor layout plans containing notable differences. The Council Officer acknowledged that he had not personally been inside the property and

the Council's plans were compiled from records and the recollection of another Officer. As such, it was expected they contained errors. From my site visit I was able to be satisfied that the internal layout corresponds with the appellant's plans.

14. These show a single main entrance door leading into a hallway. On the ground floor to the front left there is bedroom (marked as bedroom 3) with en-suite bathroom. To the front right side of the hallway is lounge with sliding doors into a bedroom (marked as bedroom 1) with en-suite bathroom. At the end of the hallway there is a fitted kitchen positioned centrally within the property. A lockable internal door divides this kitchen from another kitchen of similar size. Behind that kitchen is small lounge area with door leading into a large bedroom (marked bedroom 2) with en-suite bathroom.

15. Off the hallway there are stairs with a small landing at the midway point whereupon the stairs spilt to turn in opposite directions. At the top of each flight of stairs there is a lockable door. Behind the door to the right hand side there are two first floor bedrooms (marked as bedrooms 4 and 5). Off the top landing, on the same side of the house, there is a bathroom and large kitchen/dining room to the rear of the property. To the left side of the first floor there is a bedroom at the front (marked as bedroom 6). A kitchen is on the opposite side of the landing at the back of the house with a bathroom off it.

16. Based on the internal layout, it is not difficult to see why the Council concluded there were four independent residential units. On the first floor, the property is physically divided into two areas by the stairs with each side having living accommodation and its own a kitchen and bathroom. There are all the facilities needed for independent day-to-day living contained behind a lockable door at the top of each set of stairs. Similarly, if the internal door between the two ground floor kitchens is locked, the layout could correspond with there being two separate self-contained units; one at the front and another at the rear.

17. The point in issue is whether that is how the property was being used at the relevant date, as claimed by the Council. The fact the property is capable of being used as separate residential units is not the determinative factor.

18. Whilst the appellant has the burden of proof, case law has established that the evidence of the appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence is sufficiently precise and unambiguous, there is no good reason to dismiss an appeal on any legal ground. Thus, the onus is on the appellant in the first instance to give sufficiently precise and unambiguous evidence, even if uncorroborated.

19. In his written submission the appellant had sought to suggest that the use of the property fell within Class C4 of the UCO, being a HMO with six residents or fewer. However, his evidence at the Inquiry was that occupation levels had fluctuated. At times there were less than six residents and at other times there were as many as eight residents. The appellant thought there eight residents when the notice was issued.

20. For the purposes of the ground (b) appeal, the size of any HMO will not matter because the issue for determination on this ground is whether or not there are four independent residential units. If the appellant succeeds in demonstrating

that the whole or any part of the property was in use as a HMO of whatever size, then the allegation will be wrong and the notice will need to be quashed.

21. Section 254 of the Housing Act 2004 sets out the criteria to be met if a building or a part of a building is a small HMO. The criteria is fulfilled where: there is one or more units of living accommodation not consisting of a self-contained flat or flats, the accommodation is occupied by persons who do not form a single household, it is their only or main residence and constitutes the only use of that accommodation. At least one occupier must be liable to pay rent or to provide other consideration for occupying the property. Finally, two or more of the households must either share, or be lacking in, one or more basic amenities i.e. a toilet, personal washing facilities or cooking facilities.

22. There is no statutory definition for a large HMO with more than 6 residents, but it would be logical for similar criteria to be applied.

23. A "self-contained flat" is defined within section 254 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.

24. Therefore, the key factor in this appeal is whether the property was in use as self-contained flats or whether the households shared one or more of the basic amenities.

25. Copies of various documents headed up 'Licence to Occupy' have been produced by the appellants. Many simply give the address as 27 Eric Road without specifying a particular part of the property. Under affirmation, the appellant identified the rooms to which these related.

26. In relation to the first floor, the appellant acknowledges that bedroom 6 has been rented out with use of the kitchen and bathroom on the left side of the property. Similarly, bedrooms 4 and 5 were rented out together along with the kitchen and bathroom on the right hand side of the property. A 'License to Occupy' what the appellant identified as bedrooms 4 and 5 was entered on 16 June 2016. The appellant confirmed that those 'licensees' remain in occupation. In terms of bedroom 6, the appellant produced a 'License' entered on 19 September 2016 and confirmed the 'licensee' was in occupation when the enforcement notice was issued the following month.

27. The appellant also confirmed that no other 'licensees' use the kitchen and bathroom associated with bedrooms 4 and 5 and the same applies to the kitchen and bathroom for bedroom 6. That arrangement corresponds with there being lockable outer doors to each set of rooms which would prevent others from accessing the facilities. However, the appellant maintains that he shares these bathrooms and kitchens with the respective occupants.

28. It is the appellant's sworn evidence that he has lived in ground floor bedroom 3 as his main residence since 2009 although his wife and child live elsewhere with the appellant's parents and have done so since around February 2016. From that time onwards the appellant says he has travelled between his parent's house and No 27.

29. Given that bedroom 3 has an en-suite bathroom, it seems implausible that the appellant would use either of the upstairs bathrooms. The appellant contended

that he would "regularly" use a first floor kitchen maybe 2-3 times per week if the ground floor kitchen is locked or in use. As the appellant has a key to the ground floor kitchen, he must be able to gain access to it. Moreover, it makes no sense for the appellant to suffer the inconvenience of going upstairs to cook when there is a kitchen on the ground floor close to his room. I find the appellant's evidence in this regard less than credible. It is unsupported by any evidence from the occupiers on how the property has been used.

30. I note that there is a separate page accompanying the current 'Licence' said to be for bedroom 6 which is dated 19 September 2016 and headed up 'Licence to Occupy Special Clauses'. This records that the landlord is resident at No 27 and advises "You are sharing living accommodation with the resident landlord." However, it is unclear what living accommodation it means. It can be construed as a reference to the property as a whole. Even if it was intended as a reference to the kitchen, the use in reality must be considered.

31. The appellant may well have access to the upstairs kitchens and bathrooms in the same way that any landlord might, but that does not cause them to be in shared use. On the evidence, those facilities are for the exclusive use of the occupants living in the rooms on each side of the first floor. Thus, I consider that there were two separate self-contained residential units on the first floor as at 14 October 2016.

32. Turning to the ground floor. As set out above, the appellant says that he has resided in bedroom 3 since 2009. He insists that it is his main residence despite his wife and child residing elsewhere. There is no evidence before me to indicate to the contrary.

33. The appellant asserts that the existing occupant has lived in bedroom 1 since 23 September 2016 although the 'Licence' itself is undated. According to the appellant, bedroom 1 shares a kitchen with both himself and the occupier of bedroom 2. It is entirely logical that the occupiers of both bedrooms 1 and 3 would use the central kitchen as it is the one nearest to both their rooms. But, bedroom 2 is nearest to the other kitchen which leads into the lounge next to its bedroom. There would be no reason for the occupier of bedroom 2 to cook in the same kitchen as the other occupiers when that central kitchen is on the other side of a lockable door.

34. When I queried with the appellant why there were two kitchens side by side if not for separate use, he replied that it was initially one kitchen that had been sub-divided and it allowed utensils to be kept separate. That does not explain why any occupier of bedroom 2 would use cooking facilities in a kitchen further away from their rooms. By the same token, there would be no reason for either the appellant himself or the occupier of bedroom 1 to go through one kitchen in order to cook in another.

35. Indeed, the appellant confirmed that the internal door between the two ground floor kitchens has been kept locked at all times. The appellant suggested that a key is given to those who need to use the door, including the occupier of bedroom 2.

36. A 'Licence' dated 16 June 2015 was granted to a Mrs Nawaz for what the appellant says was bedroom 2 who remained in occupation until March 2017. On paper, access to bedroom 2 is through the house and via the central shared kitchen which would explain why the occupier of bedroom 2 would have a key

for the door separating the kitchens. There is also a back door which leads directly into the lounge for bedroom 2 and there is a gate inserted in the side garden fence. It is this gate which the Council says was used by occupiers of the outbuilding.

37. The appellant contends that "officially" the outbuilding could only be accessed through the main house. As this would involve walking through the second kitchen and lounge for bedroom 2, the appellant says that those rooms were 'shared'. Any such access may have implications in terms of exclusivity of occupation, but there is no suggestion that any occupiers of the outbuilding used the kitchen facilities in the main house. Moreover, the appellant's use of the word "officially" suggests that access through the house was not necessarily used. When I asked the appellant what he meant by "officially" he said that there is no right of way over the neighbouring property at No 25 to access the rear garden of No 27. That does not mean it has not been so used. There would be no reason for a gate unless it was for access purposes.

38. I am not persuaded on the evidence that occupiers would have walked through the main house when there is a gate at the rear of the property which would have provided far more convenient access to the outbuilding. The likelihood is that occupiers of the outbuilding used this gate. Thus, even if the occupier of bedroom 2 does walk through the house rather than use the back door, there is still a separate self-contained unit at the rear of the house once the kitchen door is locked. The appellant acknowledges that the door is kept locked. That unit comprises a bedroom, lounge, bathroom and kitchen and therefore has all the facilities required for day-to-day living including all basic amenities. It would properly be regarded as a separate flat.

39. If it is accepted that the appellant was a resident landlord on the relevant date occupying bedroom 3 as his main residence and that Mrs Nawaz occupied bedroom 1, and I have no reason to believe that they did not, then they must have shared a kitchen. With bedroom 2 also in occupation there would have been three unrelated occupiers living on the ground floor but only two kitchens, one of which is behind a locked door for bedroom 2, as already discussed.

40. I saw no cooking facilities within either bedroom 1 or 3. In the absence of evidence to the contrary I am satisfied that the central ground floor kitchen and its cooking facilities were shared at the relevant date. All other criteria in section 254 are fulfilled for these rooms to fall within the definition of a HMO.

41. The appellant's evidence is less than precise and unambiguous with regard to the use of the remainder of the property. Based on the evidence before me, I consider that, on the balance of probabilities, there were two self-contained flats on the first floor, one self-contained flat at the rear of the ground floor at the time the notice was issued.

42. Consequently, rather than a change of use to four independent residential units I consider that there was a mixed use of three self-contained flats and a HMO. Therefore, I find as matter of fact that the breach as alleged has not occurred.

43. To that extent the appeal succeeds on ground (b). The notice cannot be corrected as the use was a different one to that alleged with a different immunity period.

Conclusion

44. For the reasons given above I conclude that the appeal should succeed on ground (b). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under the ground set out in section 174(2)(d) to the 1990 Act, as amended, does not need to be considered.

KR Saward

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Ghazanfar Ejaz	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr Troy Healy	Building Control and Planning Enforcement Manager

DOCUMENTS submitted at the Inquiry

1. Notice of Inquiry.
2. Duplicate copies of 'Licenses to Occupy' and payment records for 'first floor left bedroom'.