
Appeal Decisions

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 September 2020

Appeals Refs: APP/C5690/C/19/3233511, 3233512

Land at 28 Dacres Road, London SE23 2NW

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mrs Shani Kaur Taak and Mr Dilbhad Singh Taak (DMS Property Services Ltd) against an enforcement notice issued by the Council of the London Borough of Lewisham.
 - The enforcement notice was issued on 14 June 2019.
 - The breach of planning control as alleged in the notice is Without planning permission, the material change of use of the Property to 7no. self-contained flats.
 - The requirements of the notice are:
 1. Cease the use of the Property as self-contained flats.
 2. Remove all bathroom fixtures and fittings; all kitchen fixtures and fittings; and all internal partition walls which facilitate the use of the Property as self-contained flats.
 3. Remove all materials, debris, waste and equipment resulting from compliance with the above requirements of this notice from the property and its premises.
 - The period for compliance with the requirements is six (6) months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended.
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DECISIONS

1. The appeals are dismissed and the enforcement notice is upheld.

REASONS

Grounds of appeal

2. The appeal form indicated that the appeals were being made on grounds (b), (c), (d), (e), (f) and (g). There was no ground (a) appeal. In an email dated 16 September 2019 the appellants' agent submitted facts and grounds on grounds (b), (c), (d) and (g). The Planning Inspectorate confirmed with the appellants that grounds (b) and (f) would be removed from consideration and I will proceed on this basis.
3. Most of the appellants' evidence relates to the ground (d) appeals.

Ground (b)

4. The issue is whether the use of the property changed to 7 self-contained flats as a matter of fact.
5. The appellants rely on an HMO licence being in place and the use of the property as an HMO (house in multiple occupation), even though they accept it has all the facilities for 7 self-contained flats.

6. The HMO licence was dated 4 September 2019 and came into force on 2 October 2019. The property was found to be reasonably suitable for occupation by not more than 7 households consisting of no more than 13 persons. This document post-dates the enforcement notice and does not confirm an existing HMO use existed before 14 June 2019.
7. Furthermore, the appellants' statements for the ground (d) appeals describe the property being converted into 7 self-contained flats and documentation has been submitted to support that case. The statement of truth by the appellants' agent concludes that "the property is divided into seven self-contained flats". In the immediate period before the notice was issued alterations were made to the Council tax valuation list that came into effect from 1 April 2019. The new entries relate to 7 separate flats at the property.
8. The Council visited the site in May 2019 and although access was not possible to all rooms there was sufficient access and information to conclude the property was split into 7 self-contained flats. The description of the accommodation and the self-contained nature of the units strongly indicate the use as flats rather than an HMO. The large communal kitchen on the ground floor looked completely unused, an observation that is consistent with the appellants' evidence.
9. I conclude that the use of the property is 7 self-contained flats as a matter of fact. The appeals on ground (b) fail.

Ground (c)

10. The issue is whether the change of use of the property to use as 7 self-contained flats amounts to a breach of planning control. The onus is on the appellants to prove their case. However, the submission to support this ground of appeal is the same as that made in respect of the ground (b) appeals.
11. The change of use of a dwellinghouse to 7 self-contained flats would be a material change and amount to development requiring planning permission, having regard to section 55(3)(a) of the 1990 Act.
12. The planning history of the site shows that the planning permissions granted were for extensions. There is no record of an application or planning permission for converting the property to 7 self-contained flats. On the other hand, on 3 October 2014 planning permission was refused for the alteration and conversion of the property to 4 self-contained flats. The appeal was dismissed by a decision dated 22 June 2015, following a site visit on 21 May 2015 (the 2015 appeal).
13. The Town and Country Planning (General Permitted Development) (England) Order 2015 (or previous Orders) has no provision to grant permission for the development described in the enforcement notice.
14. An HMO licence would not authorise the use of the property as 7 self-contained flats under the planning acts.
15. I conclude the material change of use of the property to use as 7 self-contained flats was a breach of planning control and the appeals on ground (c) fail.

Ground (d)

16. The issue is whether a material change of use to 7 self-contained flats occurred before 14 June 2015 and whether the use has continued without significant interruption for a four year period thereafter. The onus is on the appellants to prove their case. The standard of proof is the balance of probability.
17. Planning Practice Guidance confirms that when assessing lawfulness of an existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. The same approach applies in this case.
18. In relation to a material change of use it is necessary to consider both the physical works, the date when the property was capable of providing viable facilities for living, and when the use actually commenced. It is then a matter of fact and degree as to when the change of use occurs.
19. Mrs Shani Kaur Taak stated that in May 2015 the property was converted to 7 self-contained flats. The entire property was rented out to D Singh Properties, a property management company. In June 2015 all the self-contained flats/studios were filled with family and individuals. She lived in a ground floor flat before moving elsewhere in February 2016 to join her son and his family. One her grandsons lived in flat 2 to provide care and support.
20. The witness statement of Mr Dilbhag Singh Taak adds to this information by referring to the planning history and to the conversion works. He stated that his company have let the property as self-contained flats since June 2015 and that they have been occupied continuously since that date.
21. A summary sheet has been compiled for each flat listing the name of the occupant, the period of occupation, the type of occupancy - whether a London Borough placement or assured shorthold tenancy (AST). This summary is supported by documentation on the tenancies. Additional evidence includes witness statements, gas and electric and energy performance certificates, a fire risk assessment, a portable appliance test inventory, bills/invoices and information related to maintenance and complaints.
22. The Council has not made any comments on this evidence. The enforcement investigation was prompted by a complaint received on 2 July 2017 from a nearby resident that works were taking place to sub-divide the property.

Planning history

23. In the 2015 appeal the proposed development was described as conversion of house into 4 no. flats. There is no indication that the planning application was seeking permission retrospectively. The property was described as a four bedroom semi-detached house. The main and determining issue was the loss of a large single family house.
24. The probability is that the property had not been converted into 7 flats before May 2015. That left a very small amount of time to carry out the alterations and conversion ready for tenant occupation at the beginning of June.

Appellants' evidence

Witness statements

25. Mr D Singh Taak explained that he expected that the appeal for the proposed conversion to 4 flats would be unsuccessful and that he started planning the conversion to 7 flats in April 2015. Work was completed by early June 2015. The witness statement from CD described how he carried out the conversion for the appellant and that the works were straight forward, as most of the bedrooms already had ensuite bathroom and shower facilities. He said the actual works started 'somewhere in May 2015' and the job was completed in early June 2015. The statement by JS who carries out pest control services also gave an end of May to early June 2015 period for the conversion. An electrical engineer, who works for DMS properties, stated he saw the property being converted to self-contained flats in 2015. He stated he inspected the site, carried out minor electrical works, made it electric hazard free and issued a certificate in August 2015. All three tradespeople stated that the property had been in continuous use as 7 self-contained flats since June 2015.
26. All the witness statements are statements of truth, signed and dated by the individual. They do not take the form of sworn evidence under the Statutory Declarations Act 1835. These signed statements, to which no personal sanctions apply, have not the status, authority or weight of statutory declarations or affidavits.
27. The AST Agreement referred to by Mrs Shani Kaur Taak is dated 1 June 2015, the same date it is maintained tenants occupied flats 1, 2 and 3. The address for Mrs Shani Kaur Taak at the top of the Agreement is not the appeal site where she said she was living at that time but the address she said she moved to in February 2016. This discrepancy raises a question mark over the accuracy of dates and evidence.
28. I note that the appellant said preparatory planning work on the conversion commenced in April 2015. His statement and the statements of CD and JS provide the same date for carrying out the conversion works – stating sometime in May 2015 and completion of the job in early June 2015. On this timetable the conversion of the property to 7 flats would have predated the outcome of the appeal, which is at odds with deciding to go to the time and expense to appeal. Mrs Taak's evidence is not entirely consistent with these dates, which points to the evidence being insufficiently precise. The statements lack the necessary precision over the completion date of the conversion works in June. It was not until August 2015 that an electrical certificate was issued.

Tenancy evidence

29. Flat 1. The first tenant occupied the flat on an AST, which according to the submitted document commenced on 1 June 2015. The agreement does not have the individual handwritten signature of the tenant. All receipts for monthly payments are typed, the first being dated 5 July 2015. Subsequent tenants were through local authority placements. The occupation periods for each tenant are not fully supported by the detailed documentation¹.

¹ For example, the period of occupation 21.10.2016 to 01.05.2017 where the booking details for that tenant are for 2 nights on 1 and 2 December 2016.

30. Flat 2. The first tenancy was through an AST agreement. The submitted document is dated 15 June 2015, not 1 June as stated in the summary. There are two handwritten signatures at the end of the document. However within the document the term of the tenancy is stated to commence at 12 noon on 1 August 2018². Otherwise apart from minor discrepancies in dates the summary table of occupation is a fair reflection of the tenant details.
31. Flat 3. The first occupier of this flat was the appellant, on an AST commencing on 1 June 2015. The period of occupancy until February 2016 is consistent with her witness statement. Receipts of payments are typed. The placement letters and details with local authorities indicate that the flat was occupied over the period to August 2019 by several tenants with short periods of vacancy between each tenancy.
32. Flat 4. The submitted AST for the first tenant was dated 15 June 2015. The placement letters and details from local authorities indicate that the flat was occupied over the period between February 2016 to August 2019 by several tenants with short periods of vacancy between each tenancy.
33. Flat 5. The first tenant occupied the flat on an AST and the submitted agreement is dated 12 June 2015. The placement letters and details from local authorities indicate that the flat was occupied over the period between April 2016 to May 2019 by nine tenants with short periods of vacancy between each tenancy.
34. Flat 6. The first tenancy agreement was dated 8 June 2015 and it appeared that the tenant occupied the flat until 24 February 2016. The second tenant is stated to have commenced occupancy on 1 March 2016, although the submitted details cover only a short period in December 2017, when the tenancy ended. Thereafter the submitted documents support the summary list of occupancy by six tenants through to January 2020.
35. Flat 7. The first AST agreement was dated 15 June 2015. The first tenant is stated to have occupied the flat through to May 2016. Subsequent tenants were placed through local authorities and details are provided over the period from 9 June 2016 to July 2020.
36. In summary, all flats were initially occupied under an AST. The dates of these agreements are 1 June 2015 for two of the ground floor flats, 8 June 2015 for flat 6, 12 June 2015 for flat 5 and 15 June 2015 for flats 2, 4 and 7. A tenancy agreement alone does not prove actual occupation of the flats. There also is reason to question the legitimacy of the agreements. An AST would only become a legally binding contract once it is signed and completed. I would expect to see actual signatures on the documents, not only a typed name. Only one of the documents (flat 2) is actually signed. This document has within it the date of 1 August 2018. In this case the ASTs in isolation have limited weight.
37. In contrast the documentation on the local authority placements provides sufficient information to demonstrate on the balance of probability continuous occupation of the property as 7 self-contained flats from March 2016.
38. In this case there is a particular need for precision on dates because of the relevant date for the four year time limit. Early June 2015 is not sufficiently

² See page 121

precise. Even the appellants' evidence indicates certain flats would have been occupied before the completion of the conversion work. Three of the flats would have been occupied after the relevant date.

Other evidence

39. The invoices and payment summaries with the placement local authorities support the tenancy information for the period August 2016 to August 2019.
40. Bank statements over a period from May 2015 to March 2016 are included within the tenancy evidence (LC2). There is no commentary or explanation of this evidence. It appears that payments were received from the named tenant for flat 1 but there is nothing in the bank statements to link the payments to the property or flat in question.
41. The earliest record in the maintenance and complaint information was for 15 June 2016. The earliest gas certificate was dated 10 August 2017. These sources of evidence do not assist in establishing when the use as 7 flats commenced.
42. Electric certificates. The earliest document is dated 18 April 2015 but relates only to the installation of a new fuse board. On other documents the address of the property inspected is given as 28 Dacres Road. Overall the documents are of little assistance in confirming when the change of use occurred to 7 flats and periods of occupancy.
43. The Fire Risk Assessment report is dated 18 July 2019 and describes the use as an HMO up to a maximum of 8 people approximately. The Portable Appliance Test inventory relates to July 2019. These documents have very little weight.
44. The Lawful Development Certificates issued for other properties would have been based on the specific facts and evidence for each property and so have no weight.

Council's evidence

45. The Council's evidence relates primarily to its active investigation since March 2019, including the inspection of the property in May 2019. The sub-division works referred to in the complaint in 2017 does not correspond with the appellants' evidence but in view of the minimal information about the works seen the complaint has very little weight. Therefore there is no specific information dating back to the period around May to July 2015.
46. The representation in response to the appeal indicates that the property was converted shortly after the appeal decision in 2015 and so is not sufficiently precise to help to decide when the change of use actually took place.

Conclusions

47. The Council has not produced evidence to contradict or otherwise make the appellants' version of events in 2015 less than probable. Even so the appellants' evidence has to be sufficiently precise and unambiguous, more especially to inform the date when a change of use occurred.
48. The evidence relating to the dates of the conversion works and the first occupation is not sufficiently precise to show when a material change of use

took place. Even on the appellants' own evidence of the AST agreements, the occupation of flats 2, 4 and 7 would just post-date the critical date.

49. From around February 2016 there is a volume of evidence, based on local authority placements, to support a conclusion that the property was in more or less continuous occupation as 7 self-contained flats. Any breaks in occupation were short periods coinciding with one tenant leaving and another arriving.
50. The appellants have not demonstrated on the balance of probability that a material change of use of the property to 7 self-contained flats occurred before 14 June 2015. Therefore the development is not immune from enforcement action through the passage of time. The appeals on ground (d) do not succeed.

Ground (g)

51. The issue is whether the compliance period of six months is reasonable and proportionate.
52. The appellants have asked that the compliance period be extended to twelve months. A period of six months is considered insufficient to organise and undertake the works to the property and to rehouse the tenants of all the apartments.
53. Compliance with the notice will require the use as self-contained flats to cease. Existing tenants would lose their home and consequently there would be an interference with their right to respect for their private and family life, their home and their correspondence³. However, this right is a qualified right, requiring a balance between the rights of the individual and the needs of the wider community. Similarly, in respect of the appellants' rights, Article 1 of the First Protocol (right to peaceful enjoyment of their possessions) is a qualified right.
54. The conversion was described in the appellants' evidence as a straightforward job. The appellants have contact with a trader who undertakes such works and who knows the property. The probability is that removal of fixtures and fittings and partition walls would not require as much pre-planning as the initial conversion.
55. The existing tenants are on local authority placements and their accommodation is temporary. They are expected to move at short notice, which could be either the same day or next⁴. It has not been explained why a compliance period of six months would put them in a worse position. The documentation demonstrates that tenants are placed at very short notice. There is the likelihood that a longer compliance period would be used to house additional tenants, rather than to secure vacant possession at the earliest opportunity to enable the physical works to be carried out.
56. I conclude that a compliance period of six months is reasonable and proportionate. Compliance with the notice would be in the wider public interest and there would be no violation of the human rights of the appellants or the occupiers of the flats.

³ Article 8 of the Convention on Human Rights, enshrined into UK law by the Human Rights Act 1998

⁴ Appellants' Statement LC2 page 84

Conclusion

57. For the reasons given above the appeals should not succeed.

Diane Lewis

Inspector