



Appeal Decision

Site visit made on 8 July 2020

by A A Phillips BA(Hons) DipTP MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 July 2020

Appeal Ref: APP/A5840/C/19/3233781

46 East Dulwich Road, London SE22 9AX

- 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 David C Lewis against an enforcement notice issued by the Council of the London Borough of Southwark.
- The enforcement notice was issued on 17 June 2019.
- The breach of planning control as alleged in the notice is the material change of use of the property by the subdivision of the upper floors into four self-contained flats.
- The requirements of the notice are:
 1. Cease the use of the upper floors of the Property as four self-contained flats.
 2. Remove all kitchens and bathrooms that facilitate the use of the building as multiple self-contained flats.
 3. Remove any resultant debris from the Property.
- The period for compliance with the requirements is twelve months.
- The appeal is proceeding on the grounds set out in section 174(2) (d) and (f) of the Town and Country Planning Act 1990 as amended.

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

Preliminary Matters

1. I have noted that there are some typographical errors in the enforcement notice, but these can be corrected without causing injustice to the parties.

Reasons

Legal Basis for Determination

2. When dealing with an appeal on ground (d), the burden of proof is on the appellant and the standard of proof is the balance of probabilities. Following the judgement of *Gabbitas*¹ the evidence of an 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 alone is sufficiently precise and unambiguous, the appeal should be allowed.
3. Under s171B (2) of the Act, 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 of a material change of use of a building to residential use. The enforcement notice was dated 17 June 2019 and therefore the material date for the use of the property will be 17 June 2015.

¹ *Gabbitas v SSE & Newham LBC* [1985] JPL 630

4. Furthermore, under case law² in establishing whether the use has been affirmatively established over the four year period, the correct approach is to ask whether there was any period during the four years when the building in question was not physically occupied, even though available, when the local planning authority (LPA) could not have taken enforcement action against the use. It is also necessary to make a finding as to whether any periods of non-occupation were '*de minimis*'.
5. In determining when the four-year period will begin to run, case law³ indicates that it is necessary to look at the physical works i.e. the date the premises were capable of providing viable facilities for living, rather than the date when all the works were completed – and when the use actually commenced. It is possible for the change of use to have commenced prior to actual occupation provided the premises were capable of being so used.
6. In addition, a Supreme Court case⁴ concludes that "Too much stress, has I think, been placed on the need for 'actual use'... it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is". Consequently, it is a matter of fact and degree as to when the change of use occurs; it is incorrect to simply regard the commencement of actual residential use after conversion works as giving rise to the change of use.
7. In determining this appeal it is necessary to consider when the change of use occurred, how the property has been occupied and whether there is evidence of continuous occupation during that period.

Appeal site and background

8. No 46 East Dulwich Road is a mid-terraced property with a ground floor commercial use occupied as a fish and chip restaurant with two additional storeys above. The adjoining properties also have commercial uses on the ground floor and appear to incorporate two floors of residential above.
9. To the immediate rear of the appeal site is a poorly maintained narrow service alley which forms access to the rear of properties along East Dulwich Road. This provides pedestrian access to the rear of the appeal site where there is access to four residential flats.
10. In support of this appeal a range of evidence has been submitted, including a sworn affidavit by the appellant, title deeds, a borrowing agreement, photographs, confirmation of rent received, floor plans, a note of payment received and letters from an accountant, income and expenditure accounts and tenancy agreements.

Change of Use

11. The appellant and his business partner purchased the appeal property in December 2009 when he states that the upper floors were vacant but had previously been used as student accommodation. A scanned copy of a borrowing agreement dated 5 August 2013 for the sum of £45,000 to convert the upper part of 46 East Dulwich Road into 4 studio flats has been submitted.

² Swale BC v FFS & Lee [2005] EWCA Civ 1568

³³ Impey v SSE & Lake District SPB [1981] JPL 363; [1984] P&CR 157 and Backer v SSE & Camden LBC [1983] JPL 167

⁴ Welwyn Hatfield BC v SSCLG and Beesley [2011] UKSC 15

However, there is no evidence that the money was received by the appellant, the signatures on the document are not dated or witnessed and there is no evidence that the money was actually spent on converting the upper floors to four self-contained residential flats.

12. The appellant contends that conversion works took place between Autumn 2013 and late Spring 2014, but no precise dates have been provided. The appellant has not submitted invoices, receipts, building contracts or other documentation as firm evidence of the dates of conversion works. Photographs of the interior of the flats have been submitted but do not appear to be dated. In addition, floor plans (Basement, Ground, First and Second Floor Plans Reference 1935-01 Rev A have been provided but the document appears to be dated July 2018. There is no evidence that these were provided to contractors prior to the conversion works.
13. The evidence before me also shows that no building control records were submitted to the Council and there is no evidence that any such application was ever made.
14. On this issue I conclude that although the appellant has made a statutory declaration regarding the date of conversion works, there is little meaningful supporting evidence to support his claims. Therefore, there is insufficient evidence to demonstrate that on the balance of probabilities the change of use occurred before the material date of 17 June 2015.

Residential occupation

15. The appellant states that the flats were occupied prior to June 2014. A hand-written note has been submitted showing rental payments to be made with respect to Flat 1B on 17 May 2014. It appears to show £1,640 paid on 17 May 2014 and rental sums due on 17 June 2014, 17 July 2014, 1 August 2014 and 1 September 2014. The full address of the property to which this note relates is not shown on the document, nor is it clear whether this is evidence of payments made or due or an indication of the income that could be generated from the flat in question.
16. Letters from Bayar Hughes & Co Chartered Certified Accountants state that four residential flats at 46 East Dulwich Road have been let out since 1 June 2014 "to present day". The date of the first letter is 16 July 2019. The second letter from the same Chartered Accountants dated 19 June 2019 states the same. It is further stated that income from the four flats has been declared to HM Revenue and Customs and taxes paid. This evidence does not show details of any tax declarations, payments or that the occupation of the four flats has been continuous since June 2014.
17. The income and expenditure accounts submitted are not on headed paper and cover the period June 2014 to April 2015. Only one account sheet is provided for each flat and there is no evidence of income or expenditure from any of the four flats after 5 April 2015. There is no indication why that is the case. In addition, the flats are referred to as Flat 1, Flat 2, Flat 3 and Flat 4 which does not correspond to the numbering of the flats elsewhere in the supporting evidence. Furthermore, and of significance in determining the case is the lack of clarity regarding whether or not income and expenditure sheets are formal records or forecasts regarding the income that could potentially be generated from the flats.

18. Tenancy agreements have been submitted for Flat 2B dated 16 July 2016 for 12 months, Flat 2 dated 20 August 2016 for 12 months and Flat F1 dated 24 October 2016 for 12 months. Each of these agreements is dated after the material date of 17 June 2015. The appellant has stated that he does not keep copies of tenancy agreements once new ones have been signed. There are no tenancy agreements for the fourth flat and those that have been submitted cover a limited period of time. It may be that the tenants which signed the submitted agreements remain as tenants, but there is no indication that that is the case. No statutory declarations have been provided by past or present occupants of the self-contained flats.
19. Although there is some evidence of residential occupation, there is insufficient to demonstrate that on the balance of probabilities the four self-contained flats were occupied continuously for the four year period up to the date the enforcement notice was served.

Conclusion

20. The evidence submitted is generally unclear and of a poor quality in terms of providing strong evidence, nor is it corroborated by supplementary information that would normally be expected in a case such as this. With the exception of the statutory declaration made by the appellant the remaining pieces of evidence provide details of a particular snapshot in time rather than linked forms of evidence which when pieced together show when the conversion took place and continuous occupation as four self-contained flats for the material period of four years.
21. There are some significant gaps in the evidence presented and, although I acknowledge that if an appellant's own evidence is sufficiently precise and unambiguous the appeal should be allowed, that is clearly not the case in this instance. The appeal on ground (d) fails.

The appeal on ground (f)

22. The ground of appeal is that the steps required by the notice to be taken exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in s173 of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). Since the notice requires the cessation of the use of the upper floors as four self-contained flats and associated works necessary to implement that, the purpose is clearly to remedy the breach.
23. The appellant states that there is sufficient space within the first and second floors to create two larger one bedroom apartments which would involve some relatively modest internal works. He contends that such lesser steps represent an appropriate course of action. Case law⁵ states that where the appellant has chosen not to pursue an appeal on ground (a), general planning considerations or argument about amenity cannot be introduced under (f). Therefore, in the absence of an appeal on ground (a) in this case I am only able to consider whether the steps exceed what is necessary to remedy the breach.
24. Consequently, the appeal on ground (f) fails.

⁵ Wyatt Bros (Oxford) Ltd v SSETR & Oxfordshire CC [2001] Civ 1560

Conclusion

25. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections.

Formal Decision

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

- a) The deletion from paragraph 3 of the word "floor" and the substitution therefor of the word "floors";
- b) The deletion from paragraph 4.22 of the word "sixe" and the substitution therefor of the word "size"; and
- c) The deletion from paragraph 4.2.2. of "_" between the word "accommodation" and "and".

Subject to these corrections the appeal is dismissed.

A A Phillips

INSPECTOR