The Planning Inspectorate

Appeal Decision

Site visit made on 31 July 2017

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 7 August 2017

Appeal Ref: APP/V5570/C/17/3172816
286 Caledonian Road, London, N1 1BA

- 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 Quadvest Limited against an enforcement notice issued by the Council of the London Borough of Islington.
- The enforcement notice, numbered 09/2017, was issued on 25 January 2017.
- The breach of planning control as alleged in the notice is without planning permission, the material change of the premises from a mixed use of retail with ancillary storage at ground floor and basement levels with a one x 1 bedroom flat at first floor level and one 3 x bedroom maisonette on levels two and three to use as retail at first floor level (front) and five self-contained flats.
- The requirements of the notice are:
  1. Cease the use of Flat 1, Flat 2, Flat 3, Flat 5 and Flat 6 (as shown in drawing 1070-105 at Appendix 1 to the notice) within the premises as self-contained flats.
  2. Remove all kitchens and bathrooms from the premises apart from the kitchen and bathroom that services Flat 4, including waste materials and detritus therefrom.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (d) (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

The Notice

1. The allegation refers to the retail use being on the first floor. Both the Council and the Appellant have pointed out this error. I consider that it is obvious that the reference to 'first floor' is an error and as no injustice would be caused to either party I will correct the allegation accordingly pursuant to my powers in s.176 of the 1990 Act.

2. The allegation refers to the use of the premises as 'five self-contained flats'. The Council has asked for this to be corrected to 'six self-contained flats'. I note that the reasons for issuing the notice refer to six flats; the drawing of the premises attached to the notice identifies six flats; the drawing was provided in support of a Lawful Development Certificate application in early 2016 which was refused[1]; the requirements refer to Flats 1 – 6; and that the notice was served on the Owner/Occupier of Flats 1 - 6. Therefore, on its face and taken as a whole it seems to me that the notice is quite clearly aimed at six flats in the building as a whole. The Appellant is aware that the Council seeks a correction and was given the opportunity to comment but has not done so. I

[1] Ref P2016/1495/COLP

am satisfied that the Appellant would suffer no injustice if the notice was corrected as requested by the Council and I will do so.

3. In the ground (b) appeal the Appellant says that because the first floor flat and the maisonette on the upper floors are lawful they should not be counted as being part of the premises where the breach occurred and he asks me to reduce the scope of the allegation. It may be the case that the first floor flat and the maisonette are lawful but I have no powers to change or vary the allegation in this way because it would fundamentally alter the allegation and therefore would result in injustice to the Council. The matter raised by the Appellant is one for consideration in the ground (f) appeal.

The appeal premises

4. The appeal property is a three storey plus mansard and basement terraced property on the eastern side of Caledonian Road. At the time of my visit it appeared to me that the property had recently been renovated and redecorated in that, among other things, the bathrooms and kitchens appeared to be newly fitted and the paint-work was fresh and largely unmarked. The flats were all vacant save for the rear ground floor one.

5. Also, at the time of my visit the property comprised what appeared to be an unused shop; two flats in the basement, one x one bedroom and one x two bedroom; one x one bedroom flat on the rear ground floor; one x one bedroom flat on the first floor; and a maisonette on floors two and three comprising a lounge/kitchen, bathroom and bedroom on the second floor and two bedrooms and a bathroom on the third floor (the mansard).

The appeal on ground (b)

6. In an appeal on ground (b) the Appellant has to show that the matters alleged in the notice have not occurred.

7. I have considered the Appellant's case as put in the ground (b) appeal above. The Appellant says in his ground (f) appeal that 'the maisonette became vacant in March 2016 after which refurbishment works as a maisonette [took place]. The use of Flats 5 and 6 had already ceased by the time of the service of the notice and there is only one kitchen and the fall–back position has been implemented'.

8. An application for a Lawful Development Certificate (LDC) for separate Flats 5 (second floor) and 6 (top floor) was made in April 2016[2] and the submitted plans, one of which was the one attached to the notice[3], indicated two separate flats on those floors and six flats in total at the property. The Appellant purchased the premises in about August 2016. The Land Register, which was updated in September 2016, shows six flats at the property[4].

9. It is for the Appellant to prove his case. In stating that the use of Flats 5 and 6 had ceased it seems to me that the Appellant is acknowledging that they were in use as separate flats. The case made in the LDC application was that there were six flats at the premises. No evidence has been provided to show that the property had not been in use as six self-contained flats with a retail use as

[2] Ref P2016/1495/COLP
[3] Drawing No 1070-105
[4] Page 104 of the Council's statement

alleged. I therefore find as a matter of fact that the property was in use as a mixed use of retail and six self-contained flats as alleged. The appeal on ground (b) fails.

The appeal on ground (d)

10. In an appeal on ground (d) the Appellant has to prove on the balance of probability that at the time the notice was issued no enforcement action could be taken in respect of the alleged breach. In this case this means that the Appellant has to prove that the property was in continuous mixed use as retail and six self-contained flats for four years before the notice was issued.

11. The documentation supplied by the Appellant in respect of this ground of appeal is extremely confused and confusing given the different numbers/letters ascribed to the various Flats. The documents that have been supplied relate in the main to the basement and ground floor Flats with details relating to the upper floors confined to Thames Water confirming that water has been supplied to the First and Second Floors since 1999 and 2000 respectively[5] and EDF confirming that 'EDF Energy is the supplied for the meters (sic)' said by the Appellant to supply the first floor and the maisonette[6]. The supply of water and electricity to premises is not evidence of residential use of those floors.

12. With regard to the basement Thames Water say that 'water and waste water charges applied from 2001 and continues till 2016'[7]; Thames Water do not differentiate between the front and rear flats in the basement but merely refer to the basement flat. EDF say that they have one meter which the Appellant says is for the basement Front Flat (Flat 5) and Coop Energy say that they have been supplying energy to Flat B, which the Appellant says is the basement rear, since 2012[8].

13. Tenancy agreements refer to Basement studio flat[9], lower ground studio[10] and Flat 1[11]. The same tenant is named on the documents which date from September 2000 to August 2012 and that tenant was in receipt of Housing Benefit for Flat 1, Bst Flat RR[12]. The agreement in September 2000 is between Mr Chohan as landlord and Mr Rowlands as tenant; Mr Chohan did not sign the document and 'Direct property services, 259 Caledonian Road' is stamped as the address for service of notices[13] whereas the tenant paid his deposit to 'Saints'[14]; despite the agreement being for a six month term, the next agreement is dated March 2002 when Saints property services are acting for the landlord[15]; the landlord in March 2003 is LPI Ltd[16] and Mr Chohan is named again in later agreements although one agreement dated 25 February 2015 has no named landlord and is not signed by a landlord[17]. A new tenancy with a new tenant for 'basement flat' is dated October 2013[18]. The statutory

[5] Page 55 of the Appellant's statement
[6] Page 57
[7] Page 55
[8] Page 100
[9] Page 62
[10] Page 68
[11] Page 71
[12] Page 90
[13] Page 63
[14] Page 96
[15] Page 67
[16] Page 68
[17] Page 84
[18] Page 73

declaration by a former tenant of Flat 1 is so vague and dates from February 2015 until May 2016 only that it is of no assistance to me.

14. Tenancy agreements for Flat 5 Basement Front date from May 2007[19] and there is one for a twelve month term from 15 May 2010[20] but the next agreement in the sequence is dated 6 January 2015 with Flat 5 as the address, with no reference to the basement[21]. The next agreement has no named landlord, no landlord's signature and no address for the property the subject of the agreement save for where the tenant should sign but has not[22]. The EDF Bills said to be for the basement front are addressed to Miss Lopes at ground floor front and date from November 2014[23].

15. Agreements dated October 2004[24] and January 2005[25] are said to be for Flat 2 on the ground floor but the address of the property is given as 286 Caledonian Road with no Flat designation. Flat 2 is named on an agreement dated 20 August 2008[26] and the words 'Flat 2' have been inserted in writing on an agreement dated 22 February 2014 for the ground floor[27]. Electricity bills for Flat A date from November 2015[28].

16. A letter from the Council to the then owner, Mr Chohan, dated June 2004[29] says that the property has been split into five self-contained flats and seeks responses to a number of questions. The response[30] includes information that Mr Rowlands took up residence of Flat 1 on 19 March 2003 but I have been provided with a tenancy agreement dated September 2000. With regard to Flat 2, Ms Loren was said to have taken up residence on 18 March 2003 but I do not have that agreement and the agreement dated October 2004 is to different tenants. Flat 5 was vacant at that time. The response refers to a demand for Council Tax being attached but this has not been submitted.

17. Mr Chohan has provided a statutory declaration dated 7 February 2016[31] in which he says, among other things, that he and another person, purchased the property in 1993/1994; that its current layout is a shop on the ground floor and five flats; the layout has been the same since 2000; that the flats have been let since 2006; and continuously for at least the past four years. Mr Chohan does not exhibit any documents to his declaration, he refers to five flats only, his comments are assertions which lack detail and they do not reflect the dates in the various tenancy agreements. I give this document very little weight.

18. The Council has provided evidence in the form of photographs taken on 18 July 2013 which show extensive works being undertaken at the premises when at least some of the flats were vacant and when I understand Mr Chohan was the owner. Whilst I accept that flats are often vacant for short periods for

[19] Page 103
[20] Page 106
[21] Page 107
[22] Page 110
[23] Appendix E Pages 116 and 119
[24] Page 123
[25] Page 126
[26] Page 129
[27] Page 133
[28] Page 144
[29] Page 40
[30] Page 41
[31] Page 48

redecoration and refurbishment the works appear to be significant and omission of them from Mr Chohan's statutory declaration is surprising.

19. Even if the documents produced were specific and unambiguous as is necessary to prove this ground of appeal and they showed a continuous occupation of the basement flats and the ground floor flats, which they do not because of the discrepancies detailed above and the gaps in the dates of the agreements, no documents have been produced relating to the occupation of the flats on the upper floors or the retail use. In order to succeed on this ground of appeal the Appellant has to prove that all of the six flats alleged in the mixed use as stated on the notice were continuously occupied for the relevant period and I find that the Appellant has not achieved this.

20. The appeal on ground (d) fails.

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

21. In this appeal and in the deemed planning application the Appellant is, in effect, seeking planning permission for what is alleged in the notice, that is, a mixed use of the premises as retail and six self-contained flats.

22. From the reasons for issuing the notice the main issues to be considered are whether the Flats provide adequate living conditions in terms of floor space, layout natural light, outlook, sunlight and daylight, ventilation and accessibility; whether the mixed use provides an adequate mix of housing; and whether a financial contribution for the delivery of affordable housing is required.

Living conditions

23. Policy DM3.4 of the Council's Development Management Policies requires all housing developments to provide accommodation that is, among other things, of adequate size with an acceptable layout of rooms. The Policy refers to the Council's minimum space standards which provide for a gross internal floor area of 37 sq m for a single bedroom flat.

24. The basement rear flat has a gross internal area of some 40 sq m[32]; the basement front flat is 49 sq m which is 12 sq m below the standard for a two bedroom flat; and the ground floor flat is 28.5 sq m. The Appellant has not provided areas for the upper floor flats because of the contention that they have a lawful use but the application I am considering is for six flats at the property. From drawing 1070-603 it appears that the first floor flat is 32 sq m and the flats on the second and third floor together total 68 sq m.

25. Whilst I accept that the flats are generally well laid out with separate living/kitchen areas, bedrooms and bathrooms they are all compact with some falling short of the minimum space standards. In addition the living rooms were combined with the kitchens and did not meet the normal standard that kitchens should be separate from living rooms (Criterion iv)). The total development therefore fails to comply with Policy DM3.4.

26. The front basement flat is subterranean with no natural light. At the time of my visit it appeared that lightwells from the ground floor were being inserted/renovated but these did not dispel the unaired, gloomy and oppressive

[32] Measurements from the Appellant's statement paragraphs 6.5 – 6.9

nature of the flat. I consider that all of the rooms in the front basement flat are totally unacceptable for human habitation.

27. None of the flats are, or could be, accessible for wheelchair use but I do not consider that this is unusual in developments of this type.

28. The rear basement flat and the ground floor flat have access to the rear of the site. I do not call it a garden because at the time of my visit it was a neglected, derelict and uninviting space that I consider no one would wish to go into. In addition the steps up from the basement looked dangerous to use and they were blocked by discarded white goods. The outlook from the rear basement flat was onto these steps and it was therefore an unattractive and oppressive one.

29. Taking the development as a whole I conclude that the six flats provide inadequate living conditions and that the six flats fail to comply with Policy DM3.4.

Mix of housing

30. Within the development of six flats five of them have one bedroom and the two bedroom flat is, to my mind, uninhabitable. Whilst I accept that, given the location and layout of the premises, any residential accommodation within it may not be suitable for family use, the premises could provide a mix of housing. But six flats does not provide a good mix of housing sizes as required by Policies DM3.1 and DM3.3

Affordable housing

31. With regard to the provision of affordable housing the Appellant's case relies on a submission that the Secretary of State's Written Ministerial Statement (WMS)[33] and the Planning Practice Guidance (PPG) outweigh the Development Plan and the Islington Affordable Housing Small Sites Contributions Supplementary Planning Document 2012 (SPD) but no evidence has been submitted to support this submission.

32. Policy CS12 of the Council's Core Strategy seeks to provide high quality, inclusive and affordable homes through, among other things, securing affordable housing
on sites capable of delivering ten or more units; schemes below this threshold will be required to provide a financial contribution towards affordable housing elsewhere. The reasons for this approach are explained in the supporting text and in the SPD which refers in turn to relevant aspects of policy found in the London Plan[34]. The SPD sets out a tested viability requirement for a contribution of £50,000 per new dwelling[35] .

33. The approach in Policy CS12 is broadly consistent with the Nation Planning Policy Framework (the Framework)[36] which requires local planning authorities to meet the full, objectively assessed needs for market and affordable housing and where they have identified that affordable housing is needed, set policies for meeting this need on-site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified. The intention

[33] Dated 28 November 2014
[34] Policy 3.3
[35] Or higher in areas where sales prices are higher
[36] Paragraphs 47 and 50

of the WMS is to ensure that financial contributions do not become a disproportionate burden for small scale developers and thus frustrate housing supply. Its mandatory terms are translated into national PPG[37]. There is therefore a conflict between the WMS and the PPG and Policy CS12 which is consistent with the Framework

34. Neither the WMS nor the PPG alter the statutory basis for determining proposals in accordance with the Development Plan unless material considerations indicate otherwise. The WMS and the PPG are material considerations of substantial weight. However, the need to encourage new house building has to be balanced against the contribution that small sites make towards providing affordable housing.

35. The Council's unchallenged statement is that the area has a significant proportion of households that earn less than £20,000 per annum; there is severe need for affordable housing; house prices and rents continue to rise considerably; and a substantial amount of new housing comes forward through developments of ten units or less. The Council says that its approach to viability testing ensures that contributions would not necessarily burden a small-scale developer and is consistent with the justification for Policy CS12.

36. It seems to me that small sites such as this play an important role in achieving the Council's aim of delivering homes for all of its residents together with meeting the identified need for affordable housing. The Council's case shows significant reliance upon small sites in delivering much needed affordable housing. On the basis of the Council's statement, I consider that if the requirements in Policy CS12 and the SPD were not taken into account housing delivery would be undermined and adversely affected.

37. The purpose of the WMS and the PPG is to exempt small sites from the need to provide affordable housing contributions and thus avoid a disproportionate burden of such contributions on small-scale developers, custom and self-builders but no evidence has been submitted by the Appellant to show that the development is unviable if a contribution has to be made.

38. I consider that the undisputed local circumstances justify a finding that Policy CS12 and SPD are not outweighed by the WMS and the PPG. In this respect I note the many appeal decisions referred to by the Council that support this view.

39. I therefore conclude that because the development at the appeal property makes no provision for affordable housing it does not comply with Development Plan policy and it has a harmful effect on the supply of affordable housing.

Mixed use

40. Neither the Council nor the Appellant make any reference to the retail use of the property. I noted on my visit that the retail part was vacant and from the drawing[38] it appears to comprise one single room of some 36 sq m with no facilities or services. I therefore question its use as a viable retail space but acknowledge that the lawful use is a retail one.

[37] Planning Practice Guidance paragraph 031 reference ID: 23b-031-20161116
[38] Drawing No 1070-602

Conclusion

41. I therefore conclude that the change of use of the property to retail at ground floor level (front) and six self-contained flats would have an adverse effect on living conditions; would not provide an adequate mix of housing; and that a financial contribution for the delivery of affordable housing is required and has not been made. The development is therefore contrary to Policies DM2.1, DM3.1, DM3.3 and DM3.4 of the Islington Development Management Policies; CS12 of the Islington Core Strategy; and Policy 3.5 of the London Plan.

The appeal on ground (f)

42. In an appeal on ground (f) the Appellant is saying that the steps required by the notice exceed what is necessary to remedy the breach.

43. The first floor flat (Flat 4 on the notice) is lawful and this has been accounted for in the requirements because they do not apply to that Flat.

44. At the time of my visit the second and third floors had been laid out as a maisonette which is the lawful use and there was no kitchen on the top floor or division between the floors. In this respect the notice had been partially complied with insofar as those upper floors were concerned. I appreciate the Council's view that the requirement to cease the use of these floors as separate flats (Flats 5 and 6 on the notice) should remain to prevent any use as such in the future. However, given the works that have been done and the lawful use of the upper two floors I consider it unnecessary to require the removal of the kitchen on the second floor (Flat 5) and the bathroom on the third floor (Flat 6) and I will vary the notice accordingly.

45. The appeal on ground (f) succeeds to that limited extent.

The appeal on ground (g)

46. In an appeal on ground (g) the Appellant is saying that the period specified for compliance falls short of what should reasonably be allowed. The Appellant asks for one year to reconvert the basement and ground floor into storage and ancillary retail space.

47. The property is vacant save for the tenant in the ground floor flat and no details of the terms of her occupancy have been provided. It may well be that the tenancy will expire through the passage of time within the compliance period of the next six months. If it should not be sufficient the Council is aware of its powers in s.173A(1)(b) of the Act to extend the period for compliance should it be necessary to do so.

48. The works required are limited and would not, in my view, take longer than six months to implement.

49. The appeal on ground (g) fails.

Conclusions

50. For the reasons given above, and taking all other matters into account, I conclude that the requirements are excessive and I am varying the enforcement notice accordingly together with corrections to the allegation prior to upholding it and I refuse to grant planning permission on the deemed application.

Decision

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

1) In Schedule 2 the deletion of the words 'retail at first floor level (front) and the substitution of the words 'retail at ground floor level (front)'; and

2) In Schedule 2 the deletion of the words 'five self-contained flats' and the substitution of the words 'six self-contained flats';

and varied by:

3) In Schedule 4 requirement 2 the insertion of the words after Flat 4 '(first floor) and Flat 5 (second floor) and the bathroom that services Flat 6 (third floor)'.

Subject to these corrections and variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Gloria McFarlane
Inspector