



Appeal Decisions

Inquiry held on 31 January and 7 August 2019

Site visit made on 7 August 2019

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

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

Decision date: 22 August 2019

Appeal Ref: APP/T5150/C/17/3182904

194a Harlesden Road, London NW10 3RE

- 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 Ms Ebele Muorah against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 24 July 2017.
 - The breach of planning control as alleged in the notice is the erection of a canopy and door facing Harlesden Road and the material change of use of the premises from one to two dwellings.
 - The requirements of the notice are 1. Cease the use of the premises as flats and its occupation by more than ONE household and remove all kitchens and cooking facilities, except ONE, and remove all bathrooms, except TWO, from this building; 2. Demolish the front canopy and door, facing Harlesden Road, and restore this elevation back to its original condition before these works took place as per the attached photograph; and 3. Remove all fixtures and fittings associated with these works from the premises.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Appeal Ref: APP/T5150/X/18/3199256

9 Cross Way, London NW10 3RF

- 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 Ms Ebele Muorah against the decision of the Council of the London Borough of Brent.
 - The application Ref 17/3802, dated 1 September 2017, was refused by notice dated 30 November 2017.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which an LDC is sought is use of a dwelling house as two flats.
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Decisions

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1. The enforcement notice is corrected by the deletion of 'these works' in Step 3 in Schedule 4 and the substitution instead of 'the change of use'.

2. The ground (c) appeal partially succeeds and the enforcement notice is varied by the deletion of 'the erection of a canopy and door facing Harlesden Road' in Schedule 2, and by the deletion of Step 2 in Schedule 4.
3. The ground (f) appeal partially succeeds and the enforcement notice is varied by the deletion of 'and remove all bathrooms, except TWO,' in Step 1 in Schedule 4.
4. The appeal fails in so far as it relates to the material change of use of the premises from one to two dwellings and the enforcement notice is upheld as corrected and varied.

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5. The appeal succeeds and attached to this decision is a lawful development certificate describing the existing use which is considered to be lawful.

Procedural matters

6. The Council has identified an error in a requirement of the enforcement notice and this has been corrected without causing injustice to the Appellant.
7. The Appellant made an application for costs against the Council before the Inquiry, but withdrew the application at the Inquiry.
8. The Appellant did not originally make a ground (g) appeal but has requested in her Inquiry statement that the compliance period be increased to one year. Mr Wicks, on behalf of the Council, commented on this matter at the Inquiry and no injustice is caused for a ground (g) appeal to be considered in this decision.
9. Evidence at the Inquiry was given under oath.

Reasons

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The ground (c) appeal

10. The ground (c) appeal relates to the erection of a canopy and door on the Harlesden Road elevation of the appeal building. The Appellant purchased the three storey end-terrace property in 2008. At that time the property had a kitchen/dining room, a toilet and a family room at ground floor level, a bedroom and a living room at first floor level, and a bathroom and two bedrooms, one with an en-suite, at second floor level. It had a front door on the end elevation of the terrace facing Cross Way and patio doors leading from the dining area to the garden, and at the bottom of the staircase leading to the first floor was a window.
11. Shortly after purchase a shower was installed in the ground floor toilet, and a kitchen was installed in the first floor living room. The Appellant has always lived at the property and initially she occupied the first floor bedroom; the other three bedrooms being occupied by lodgers. The Appellant subsequently moved to the ground floor bedroom but has, throughout her ownership, rented other rooms to lodgers on short-term tenancies or, during 2016 and 2017, on a daily basis to those responding to an internet advert. The aforementioned ground floor window was altered to a door, and the canopy was erected, in September 2015.
12. Before that all occupants of the property will have used the door on the Cross Way elevation for access and egress to and from the property, which must

have been in C3(c) 'Dwellinghouse' use or C4 'House in Multiple Occupation' (HMO) use, depending on the degree to which facilities were shared and given that there is no evidence to indicate that the property was ever occupied by more than six people. Though the insertion of the door, together with the installation of a 'partition', facilitated the horizontal subdivision of the property to two residential units, the works were carried out at a time when the property was in use as a dwellinghouse. In this regard, given the circumstances of this case, it is not necessary to determine whether the property was in C3(c) or C4 use.

13. The insertion of the door and the erection of the canopy in September 2015, because it has been determined that the property was in use at that time as a dwellinghouse, was development permitted under Class A of Part 1 of Schedule 2 of The Town and Country Planning (General Permitted Development) Order 2015 (the GPDO), which came into force on 15 April 2015.

14. The ground (c) appeal thus succeeds and the enforcement notice has been varied by the deletion of the operational development element of the breach of planning control and by the deletion of the relevant requirement of the notice. The ground (a), (d), (f) and (g) appeals, in relation to the insertion of the door and the erection of the canopy, do not need to be considered.

The ground (d) appeal

15. The ground (d) appeal relates to the change of use element of the breach of planning control. For the ground (d) appeal to succeed there must be sufficient precise and unambiguous evidence to justify a conclusion that, on the balance of probability, the change of use of the property from one to two dwellings occurred more than four years before the date of issue of the enforcement notice. The critical date is 24 July 2013.

16. It has been determined that the property, in September 2015, was in use as a C3(c) or C4 dwellinghouse. Before then, irrespective of all other considerations such as the Council tax situation, all occupants used a single entrance and the property was not subdivided into two separate residential units. The property has not, as a matter of fact, been in use as two dwellings for the four year period prior to issue of the enforcement notice. The ground (d) appeal thus fails.

The ground (a) appeal

17. The main issues are; first, whether the change of use of the property from one to two dwellings accords with development plan policy; and second, the effect of the change of use on the amenities of residents of nearby dwellings.

The first issue – development plan policy

18. The development plan includes the London Borough of Brent Development Management Policies (DMP), the London Plan (LP), and saved policies of Brent's Unitary Development Plan. DMP policy DMP17 states that to maintain family sized housing, conversion of a family sized home (3 bedrooms or more) to two or more other dwellings will only be allowed if the existing home is 130 square metres or more and if it results in at least a 3 bedroom dwelling preferably with direct access to a garden/amenity space. LP policy 3.5 establishes minimum space standards for dwellings; the minimum for a one bedroom dwelling being 37 square metres and for a three bedroom two storey dwelling being 84 square metres.

19. Each floor of the property is 37 square metres and its total floor area is therefore 111 square metres and less than the minimum required by DMP policy DMP17 to be suitable for conversion. The ground floor flat that has been created is about 32 square metres and the three bedroom two storey maisonette at upper floor levels is 79 square metres, even including 5 square metres at ground floor level which is given up to a lobby and a staircase. Neither of the dwellings that have been created satisfy the minimum space requirements set out in LP policy 3.5. Access to the front door into the two storey dwelling is through a small front garden but this is open on three sides and is not a private space than can be regarded to provide an adequate garden/amenity space for the dwelling.

20. The Appellant has referred to saved policies in Brent's Unitary Development Plan (UDP) and to the possibility of erecting an extension to the ground floor dwelling under permitted development rights. The UDP policies referred to were saved in September 2007, which predates the adoption of the DMP in November 2016 and the LP in 2016. The UDP policies have been superseded and are afforded no weight. Flats do not benefit from permitted development rights afforded by the GPDO and the proposed erection of an extension, under such rights, could only be achieved if the property reverted to use as a single dwelling.

21. The change of use of the property from one to two dwellings does not accord with the development plan, particularly DMP policy DMP17 and LP policy 3.5.

The second issue – amenities of nearby residents

22. The Council has referred to complaints made to them, only in July 2017, by residents of nearby dwellings, but the Appellant owns three other similar properties in the vicinity and it is not clear whether the complaints relate to occupation of the appeal property. The property, if it reverted to its original layout, could be occupied as a four bedroom HMO. Occupation of the property on this basis would be similar to the use of the property as two dwellings, a single bedroom flat and a three bedroom dwelling, which could be occupied by three individuals on an HMO basis. It is unlikely that occupation of the property as two dwellings results in any significant harm to the amenities of residents of nearby properties. The use of the property as two dwellings does not, in this regard, conflict with DMP or LP policies.

Conclusion

23. The National Planning Policy Framework (NPPF), at paragraph 47, reminds decision makers that planning law requires applications for planning permission to be determined in accordance with the development plan unless material considerations indicate otherwise. Notwithstanding the conclusion on the second issue, the use of the property as two dwellings conflicts with DMP policy DMP17 and LP policy 3.5 and there are no material considerations to indicate that determination of the ground (a) appeal should be made other than in accordance with the development plan. The ground (a) appeal thus fails.

The ground (f) appeal

24. Nothing would prevent the use of the property as a C4 HMO after compliance with the requirements of the enforcement notice. The Appellants remarks, in fact, relate to this possibility and to the need to comply with HMO regulations. But the notice only requires the removal of one kitchen and this could be, to comply with the regulations, the ground floor kitchen even though this was the original kitchen in the property. The decision on which kitchen to remove is for the Appellant to

make and this requirement of the notice is not excessive, because it is necessary to ensure that the property reverts to being a single dwelling.

25. The notice also requires the removal of one of three bathrooms but one of these is an en-suite shower room to a second floor bedroom and its removal would not affect the overall use of the property. Retention of the bathroom at first floor level and the shower room at ground floor level would comply with the requirements of the notice and retention of the en-suite would simply be retention of a facility only usable by the occupant of the associated bedroom.

26. The removal of one of three bathrooms is excessive and to this extent the ground (f) appeal succeeds. The enforcement notice has been varied accordingly.

The ground (g) appeal

27. The period specified in the enforcement notice for compliance with its requirements will commence on the date of this decision. The Appellant stated at the Inquiry that tenants of the property are on two month tenancies so there would be sufficient time for them to address the need to relocate, if that were required, and to locate, secure and move to alternative accommodation, within the six month compliance period. It is necessary to remedy a breach of planning control as soon as is reasonable. The period for compliance is reasonable and the ground (g) appeal thus fails.

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28. The onus of proof in an LDC appeal is on the Appellant and for the appeal to succeed there must be sufficient precise and unambiguous evidence to justify a conclusion, on the balance of probability, that the use of the dwelling house as two flats has subsisted continuously for the four year period ending on the date of the application, which is 1 September 2017.

29. The Appellant purchased the three storey end-terrace property in 2008. At that time the property had a kitchen/dining room, a toilet and a family room at ground floor level, a bedroom and a living room at first floor level, and a bathroom and two bedrooms, one with an en-suite, at second floor level. It had a front door on the end elevation of the terrace and patio doors leading from the dining area to the garden, and at the bottom of the lower staircase was a window.

30. Shortly after purchase a shower was installed in the ground floor toilet, and a kitchen was installed in the first floor living room. In 2009 the window at the bottom of the staircase was altered to be a door and a partition with a door was installed next to the staircase to "...keep marketing options open as it was not possible to know whether a large family...would take the house or two smaller households.... As it turned out the first two tenancies required entire access to the house...". The Appellant maintains, however, that since early 2013 the property has been in use as two flats.

31. The Appellant has provided timelines of occupation of the two dwellings since early 2013, starting with Innes Chabbi in the ground floor flat and Pauline Carlin in the upper maisonette. In June 2014 Haider Sabah took up occupation of the ground floor flat and remained up to May 2017. Pauline Carlin was replaced by, successively, Cristian Calniciuc and others, Manuel Goncalves and others, Deborah Adetunji and Claudio Crisafulli. The Appellant has provided tenancy agreements for all of the aforementioned tenants except for Deborah Adetunji who stayed for only a short period and did not pay any rent. This is not significant.

32. The tenancy agreements show almost continuous occupation of each flat for the four year period prior to the date of the application, except for a five month period for the ground floor flat immediately before that date. During this period the flat was advertised on the internet for short term letting purposes and was occupied for 79 nights over the five month period. The ground floor flat remained in sole use, whilst the upper flat was similarly occupied, and was occupied for residential purposes. The short-term letting of the ground floor flat for the five month period continued the established independent residential use of the flat.

33. Innes Chabbi and Pauline Carlin originally had a shared tenancy of the property, principally because the two flats are not separately metered for electricity, gas and water supplies. But they had made separate housing benefit applications so, following an inspection by an Officer, the Council regarded the property to be split into two flats by May 2013. New Council Tax bands were initiated at that time and, following an appeal and despite the single tenancy, the Valuation Office Agency confirmed that, as each tenant could live separately, the separate tax bands would remain. The two tenants subsequently entered into separate tenancies and had a mutual arrangement for payment of utility supplies.

34. The aforementioned shared tenancy was for 9 Cross Way, as it should have been as the tenancy was for the whole property, and, setting aside inconsequential minor errors, subsequent tenancies identified the relevant flat and the method of payment of utility bills. Tenancies for Pauline Carlin refer to Damian Thompson and Gabrielle Thompson but the Appellant explained at the Inquiry that they are Ms Carlin's children who lived with her at various times. There are some discrepancies in other documents provided by the Appellant but these are minor and do not undermine the Appellant's case. The Appellant has provided sufficient precise and unambiguous evidence to demonstrate that, on the balance of probability, the use of the dwelling known as 9 Cross Way as two flats has subsisted continuously for the four year period ending on the date of the application.

Conclusion

35. For the reasons given above, and on the evidence now available, the Council's refusal to grant a certificate of lawful development in respect of the use of the dwelling house as two flats at 9 Cross Way, London was not well-founded and the appeal succeeds. The powers transferred under section 195(2) of the 1990 Act as amended have been exercised accordingly.

John Braithwaite

Inspector

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 1 September 2017 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan 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 subsisted continuously for the four year period immediately prior to the date of the application

Signed

John Braithwaite

Inspector

Date: 22 August 2019

Reference: APP/T5150/X/18/3199256

First Schedule

Use of the dwelling house as two flats

Second Schedule

Land at 9 Cross Way, London NW10 3RF

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 described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was 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

This is the plan referred to in the Lawful Development Certificate dated: 22 August 2019

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

Land at 9 Cross Way, London NW10 3RF

Reference: APP/T5150/X/18/3199256

Scale: not to scale

