



Appeal Decision

Site visit made on 22 November 2019

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 28 November 2019

Appeal Ref: APP/C5690/C/18/3217341 305 Stanstead Road, London SE23 1JB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr J Gutstein of Tangier Estates Ltd against an enforcement notice issued by the Council of the London Borough of Lewisham.
- The enforcement notice was issued on 11 October 2018.
- The breach of planning control as alleged in the notice is without planning permission, the erection of a part single, part two storey rear extension and the material change of use of the property to use as three self-contained flats and a retail unit.
- The requirements of the notice are:
 1. Cease the use of the ground floor of the building as a dwelling;
 2. Remove the kitchen fixtures, fittings and drainage connections that facilitate the use of the ground floor as a dwelling;
 3. Remove all bathroom fixtures, fittings and drainage connections which facilitate the use of the ground floor as a dwelling;
 4. Remove the unauthorised ground floor rear extension;
 5. Remove the partition wall at ground floor level which divides the unauthorised dwelling from the retail unit;
 6. Provide the bin and bike storage areas shown hatched blue on Approved Drawing 305SR-PP1-01 Rev B (dated 26/11/13) of planning permission DC/13/084142;
 7. Make good any damage resulting to the premises from the carrying out of requirements 2-5 above.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (f) of the 1990 Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Preliminary Matters

1. The appeal property is a three-storey extended building comprising a ground floor retail unit and three self-contained flats. Planning permission has been granted for the retention of the retail unit, a rear extension, external alterations and the change of use of the property to provide two self-contained flats on the upper floors¹. The approved extension at first and second floor level was supported by posts, which maintained a proportion of the rear yard underneath for the use of the occupants. However, the scheme as built includes a ground floor extension, below that approved on the upper floors, which has enabled the creation of a third self-contained flat, accessed from the rear of the building.

¹ Ref DC/13/084142 dated 7 March 2014.

2. The appellant argues that the allegation should relate to the creation of an additional residential unit as it is only this part of the works that are targeted in the requirements. I have therefore considered whether it is necessary and appropriate for me to use my powers to correct or vary the allegation.
3. The Council has chosen to identify the breach as relating to the whole building. It considers the development has not been carried out in accordance with the approved plans and is unauthorised. This is not an incorrect approach as the Council is entitled to 'under-enforce' by only targeting the ground floor in its requirements. Consequently, I do not consider it necessary to correct the allegation.

The appeal on ground (b)

4. On order to succeed on a ground (b) appeal, the appellant must show on the balance of probability that the matters alleged have not occurred as a matter of fact. The starting point is the allegation, which concerns the erection of a part single, part two storey rear extension and the material change of use of the property to three self-contained flats and a retail unit.
5. There is no dispute that the matters alleged have occurred. Rather, the appellant submits that the works were completed in accordance with the planning permission and then altered to create the new unit on the ground floor. This argument is more appropriately considered under ground (c), below.
6. I conclude on this matter that it has not been shown that the matters alleged have not occurred as a matter of fact, hence, the appeal on ground (b) must fail.

The appeal on ground (c)

7. In order to succeed on a ground (c) appeal, the appellant must show on the balance of probability that the matters alleged do not constitute a breach of planning control.
8. I am referred to an email from the project manager² confirming that the development was constructed in accordance with the planning permission. After completion he was instructed to fill in the rear extension flush with the first and second floors to create a flat at the rear of the ground floor.
9. From my site visit I saw no visual evidence that the extension had been constructed as approved and then altered. The brickwork suggests the development occurred as one continuous operation. There are no discernible supporting posts, for example, which I would have expected to see had the work been carried out in two phases. I appreciate that the ground floor may have been entirely re-faced in brick but this unlikely as the brickwork is flush with the upper floors. Overall, the appellant's evidence on this matter is very limited. Even if I were to accept to appellant's argument, it would still be necessary to show that the subsequent infilling of the ground floor and creation of a residential unit does not amount to a breach of planning control.
10. Section 55(1) of the 1990 Act as amended sets out that "development" means "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change in the use of any

² Dated 14 November 2018.

buildings or other land". "Building operations" includes structural alterations of or additions to buildings. Under section 55(2) works which affect only the interior of the building or do not materially affect the external appearance are excluded from the definition of development.

11. In this case, the infilling of the ground floor involved a structural alteration or addition to the building and constituted a building operation. The works materially affected the external appearance and amount to development within the meaning of s55. Section 57 states that planning permission is required for development. There is no evidence of planning permission for the building operations that resulted in the infilling of the ground floor. Moreover, the appellant accepts that the works have enabled the creation of an additional self-contained flat which constitutes a material change of use.
12. For completeness, I have considered whether the development would fall within that permitted by virtue of Article 3 and Schedule 2, Part 3, Class M of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GDPO). M.(a) and (b) permits the change of use of a building from a shop within class A1 of the Schedule to the Use Classes Order to a use falling within Class C3 (dwellinghouses) together with buildings operations reasonably necessary to convert the building. However, the permitted development right is subject to the condition that the developer applies to the local planning authority for a determination as to whether prior approval is required for specified matters. As no prior approval was sought, the permitted development right cannot apply in this instance.
13. I conclude on this matter that the works alleged amounted to development for which permitted development rights do not apply. That conclusion would be the same if I were to accept the appellant's argument about the phased method of construction. As there is no specific planning permission for the matters alleged, this constitutes a breach of planning control. Therefore, the appeal on ground (c) must fail. The fact that there is permission for part of the works does not alter this finding but is relevant to the appeals on grounds (a) and (f), which I consider below.

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

Preliminary Matters and Main Issues

14. The appeal on ground (a) is that planning permission should be granted for the matters stated in the notice. The terms of the deemed planning application are derived from the allegation. As such, planning permission is sought for the erection of a part single, part two storey rear extension and the material change of use of the property to use as three self-contained flats and a retail unit.
15. The main issues are: (i) whether the development provides adequate living conditions for the occupiers of the ground floor flat with regard to light, outlook and privacy; and (ii) whether the development provides adequate living conditions for the occupiers of the upper floor flats with regard to amenity space.

Reasons

16. The minimum space standards for new dwellings are set out in Policy 3.5 and Table 3.3 of the London Plan (2016), which are consistent with the Nationally Described Space Standard (DCLG: 2015). The standards require 39 square metres (sqm) for a one bedroom flat, where occupied by a single person, plus 1sqm for storage. This may be reduced to 37sqm where a shower room is provided in place of a bathroom, as in this case. The appellant's plan shows a floor space of 37.5sqm, which is marginally below the standard when taking account of the need for storage space.
17. There is a dispute about the levels of floorspace provided. The Council claims that the floorspace is inadequate, especially if occupied by more than one person which would require a minimum of 50sqm. If I were to accept the appellant's figures, it would also be necessary to consider the requirements of DM Policy 32 of the Local Plan³ relating to light, aspect, outlook and privacy. I saw that the ground floor unit has very limited natural light and ventilation. There is a single window on the rear wall of the living room/kitchen to which light is significantly reduced by the rear addition/extension. The outlook from this window is into part of the rear yard, an area used by the occupiers of the upper floor flats for access. This window allows direct views into the main living space of the ground floor flat, which adversely affects the occupant's privacy. A further window at the rear also allows direct views which into the bedroom of the ground floor flat. To protect privacy, it is highly likely that the occupier would keep the curtains closed, as they were during my site visit.
18. The lack of natural light, combined with the poor outlook and measures to mitigate the lack of privacy associated with the rear windows, results in a dark and oppressive living room. The occupants would be reliant on artificial lighting during the daytime, which is unsatisfactory. The room is not dual aspect, contrary to the policy, and there are no other factors that would allow an exception to be made in this instance. The substandard quality of accommodation is exacerbated by the relatively small size of the flat, which is marginally below the floor space standards if occupied by one person, and the lack of privacy resulting from the ground floor windows.
19. I have taken account of the appeal decisions at 245 Stanstead Road⁴ insofar as they are relevant. The full details are not before me, but I note that the Inspector found the light reaching the one-bedroomed unit on the ground floor to be more than adequate. This is a marked contrast to my findings on this issue and indicates a significant difference in the site-specific circumstances that warrant a different conclusion in this case.
20. I find that the development does not provide adequate living conditions for the occupiers of the ground floor flat with regard to light, outlook and privacy. It fails to comply with Policy 3.5 of the London Plan and DM Policy 32 of the Local Plan which seek, among other things, to secure high quality residential development.
21. The ground floor extension has resulted in a reduction in the size of the yard area. However, I saw that there is adequate space remaining for a bin store and for three cycle racks. I accept that the size of the amenity space has been

³ Lewisham Development Management Local Plan (November 2014).

⁴ Refs APP/C5690/W/15/3133186 and 3137556 dated 20 January 2016.

- reduced from that envisaged when planning permission was granted. However, I am not satisfied that the amenity area provided in the approved scheme was usable in any event, given the area in question would have been underneath the first and second floor extensions.
22. Furthermore, my attention is drawn to the proximity of public open spaces in the vicinity, which are reasonably accessible from the appeal premises and provide adequate mitigation.
23. Therefore, having particular regard to the fallback position provided by the approved scheme, I do not consider that the development has a material adverse effect on the living conditions of the occupiers of the upper floor flats with regard to amenity space and outdoor storage. The development meets the aims of Policies 3.5 and 6.9 of the London Plan, DM Policy 32 of the Local Plan and Policies 7 and 14 of the Core Strategy (2011) which, among other things, seek to ensure quality residential development and promote alternative forms of transport.
24. This does not overcome my concerns about the living conditions provided by the ground floor flat. The appellant claims a valid fallback position in that permitted development rights would allow an application for prior approval for the creation of the ground floor flat. It is by no means certain that the local planning authority would give that approval, however, and this consideration carries limited weight. I appreciate the development is well-located for access to services and it would make a very small contribution to local housing need. These considerations do not outweigh my concerns about the standard of accommodation.
25. I have considered whether there is an obvious alternative short of demolition that would allow me to grant permission for the ground floor extension. No such suggestion has been put to me and it is not apparent that the ground floor extension could be retained and put to a lawful use. Therefore, for the reasons given above, I conclude that the appeal on ground (a) should fail.

The appeal on ground (f)

26. The appellant has appealed under ground (f) on the basis that the steps required by the notice to be taken exceed what is necessary. It is argued that requirements 4, 5 and 6 serve no purpose.
27. Section 173 of the 1990 Act as amended indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first is to remedy the breach of planning control which has occurred. The second is to remedy any injury to amenity which has been caused by the breach. The requirements target the ground floor flat since this is the element of the scheme which deviates from the planning permission, in the Council's view. The notice is directed at remedying the breach of planning control and what must be considered is whether the requirements exceed what is necessary to achieve that purpose.
28. Requirements 1, 2 and 3 are to cease the use of the ground floor flat and remove the works that are part and parcel of, and integral to the unauthorised use. The kitchen and bathroom facilitate the use of the ground floor as a self-contained flat and their removal is necessary to prevent the breach re-occurring. As explained above, it is not apparent that these facilities could be

retained in association with a lawful use. The appellant is not seeking to increase the size of the retail unit as it is explained that this would lead to a higher rent.

29. Requirements 4, 5, 6 and 7 are seeking, in combination, to make the development accord with the planning permission DC/13/084142, although requirement 6 goes further by seeking the provision of bin and bike storage areas. This requirement goes beyond what is necessary to remedy the breach.
30. Therefore, I propose to vary the requirements by replacing 4–7 with a single requirement to make the development accord with the planning permission. This would remedy the breach of planning control and achieve the purpose behind the notice.
31. The appeal on ground (f) succeeds to this limited extent.

Conclusion

32. For the reasons given above, I conclude that the appeal should succeed on ground (f) only. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the deemed planning application.

Formal Decision

33. It is directed that the enforcement notice be varied by the deletion of requirements 4, 5, 6, and 7 [numbered incorrectly on the notice as 4, 5, 5 and 6] in their entirety and their replacement with a new requirement 4 as follows:
- “Alter the development so that it accords with planning permission Ref DC/13/084142 dated 7 March 2014, approved plan Ref 305SR-PP1-01 Rev B.”
34. Subject to this variation, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Debbie Moore

Inspector