The Planning Inspectorate

# Appeal Decisions

Site visit made on 26 June 2017

**by Jean Russell MA MRTPI**

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

**Decision date: 28 July 2017**

## Appeal A: APP/V5570/C/16/3157420
## Appeal B: APP/V5570/X/16/3157242
## Land at Ground Floor Flat, 28 Crouch Hill, Islington, London, N4 4AU

- Appeal A is made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act). Appeal B is made under section 195 of the 1990 Act.
- Appeal A is made by Mr Daniel Abrahamovitch against an enforcement notice issued by the Council of the London Borough of Islington. Appeal B is made by Mr Daniel Abrahamovitch against the decision of the Council of the London Borough of Islington to refuse to grant a certificate of lawful use or development (LDC).

**Appeal A**

- The enforcement notice was issued on 5 August 2016.
- The breach of planning control as alleged in the notice is: without the necessary planning permission the conversion of the ground floor commercial unit to a self-contained residential flat.
- The requirement of the notice is to cease the use of the ground floor of the "Premises" as a self-contained flat.
- The period for compliance with the requirements is three months.
- Appeal A is proceeding on the grounds set out in s174(2)(c) and (d) of the 1990 Act.

**Appeal B**

- The LDC application ref: P2016/1403/COLP, dated 8 April 2016, was refused by notice dated 6 June 2016.
- The application was made under section 191(1)(a) of the 1990 Act.
- The use for which a LDC is sought is use of ground floor as a self-contained single residential flat (C3 use).

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### DECISIONS

### Appeal A: APP/V5570/C/16/3157420

1. It is directed that the enforcement notice is corrected by the deletion of the text pertaining to Schedule 2 and the substitution of: "*without planning permission, the making of a material change of use of the ground floor unit to use as a self-contained residential flat*". Subject to this correction, Appeal A is dismissed and the enforcement notice is upheld.

### Appeal B: APP/V5570/X/16/3157242

2. Appeal B is dismissed.

### Preliminary Matters

*Appeal A: the Enforcement Notice*

3. Under s176(a) of the Town and Country Planning Act 1990 (the 1990 Act), I may correct any misdescription in the enforcement notice, so long as doing so would cause no injustice to the appellant or the Council. It is alleged in the notice that there has been a 'conversion' but that term is not precise.

4. A breach of planning control will occur where development is carried out without the required planning permission; s55(1) of the 1990 Act defines 'development' as meaning the carrying out of operations or making of a material change of use. The term 'conversion' may denote a material change of use **and/or** works that enable the change; further explanation is required as to exactly what the breach may be.

5. In this case, the notice requires that the use of the unit as a flat must cease – but not that any remedial works take place. It seems that the Council is concerned that there has been a material change of use alone. This is consistent with the fact that the LDC application subject to Appeal B was made solely in relation to existing use.

6. The notice refers to a 'commercial' unit but that is not a particular use. It is clear that the unit was last used as a restaurant but not whether that was the last *lawful* use. Since it is not essential for a notice to state what a change of use was from, I shall correct the allegation to simply address the making of a material change of use of the ground floor unit to use as a self-contained flat. This will not alter the notice in substance, make it more onerous to comply with or cause any injustice.

*Appeal B: the Council's Reason for Refusal*

7. The Council's reason for refusing the LDC included an erroneous reference to 'two self-contained units'. That is regrettable, but whether the Council considered the LDC application with 'due diligence' is a matter outside of my remit. The question for me is whether the Council's *decision* to refuse a LDC was well-founded – not whether the reasons for that decision were precisely written.

*Appeals A and B*

8. Where enforcement appeals proceed on grounds (c) or (d), and in LDC appeals, the onus is on the appellant to make his or her case to the standard of the balance of probabilities. Appeals A and B are concerned only with matters of lawfulness, and so I cannot comment on the merits of the use of the unit as a flat, or the Council's reasons for taking enforcement action set out in Schedule 3 of the notice.

**Appeal A on Ground (c) – and the Implications for Appeal B**

9. Ground (c) is that the matters stated in the enforcement notice do not constitute a breach of planning control. This ground would cover any argument that the alleged change of use did not involve development, did not require planning permission, or that planning permission has been granted.

10. In relation to Appeal A, the appellant has only sought to demonstrate that the use of the unit as a flat had become immune from enforcement action by the date that the notice was issued. This matter falls to be considered under ground (d) – that at the date the notice was issued, it was too late to take enforcement action. The case in support of Appeal B is similarly that the time for taking enforcement action had expired by the date that the LDC application was made.

11. Grounds (c) and (d) are not 'interlinked'. In an enforcement appeal, if it is found on ground (c) that a breach of planning control has not occurred, the notice must be quashed on that basis; any question of immunity would not be considered. If ground (c) fails or is not pleaded, but there is success on ground (d), it will follow that there was a breach but the development became lawful over time.

12. The appellant has made no case which pertains to ground (c). Whether the unit was last lawfully used as a restaurant or other commercial purpose, there is no suggestion that the change of use to a flat did not involve development, or did not require planning permission, or that permission is already granted.

13. I conclude that the appellant has not demonstrated that the use of the unit as a flat was lawful on the dates that the notice was issued or the LDC application was made. On the balance of probabilities, a material change of use has taken place in breach of planning control. Appeal A fails on ground (c), and a LDC could not be granted under Appeal B on a basis that there had been no breach.

**Appeal A on Ground (d) and Appeal B**

***Context***

14. Under s171B(2), no enforcement action may be taken at the end of the period of four years beginning with the date of a breach of planning control consisting in a change of use of any building to use as a single dwellinghouse; this applies to the change of use of part of a building to use as a self-contained flat.

15. In cases such as this, it is not only necessary for the appellant to date the change of use, but also show that the use continued substantially uninterrupted over the four year period. The test is whether the Council could have taken enforcement action at any time. Where the use of a building as a dwelling is lawful, it is not necessary for the occupier to be continuously or regularly present. Prior to that, however, the use must become affirmatively established over a four year period.

16. The material dates are 5 August 2012 in relation to Appeal A and 8 April 2012 for Appeal B, four years prior to the date of the issue of the notice, and the date of the LDC application respectively. The use would also be lawful if the appellant could demonstrate that it was carried out continuously over *any* four year period[1].

***Reasons***

*The Use of the Unit between February 2010 and August 2011*

17. In a sworn affidavit dated 8 April 2016, the appellant stated that he lived in the appeal flat from 27 February 2010 until 25 June 2011; he also provided a tenancy agreement indicating that the flat was let to him on 27 February 2010. Sworn evidence carries considerable weight but the claim is not entirely supported.

18. The appellant has provided photographs downloaded from a file entitled 'March 2010'; these show the unit in use for a dinner party, with beds within the existing bedrooms. However, the photographs are not dated themselves and the appellant has also submitted a plan of the 'existing ground floor' dated 'September 2010' which showed the restaurant store and kitchen where the bedrooms are now[2].

19. In paragraph 5.1 of the LDC application supporting statement, the appellant said that the use of the unit as a restaurant ceased in 'November 2009'. In the grounds of appeal for Appeal A, however, it was said that the restaurant 'failed' in '2010'. A local resident has said that the unit was 'converted' around 2010. He referred to (but did not provide copies of) Google Street View images of the restaurant in 2009, and the unit in 'its current form' in 2011.

20. It is not impossible that the restaurant closed in early 2010, and the unit was in use as a flat by February of that year. It is also possible that the September 2010 plan was drawn up incorrectly and the appellant was living in the unit at that time, as his tenancy agreement suggests. Whether or not that is the case, further evidence casts doubt on the continuity of his residency.

[1] For this reason, and contrary to the Council's submissions, it is necessary for me to consider all of the appellant's evidence regarding the use of the unit.

[2] The appellant has not said when or why the September 2010 plan was prepared, but I understand that planning permission (ref: P102320) was granted on 16 December 2010 for a change of use of ground floor Class A3/A4/bar restaurant to create two self-contained office units; the permission was not implemented.

21. An electricity bill addressed to the appellant at the 'ground floor flat' was received on 1 August 2011, in respect of a relatively long period from 20 October 2010 to 8 July 2011. Another bill was received on 24 September 2011 – and annotated to show that the total amount owing from 20 October 2010 was not paid until 24 October 2011. There is no explanation as to why the electricity provider did not send more regular bills or demand earlier payment if the unit was in continuous use as a flat from 27 February 2010 until 25 June 2011.

22. Even if the appellant did live in the unit until the latter date, there must then have been a gap in occupancy because the tenancy agreement with the next occupier was not signed until 26 August 2011. There can be minor fluctuations in the occupation of rented flats, but the appellant has not said whether any activities took place between 25 June and 26 August 2011, such as refurbishment works or marketing, in order to further the residential use.

23. The appellant has submitted sworn affidavits from the administrator and company secretary for his firm; and a painter and a carpenter employed to work in the flat. All of these people stated that they "visited the ground floor flat many times between 2010 and the present day" in the course of their work, but none gave any evidence as to why there was a break in occupation between 25 June and 26 August 2011. Thus, the appellant has not shown that the Council could have successfully enforced against the residential use during that time.

24. Overall, I find the appellant's evidence about his use and occupation of the flat to be vague and contradictory. However, I can accept that the alleged change of use took place sometime between 2010 and 2011 – and it does not disadvantage the appellant that I will not be more precise. A four year clock can run from 26 August 2011, either because that was the date of the alleged change of use, or because that date marked the end of a substantial interruption to the use.

*The Use of the Unit between August 2011 and today*

25. The tenancy agreement of 26 August 2011 covered a 12 month period. On 26 August 2012, a further 12 month agreement was signed with the same tenant. The appellant has not stated whether or not the second agreement was rolled forward – or even whether the tenant lived here for the full year[3]. It can be said, however, that the agreement would have expired on 25 or 26 August 2013, and the next one was not made until 15 December 2014, with a different tenant.

26. The appellant has submitted an annual summary statement from the electricity provider which shows that electricity usage at the 'ground floor flat' was '0kWh' for the period 17 July 2013 to 16 July 2014. In other words, no network electricity was consumed in the flat from shortly before the expiry of the 2013 tenancy agreement. The next bill which shows any electricity usage is dated 8 January 2015, by which date a new tenant had lived in the flat for about three weeks.

27. The appellant has submitted photographs from a file dated 'July 2013' which show persons in the unit using a portable laptop computer. There are no photographs of activity involving network electricity usage after that. The bills suggest that the unit was not used as a dwelling for at least a year from 17 July 2013. As a matter of fact and degree, this was a substantial interruption; any attempt by the Council to enforce against the use over that period would have been likely to fail.

28. There is no tenancy agreement after that signed on 15 December 2014 – and the appellant has not said how long the beneficiary of that agreement continued to live

[3] A fax from Cramer Pelmont Solicitors, affirming that 'the tenancy has continued after the expiry of the fixed term…' is not expressly related to this flat or any particular tenant – and it is dated 10 November 2005.

in the flat. Moreover, it appears that during the 12 month period of that tenancy, from January to at least October 2015, electricity bills and statements were not sent to the occupier, but the appellant at another property. An electricity 'account history' statement also shows that direct debit payments ceased in October 2014 and no further payment of any kind was made until March 2015, before direct debits were re-commenced in April 2015[4].

29. The electricity bills and 'account summary' show that electricity was supplied to and used in the unit during 2015 and early 2016, but not that the unit was in continuous use as a dwelling after December 2014. The appellant has not explained why electricity bills were not paid for three months after the last tenancy agreement was signed, or he remained liable for those bills.

30. The appellant's other evidence fails to show that the use of the unit as a flat has been continuous. An affidavit was provided by a person "on friendly terms with the tenants"; the affidavit from the painter indicates that he lived, at least during April 2016, within the appeal building. However, none of the people who gave sworn evidence described their visits to the flat in detail, how they saw the flat being used, or their encounters with any tenants.

31. An email from Thames Water, dated 7 April 2016, states that the 'premises GRD FLOOR 28, CROUCH HILL…is occupied from 2011 till [sic] present and bills are paid by people (tenants) for the period they staying [sic] in property [sic]'. However, the email does not confirm that the property has been in continuous residential use. The reference to occupation 'from 2011' is also at odds with the appellant's claim that he moved in during 2010.

32. The Council suggests that no occupier of the flat has been on the electoral roll, and the unit was not registered for Council Tax until the 'owner' did so in March 2015. I would not dismiss the appeals for those reasons alone, because electoral and rating matters fall under separate legislation. However, that finding does not assist the appellant, since his own records are fatal to his case.

33. I conclude that, whenever the use of the unit as a flat commenced, the appellant has failed to demonstrate that the use continued without substantial interruption for any four year period thereafter. On the balance of probabilities, the use was interrupted for at least a year from July 2013, if not for a later period or periods – and it had not become lawful on 27 February 2014, 26 August 2015, 8 April 2016 or 5 August 2016. On the date that the notice was issued, it was not too late for the Council to take enforcement action; Appeal A fails on ground (d). In respect of Appeal B, the Council's decision to refuse to grant a LDC was well-founded.

**Overall Conclusions**

34. For the reasons given and with regard to all other matters raised, I conclude that Appeal A should not succeed. I shall uphold the enforcement notice with corrections as outlined above. The Council's refusal to grant a LDC was well-founded and Appeal B should also fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

*Jean Russell*

INSPECTOR

[4] The account number on the history statement is the same account number given on electricity bills addressed to the appellant; it is different to account numbers given on previous bills that had been addressed to 'the occupier'.