



Appeal Decisions

Inquiry Held on 30 July 2019

Site visit made on 30 July 2019

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 September 2019

Appeal A: APP/U5360/C/18/3197581

80 Dunsmure Road, Hackney, London N16 5JY

- 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 The Manager, Fairdeal Housewares against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The enforcement notice was issued on 26 February 2018.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of fencing at first floor level to facilitate the creation of a roof terrace; the erection of an outbuilding at first floor level; and the material change of use of the rear of the commercial unit to use as 2 self-contained flats.
 - The requirements of the notice are:
 - 1) Cease the residential use of the basement of the property;
 - 2) Remove all internal partitions, doors, facilities, kitchen and bathroom fixtures and fittings that facilitate the unauthorised use of the basement level as self-contained flats;
 - 3) Remove the fencing erected at first floor roof level;
 - 4) Remove the timber outbuilding at first floor roof level;
 - 5) Make good all damage to the property resulting from the removal of the unauthorised works; and
 - 6) Remove from the property all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.
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Appeal B: APP/U5360/X/18/3207965

80 Dunsmure Road, Hackney, London N16 5JY

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Fairdeal Estates Ltd against the decision of the Council of the London Borough of Hackney.
 - The application Ref 2018/1573, dated 3 May 2018, was refused by notice dated 9 July 2018.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is "two x 1 bedroom basement flats as shown on submitted AJ lease plan".
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Appeal A) Decision

1. It is directed that the enforcement notice is corrected by:
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- Deletion of the words “and the material change of use of the rear of the commercial unit to use as two self-contained flats” within section 3; and
 - Deletion of requirements 1 “Cease the residential use of the basement of the property” and requirement 2 “Remove all internal partitions, doors, facilities, kitchen and bathroom fixtures and fittings that facilitate the unauthorised use of the basement level as self-contained flats” within section 5.
2. Subject to the corrections, the appeal is dismissed and the enforcement notice is upheld.

Appeal B) Decision

3. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Preliminary Matters

4. It was clarified at the Inquiry that the appellant in both appeals is Fairdeal Estates Ltd.
5. A partial application for costs was made by Fairdeal Estates Ltd against the London Borough of Hackney prior to the Inquiry with respect to Appeal B. The appellant changed their stance at the inquiry so as to seek a full award of costs for both appeals. The applications will be the subject of a separate Decision.
6. All evidence to the inquiry was given on oath.

Site and Development

7. The appeal site is on the northern side of Dunsmure Road. It is a terraced property which has a basement, ground floor, first floor and also living accommodation within the roof-space. A housewares shop faces the street at ground floor level and there is associated retail storage space within the basement. The 2 flats have been formed within a rear extension of the basement level and are accessed from an alley that runs along the rear of the terrace leading from the road to the side, West Bank.
8. The enforcement notice being considered in Appeal A relates to the 2 ground floor flats as well as operational developments at first floor level. The LDC being considered in Appeal B relates to the use of the 2 ground floor flats.

Appeal A on Ground (d) and Appeal B

9. Appeal A is proceeding on ground (d) which is that, at the date that the notice was issued, it was too late for the Council to take enforcement action. The appellant seeks an LDC under Appeal B also on the basis of immunity from enforcement action. The onus is on the appellant to make their case on the balance of probabilities.

Use of Flats 1 and 2 – Appeals A and B

10. Under s171B(2), no enforcement action may be taken after the end of the period of 4 years beginning with the date of a breach of planning control consisting in the change of use of any building to use as a single

dwellinghouse. There is no dispute that the appeal flats are self-contained and represent dwellinghouses for the purposes of s171B(2).

11. For Appeal A to succeed on ground (d) in relation to the alleged change of use, the use of each flat must have commenced by at least 26 February 2014 – 4 years prior to the date of issue of the notice. For Appeal B to succeed and an LDC to be granted, the use must have commenced by at least 3 May 2014.
12. It is also necessary to consider whether the use took place without substantial interruption for a four year period and, for Appeal B, whether the use was in contravention of any of the requirements of any enforcement notice then in force¹. I must look at each flat separately; it is possible that the use of one could be immune from enforcement action but not the other.
13. When determining the date of a material change of use to a dwellinghouse, there are two key factors to consider, neither of which is decisive: when the premises contained viable facilities for living, and when the use began. In this case, much of the dispute between the parties turns on when the basement extension was completed and fitted out internally so as to enable residential use.

Reasons

The Flats

14. Mr Roth for the appellant gave evidence to the inquiry. He was working for CPM Services Ltd who were instructed to convert the rear section of the basement to 2 flats by the previous owner of the property, Mr Rosenbaum. In his evidence Mr Roth confirmed that the works were complete by 31 October 2013, that being the date of an invoice for the work which was appended to the appellant's planning witness' proof of evidence. Under cross examination, Mr Roth said that the toilet, shower, tiles and flooring, windows and doors were in place at that time although some external works were undertaken after that point such as installation of drainage pipes and lighting. Other works continued to the wider property renovation after the flats were available for use.
15. Mr Perlman who is a director of the appellant company and a former tenant of flat 2 also gave evidence to the Inquiry. His assured shorthold tenancy agreement (AST) was entered into on 2 December 2013 with the previous owner of the property. Mr Perlman stated that he occupied flat 2 from around that time as it was convenient for him whilst taking over in setting up the shop business. He moved out of flat 2 in October 2014.
16. A tenancy agreement was entered into with respect to flat 1 which is dated 30 December 2013 by Mr Frish who was not available to give evidence to the inquiry. Mr Perlman recalled Mr Frish and that he had moved into flat 1 around January 2014. Signed declarations from nearby shop owners have been provided to confirm that the 2 flats were occupied from 2013.
17. The Council has produced photographs and notes from site visits carried out by officers who have visited the site with respect to enforcement investigations. In particular, they rely upon those notes and photographs from a site visit undertaken on 12 December 2013. The Council suggest that this evidence

¹ s191(2)(b)

demonstrates that the extension had not been fitted out internally to provide viable facilities for residential use at that time or alternatively that living conditions would be unacceptable during construction work.

18. A photograph showing the shop unit being refurbished is suggested as being sufficient evidence to indicate that noise and dust would negatively affect any residential occupation of the basement flats. Mr Roth explained in his evidence to the inquiry that heavy work such as changing joists had been undertaken before that time. He said that the internal photograph taken by the Council investigating officer showed the shop where shelving was being fitted and that only light-work was being undertaken by then.
19. Another photograph taken on 12 December 2013 by the same investigating officer shows a conveyer belt protruding from the window cavity of flat 1. Mr Roth explained that flat 1 had been completed before 12 December 2013 but that a foul water drainage problem had been reported to him. This necessitated the taking out of soil and fixing of the pipework. He stated that the conveyor at the time of the 12 December 2013 site visit was taking dry material back into flat 1 to fill-in the resultant void in the floor following this work. In cross examination, Mr Roth clarified that the work to fix this problem took around a week and was possible in a short time frame as workers were on site anyway, working on the wider renovations. The conveyor and wheelbarrow in the Council's photograph is at a higher level than the stairs down to the doors of those properties but it was explained that this was on a board that rested on a wall and was also propped up. This seems to me to be a credible explanation from what I saw at my site visit and from what the photograph shows.
20. It was also clarified by both Mr Roth and Mr Perlman that this and the wider continuing renovations were undertaken during the day when Mr Perlman was at work in the shop rather than in the flat. Mr Perlman did confirm that the work only took a few days and that the building activities did not interfere with his enjoyment and occupation of flat 2.
21. The Council's case is also reliant upon the notes from the officer who investigated these matters. The notes did not however mention noise or dust being of particular concern at that time and there was no apparent internal inspection of the flats. The Council have interpreted these photographs and assessed that they provided sufficient evidence to justify taking enforcement action without going back to the appellant to obtain an explanation about the circumstances. The officer who carried out those site visits is no longer employed by the Council and was not available to give evidence to the inquiry. Obtaining additional information from former officers is clearly problematic when they have moved to pastures new.
22. The Council therefore had to interpret the evidence in their possession as best as they could. The evidence provided by the appellants included, amongst other documents, an invoice for the works carried out to the flats dated 31 October 2013, tenancy agreements for both flats dated well in advance of the material date and evidence under oath from 2 people who had first-hand knowledge of the site at significant times.

23. The documentary evidence was backed up by what I found to be very credible evidence from Mr Roth and Mr Perlman to the inquiry. In the circumstances I consider that the appellant has shown clearly and unambiguously that both flats had viable facilities by December 2013. Furthermore, they have shown that the residential use of flat 2 also commenced in December 2013 and flat 1 in January 2014. In the circumstances, the appellant's evidence is more reliable than the Council's. There is no dispute that since initial occupation, both flats have remained in residential use and that is backed up by tenant summaries.
24. It appears therefore, on the balance of probability, that the residential use of both flats began more than 4 years prior to the date of issuing of the enforcement notice and has continued without material interruption for over 4 years. The residential use of both flats was already immune from enforcement action by the time that the enforcement notice was issued. Due to my findings with respect to Appeal A, the enforcement notice will be corrected to remove reference to the material change of use within the alleged breach of planning control. The material change of use also took place more than 4 years prior to the date of the application for the LDC and so Appeal B will be allowed.

Fencing and Outbuilding

25. Where there has been a breach of planning control consisting of operational development, s171B of the Act states that no enforcement action may be taken after the end of the period of 4 years beginning with the date on which the operations were substantially completed.
26. There is no dispute between the parties that the outbuilding, a timber shed, at first floor level at the rear of the appeal site was not in place more than 4 years prior to the issuing of the notice.
27. Fencing exists at first floor level to the side of the rear outrigger of the upper parts of the dwelling. The Council's witness said that the notice was directed at this fence as well as a temporary panelled enclosure, now removed, which Mr Perlman explained was a 'sukkah'. A sukkah is an open roofed enclosure which is used during a Jewish festival where people eat and sleep outside.
28. The posts at the rear-most part of the fence extend upwards, higher than the panels, forming a rectangular frame. It is not clear whether that frame is a part of the sukkah when that is in place. Even if it is, the fence does not rely upon the sukkah for its purpose of enclosing the terrace.
29. The fence in its present form, without the sukkah, is shown in a 'Google' image dated August 2014. Even if the date is correct and it is not verified, it is several months after the material date. An invoice dated 6 December 2013 was sent to the previous owner at the property itemising a "fence built on terrace". It was not verified by the appellant's witnesses that the fence was in position in the early part of 2014 and the sender of the invoice has not provided evidence to confirm the situation. Other than the address that the invoice was sent to, there is nothing to verify that the fence was built on that particular terrace and there is therefore a degree of assumption being applied to this document by the appellant that limits the weight that I can put to it.

30. On this basis, I consider that it has not been demonstrated on the balance of probabilities that the erection of fencing at first floor level to facilitate the creation of a roof terrace along with the erection of an outbuilding at first floor level have not, on the balance of probabilities, been completed more than 4 years prior to the issuing of the notice.

Appeal A) Conclusion

31. I conclude on the balance of probabilities that the alleged material change of use took place more than 4 years prior to the issue of the enforcement notice. Therefore at the date that the enforcement notice was issued, the time for taking enforcement action as set out in section 171B(2) of the 1990 Act as amended had expired with respect to that development. The ground (d) appeal succeeds in so far as it relates to the flats and I will correct the notice accordingly.

32. However, again on the balance or probabilities, the alleged fencing and outbuilding as described on the enforcement notice does not appear to have been completed more than 4 years prior to the issue of the enforcement notice and the time for taking enforcement action had not expired. To that extent the appeal should not succeed and I shall uphold the enforcement notice with respect to those matters.

Appeal B) Conclusion

33. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of 2 x 1 bedroom basement flats as shown on the submitted AJ lease plan was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

A Harwood

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Fullbrook of counsel

Instructed by Mr Coward

He called:

Mr Coward MRTPI

Planning consultant

Mr Roth

Cazenove Estates

Mr Perlman

Director of Fairdeal Housewares Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Miss Rokad of counsel

Instructed by the Solicitor to the Council of the
London Borough of Hackney

She called:

Mr Kirk

Planning officer

DOCUMENTS

- 1 Statement of Common Ground
- 2 Email trail between the parties starting with 25 March 2019
- 3 Notification letter of inquiry details
- 4 Letter from the appellant that had accompanied the LDC application
- 5 Council printout of received documents for LDC

Photographs

- 1 Three Images showing rear of the property at various dates



The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 3 May 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and cross-hatched in black on the plans attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The use of the premises as two x 1 bedroom flats commenced, on the balance of probabilities, in January 2014 in the case of Flat 1 and December 2013 in the case of Flat 2. The use of each flat then took place without substantial interruption for a period of four years.

Signed

A Harwood

Inspector

Date 9 September 2019

Reference: APP/U5360/X/18/3207965

First Schedule

Two x 1 bedroom basement flats as shown on the submitted AJ lease plan (Plan 2 below – position of the flats are cross-hatched)

Second Schedule

Land at 80 Dunsmure Road, Hackney, London N16 5JY

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan 1

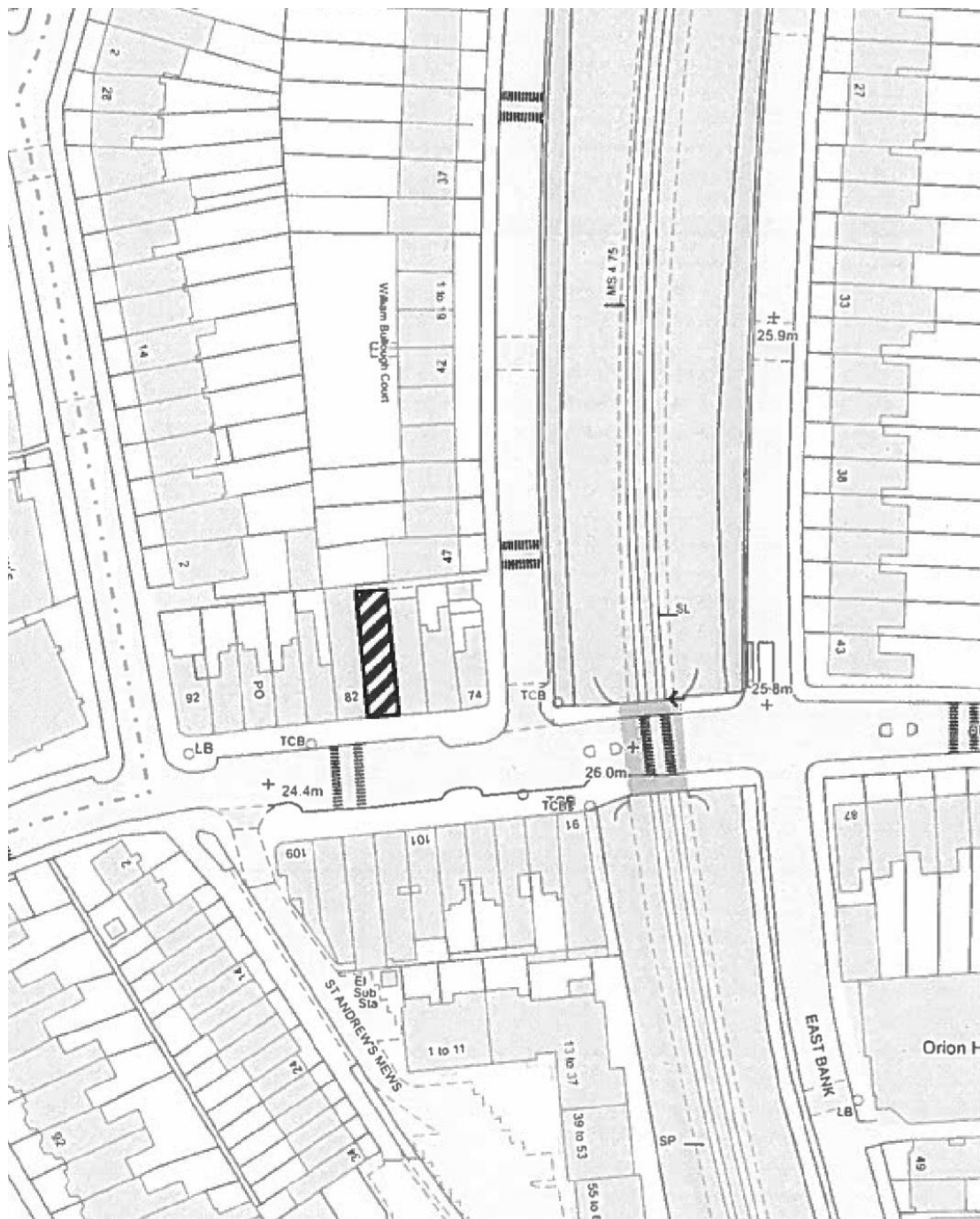
This is the plan referred to in the Lawful Development Certificate dated: 9 September 2019

by **Andy Harwood CMS MSc MRTPI**

Land at: 80 Dunsmure Road, Hackney, London N16 5JY

Reference: APP/U5360/X/18/3207965

Scale: Not to scale





The Planning Inspectorate

Plan 2

This is the plan referred to in the Lawful Development Certificate dated: 9 September 2019

by Andy Harwood CMS MSc MRTPI

Land at: 80 Dunsmure Road, Hackney, London N16 5JY

Reference: APP/U5360/X/18/3207965

Scale: Not to scale

