
Appeal Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 10 August 2020

Appeal Ref: APP/N5090/C/20/3247182

37 Pine Road, London NW2 6SB

- 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 Daniel Mulley against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice, numbered E/19/0486, was issued on 10 January 2020.
 - The breach of planning control as alleged in the notice is as follows:
Material change of use of the premises to flats.
 - The requirements of the notice are as follows:
STEP 1. Cease the unauthorised use of the premises as flats and its occupation by more than ONE household.
STEP 2. Remove all kitchens except ONE and all bathrooms except THREE from the premises.
STEP 3. Remove all partitions, doors, facilities, fixtures, fittings and equipment that facilitate the unauthorised use of the premises.
STEP 4. Remove all items, waste materials and debris from the premises arising from compliance with STEPS 1 to 3.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on grounds (d), (f) and (g) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. The appeal succeeds to a limited degree on grounds (f) and (g). Otherwise the appeal is dismissed and the enforcement notice is upheld as corrected and varied. See formal decision below.

Matters of clarification

2. Further to the case officer's letters to the parties, I consider that this appeal can be determined without the need for a physical site visit. This is because I have been able to reach a decision based on the initial submissions, supplemented by additional information being supplied. The appellant and the Council have agreed to the appeal proceeding on this basis and I am satisfied that, in dealing with it in this manner, no injustice is caused.

3. At the time the notice was served, the property comprises 4 separate flats and the agreed plan layout is as shown in the appellant's appeal documents (Drawing Number 37 PR900 Rev A 2019-05-07). This shows 2 flats to the ground floor (front and rear) and 2 to the second floor (front and rear). A Planning Contravention Notice

(PCN) had been issued on 7 October 2019, whereby the appellant had confirmed that the use at that time was as 4 separate flats.

4. Thus, although the notice does not specifically refer to 4 flats, but simply to '*the material change of use of the premises to flats*', there is no dispute that the Council's case is that there has been a change of use to 4 flats and that the appellant's case is that the 4 flats were lawful for planning purposes when the notice was issued. It is on this basis that I have dealt with this appeal and I shall correct the allegation accordingly to refer to the change of use to 4 flats. Again I am satisfied that this will not cause any injustice.

Background information

5. The appeal property is a two storey, mid-terraced dwellinghouse located on the south-west side of Pine Road. The surrounding area is predominantly residential comprising similar sized terraced properties. It does not lie within a conservation area and is not a listed building.

6. The appellant's father is stated to have purchased the property in 1963 when it was in use as bedsits. It is stated that it had been converted into 4 flats in 1996. The appellant purchased the property from his father in 2017. There is evidence that, at some point in the past, the building had been registered as a House in Multiple Occupation (HMO). However a Valuation Listing Officer (VLO) had listed the building as comprising three separate units. This had been challenged by the appellant's father on the basis that it should have been treated as 1 unit for Council Tax (CT) purposes.

7. An initial inspection by a VLO, in October 2006, had actually set out that the house had been altered and made into four separate units, each with its own facilities for living, sleeping and cooking, as well as bath or shower rooms. However, a subsequent Valuation Tribunal (VT) in November 2006 determined that the building comprised 3 separate flats, with the VT considering that the upper floors shared facilities and so should be considered as 1 flat rather than 2.

8. At that time, therefore, it was confirmed that the property consisted of 3 separate units, 2 flats on the ground floor, known as Nos. 37a & 37b and 1 unit on the first floor. Clearly it is evident that, in 2006, the property was in use as separate flats and not as a single dwellinghouse. It is indicated that the CT was only paid on the basis of 3 flats and not 4.

9. On behalf of the appellant, therefore, it is contended that this was the reason that the Council issued the enforcement notice relating to the alleged change of use to flats. On becoming the owner, following his father's death, the appellant informed the Council that CT should be paid on 4 flats rather than 3.

10. The planning merits of the case do not fall to be considered and therefore the relevant development plan and National Planning Policy Framework (NPPF) policies, set out by the Council, as reasons for issuing the notice, are not directly relevant to any of the grounds pleaded. The Council's reference to the flats being grossly undersized, therefore, does not have any bearing on the grounds pleaded. I now turn to these three grounds.

The appeal on ground (d)

Introduction

11. The notice was issued on 10 January 2020. For the alleged change of use to be immune from enforcement action and for the appeal to be successful on ground (d), the onus is upon the appellant to conclusively show, on the balance of probabilities,

that the property had been in use as 4 self-contained flats (as shown on the submitted plan) for a continuous 4 year period from on or before 10 January 2016 until 10 January 2020. Planning Practice Guidance (PPG) makes it clear that an appellant is responsible for providing sufficient evidence to substantiate their claim and that the evidence should be precise and unambiguous.

The case for the appellant

12. The Appellant states that the building has been used as 4 separate flats since the building was first acquired by his father, Mr Renford Mulley, in 1963. The Appellant refers to regularly visiting the building with his father throughout the 1960s, 1970's and subsequently again from the 1990's onwards to collect rent from the tenants.

13. The Appellant purchased the property from his father in 2017, not long before his father passed away. Unfortunately Mr Renford Mulley did not keep many records dating all the way back to 1963. However, in addition to the sworn statement by Mr Daniel Mulley, a number of other relevant documents are relied upon to substantiate that the building has been used as flats for at least the last 10 years.

14. The first of these is a letter dated 19th September 2006 from Hodders Solicitors and which refers to the Council Tax Valuation List (CTVL). At some point in the past the building had been registered as a House in Multiple Occupation (HMO). The letter sets out that the Valuation Listing Officer (VLO) had listed the building as comprising three separate units. Mr Renford Mulley had challenged this, suggesting that the building should be treated as one unit, essentially so that less CT could be paid. An initial inspection by the Listing Officer in October 2006 had actually set out that the house had been adapted into four separate units, each with its own facilities for living, sleeping and cooking as well as bath or shower rooms.

15. However, as referred to above, a subsequent VT in November 2006 determined that the building comprised three separate flats. The VT therefore confirmed that the property consisted of three separate units, two flats on the ground floor, known as Nos. 37a & 37b and one unit on the first floor. Regardless of whether or not the VT considered that the property comprised three flats or four flats, this letter from Hodders Solicitors provides proof that the property was used as separate flats, rather than as a single dwellinghouse since October 2006, well in excess of the ten year requirement.

16. It also appears that this is the reason why CT was subsequently only paid on three flats and not four flats. A letter from the HM Courts & Tribunal Service with an accompanying defence form reply by a previous tenant of one of the ground floor flats, Mr Azzedine Karim Merezekane is submitted. Mr Merezekane had rented one of the ground floor units from Mr Renford Mulley from 2008. Mr Renford Mulley renewed Mr Merezekane's tenancy on a yearly basis until July 2015 when he notified Mr Merezekane that he would be evicted as the property needed to be repaired and it needed to be empty.

17. Mr Merezekane continued to live in the flat and was subsequently served a notice in 2016. The response by Mr Merezekane, dated 21st October 2016, confirmed that he has lived in one of the ground floor units for 13 years and he further states that a leak was coming into his flat from a top floor flat. This evidence again demonstrates that at least during the period from 2008 until October 2016 that the property was not in use as a single dwelling and was in use as separate flats.

18. The Council does not have any evidence of its own to contradict that the property has not been used for at least 10 years as separate flats. Section 191 of the Town

and Country Planning Act 1990 (the Act) provides the mechanism for any person to ascertain whether an existing use or development would be lawful. Section 191(2) states that the use will be lawful if no enforcement action could be taken in respect of the use and that the use or development does not constitute a contravention of any of the requirements of an Enforcement Notice then in force.

19. It is also the case that an applicant's own evidence need not be corroborated by independent evidence in order to be accepted and if the Local Planning Authority has no evidence of its own, or from others, to contradict the Applicant's version of events, it should not refuse a Certificate of Lawfulness.

20. In this instance, although the matter is not the subject of an application for a Certificate of Lawfulness, the test regarding whether the existing use of the building is immune from enforcement is essentially the same. Thus, in the light of the information that has been submitted with this appeal and given the lack of any information to contradict the Appellant's evidence, the Appellant asserts that on a balance of probability it cannot be disputed that the building has not been in continuous use for the relevant four year period as four separate flats.

21. Notwithstanding that the VT considered in 2006 that the property was in use as 3 separate flats, not 4, the Appellant maintains that the building has been used as 4 separate flats and that the upper floor comprises two separate flats with entirely separate facilities. In any event, even if it is considered that the property comprises 3 units rather than 4 units, it still doesn't comprise a single dwellinghouse and has not done so for at least the last ten years.

22. It is pertinent to highlight that even the alleged breach of planning control, as set out on the Enforcement Notice, refers to 'flats' rather than to a specific number of flats and the evidence demonstrates that the building has been in use as separate flats for a period in excess of 10 years. As such, at the date on which the Enforcement Notice was issued, the use of the building as flats was already immune from any enforcement action and as such no action could be taken in respect on any alleged breach of planning control which may have been constituted.

23. For the above reasons it is respectfully requested that this appeal is allowed on ground (d).

The case for the Council

24. It is stressed that the appellant accepts that a breach of planning control has occurred and that it is necessary to show that the use of the property as 4 flats has been continuous for the relevant 4 year period. It is contended that, on the balance of probabilities, this has not been shown to be the case.

25. Details of the appellant's sworn statement are queried and it is argued that limited weight can be afforded to the statement. With regard to the letter from HM Courts and Tribunal Service it is contended that although the letter refers to a 'flat', this is likely to have been simply a 'room' and there is no kitchen referenced.

26. It is stressed that the confirmed Housing Benefit payment referred to (£144) accords with the rate for shared accommodation, whereas for a one bedroomed flat the rates would have been higher (current rates £295 for a one bedroom flat and £147 for shared accommodation). It is contended, therefore, that Mr R Mulley was likely seeking eviction of the tenant in order to carry out the change of use of the premises in 2017, the following year.

27. The challenge to the VT decision in October 2006 on the basis that CT was only payable on the basis of a single dwelling casts doubt over the use of the property at

that time. Furthermore the HMO Licence issued by the Council remained in force until February 2011 and confirmed that the property was then reasonably suitable for occupation by not more than 4 households and 8 persons.

28. The Council indicates that Flats C and D were only registered for CT in August 2019 and Council tax was not paid for these flats before that date. It is also confirmed that the Council's Building Control section have records of unauthorised works relating to a conversion to flats in 2019. The Council contends, therefore, that the change of use into flats was completed in 2017.

29. The Council refers to Google Street Images of 2014 and 2018 and 2019 which show the differences to indicate when the conversion works took place. In the latest images an intercom system is shown to have been installed and a new soil and vent pipe has been added to the frontage, which correspond with the first floor Flat 3 shower room. Copies of advertisements are provided by the Council to show that the flats were available for rental. The advertisements refer to '1 Bed Flats' and a 'studio Flat' (Appendix 5 to Council's statement).

30. The Council also stresses that there is no factual history of the 4 flats in terms of specific rentals. There is no evidence such as tenancy agreements; utility bills; Housing Benefit Records or maintenance bills for the relevant 4 year period. It is contended that if such evidence exists it would have likely proved that the Council's position was correct. It is indicated that the many changes over past and recent years has meant that no single arrangement as 4 flats has been proven to be lawful. The changes have basically re-set the clock for the necessary relevant 4 year period. In summary it is contended that the appellant has not demonstrated with necessary accuracy and lack of ambiguity that, on the balance of probabilities, at the date the enforcement notice was issued, such action could not be taken. On that basis it is argued that the appeal must fail on ground (d).

My assessment

31. The background information and planning history, as set out above, indicates that there is a lack of clarity about exactly how the property was occupied during Mr R Mulley's occupation. The house was clearly not in use as a single dwelling house but neither is there any precise and unambiguous evidence that the house was in use continuously as 4 separate self-contained dwellings (for any 4 year period) between 1996 and when the appellant took control in 2017. The evidence, however, does show that the property had comprised 3 flats or units during part of Mr R Mulley's occupation (see references to VT and CT information above).

32. Unfortunately there are no records or plans of these units at that time and in addition to this Mr R Mulley challenged the VT decision in October 2006 on the basis that CT was only payable on the basis of a single dwelling. I agree with the Council, therefore that this, amongst other things, casts doubts over the use of the property at that time. Another factor is that the HMO Licence issued by the Council remained in force until February 2011 and confirmed that the property was then reasonably suitable for occupation by not more than 4 households and 8 persons.

33. Turning to the relevant 4 year period, the Council has confirmed that two of the flats (see above) were only registered for CT in August 2019 and that CT had not been paid for these flats before that date. It is also the case that the Council's Building Control section have records of unauthorised works relating to a conversion to flats in 2019. On the basis of this evidence, therefore, I share the Council's view that it is likely that the material change of use to 4 flats (from an uncertain unlawful previous use) was in 2017.

34. The Google Street Images of 2014 and 2018 and 2019; the works relating to the first floor shower room and the advertisements for the flats, reinforce my view that this was the case. The lack of any tenancy agreements; utility bills and other documentation from January 2016, for 4 separate flats, also leads me to conclude that the Council was not precluded from taking enforcement action against the unauthorised material change of use.

35. In summary on this ground of appeal, I agree with the Council that that the many changes over past and recent years has meant that no single arrangement as 4 flats has been proven to be lawful. The earlier changes have basically resulted in a re-setting of the clock for any necessary relevant 4 year period.

36. For the later years the fact that there is no precise and unambiguous evidence that the property had been occupied continuously for a 4 year period between 10 January 2016 and 10 January 2020 when the notice was issued, means that the appellant has not demonstrated, on the balance of probabilities, that the change of use to 4 flats was lawful. The appeal, therefore, fails on ground (d).

The appeal on ground (f)

37. It is contended on behalf of the appellant that the requirement to remove all of the kitchens, except 1, and all of the bathrooms except 3 is excessive. It is argued that if the ground (d) appeal fails, it is highly likely that that the property would revert to being a HMO for up to 6 persons. It is indicated that it is not unusual for HMOs to have more than 1 kitchen or for each bedroom to have its own bathroom. It is, therefore contended that the cessation of the use as 4 flats is sufficient to remedy the breach and any injury to amenity.

38. The Council responds to this by indicating that the notice was served to remedy the breach and that there are no permitted development rights to convert flats into a C4 HMO. It is argued that the notice needs to be complied with in full; that the notice was issued to remedy the breach rather than any harm to amenity and that no other alternative would remedy the breach. The Council stresses that if another use of the property is proposed then this should be taken up separately with the Council. (presumably the planning department).

39. I agree with the appellant that it is unreasonable to require the removal of all kitchens except one. That is because the removal of just two kitchens (one on the ground floor and one on the first floor) would be sufficient to ensure that the breach of planning control (the use as 4 flats) would be remedied. I also consider that the requirement relating to the bathrooms is excessive. It is not unreasonable to expect a bedroom to have an ensuite facility and so in a dwellinghouse with 4 bedrooms, 4 bathrooms could be normal.

40. I shall vary the notice , therefore, to require just the removal of one kitchen at ground floor level and one at first floor level. I will also vary the notice by deleting any reference to the removal of bathrooms.

41. These variations will not preclude the appellant from applying to the LPA for alterations to the property to provide either a HMO or 2 reasonably sized flats. But, as indicated by the Council, any new use would need to be taken up separately and agreed with the Council in order to be lawful for planning purposes.

42. The appeal succeeds therefore to a limited degree on ground (f) and the notice will be varied accordingly.

The appeal on ground (g)

43. Having considered the submissions of both the appellant and the Council on this ground, I consider that under normal circumstances 6 months would be an adequate and reasonable period for compliance. However, taking into account the implications of the Covid 19 situation on matters relating to planning and development matters since March of this year, I consider that the compliance period ought to be extended to 12 months. This will give the appellant sufficient time to liaise with the Council on the future use of the property.

44. Again, therefore, the appeal succeeds to a limited degree on ground (g) and the notice will be varied accordingly.

Other Matters

45. In reaching my decision I have taken into account all of the written submissions made by the parties. These include the initial documents; the appeal statements; the photographic evidence and all subsequent documents following the case officer's requests. However, none of these carries sufficient weight to alter any of my conclusions on the grounds as pleaded and nor is any other factor of such significance so as to change my final decision.

Formal Decision

46. I direct that the enforcement notice be corrected by adding the word and figure '*four (4)*' after the words '*premises to*' in Schedule 2 of the notice (THE ALLEGED BREACH OF PLANNING CONTROL).

47. The appeal succeeds to a limited degree on grounds (f) and (g).

48. I direct that the enforcement notice be varied by deleting all 4 STEPS in Schedule 4 of the notice (WHAT YOU ARE REQUIRED TO DO TO REMEDY THE BREACH OF PLANNING CONTROL – S173(4)(A)) as drafted and by replacing them with the following:

STEP 1. Cease the unauthorised use of the premises as 4 flats and its occupation by more than one household.

STEP 2. Remove one kitchen on the ground floor and one kitchen on the first floor.

STEP 3. Remove all items, waste materials and debris from the premises arising from compliance with STEPS 1 and 2.

49. I also direct that the figure and word '*6 months*' be deleted from Schedule 5 of the notice (TIME FOR COMPLIANCE) and that the number and word '*12 months*' be substituted therefor.

50. Otherwise the appeal is dismissed and the enforcement notice is upheld as corrected and varied

Anthony J Wharton

Inspector