



Appeal Decisions

Site visit made on 5 August 2020

by Simon Hand MA

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

Decision date: 22 October 2020

Appeal A: APP/C5690/C/19/3232725

13 Farley Road, London, SE6 2AA

- 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 Sumir Jolly against an enforcement notice issued by the Council of the London Borough of Lewisham.
 - The enforcement notice was issued on 13 June 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from use as a flat arranged across basement and ground floor level to use as four self-contained flats arranged across basement and ground floor level.
 - The requirements of the notice are (a) cease the use of the property as four self-contained flats; (b) return the property to its authorised planning use as a flat (C3 use) or as a property in multiple occupation (HMO) for up to but no more than 6 occupants (C4 use); (c) remove all kitchens except ONE, and all bathrooms except ONE from the property; (d) remove the fittings and alterations that have been installed to achieve the current horizontal division and conversion of the single flat to four separate and self-contained flats; (e) remove all waste, materials and items associated with the unauthorised change of use.
 - 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), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B: APP/C5690/C/19/3232726

13A Farley Road, London, SE6 2AA

- 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 Sumir Jolly against an enforcement notice issued by the Council of the London Borough of Lewisham.
- The enforcement notice was issued on 13 June 2019.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from use as a flat arranged across first floor and second floor level to use as four self-contained flats arranged across first floor and second floor level.
- The requirements of the notice are (a) cease the use of the property as four self-contained flats; (b) return the property to its authorised planning use as a flat (C3 use) or as a property in multiple occupation (HMO) for up to but no more than 6 occupants (C4 use); (c) remove all kitchens except ONE, and all bathrooms except ONE from the property; (d) remove the fittings and alterations that have been installed to achieve the current horizontal division and conversion of the property to four separate and self-contained flats; (e) remove all waste, materials and items associated with the unauthorised change of use.
- 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), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal C: APP/C5690/X/19/3232390

Ground Floor flat 13 Farley Road, London, SE6 2AA

- 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 Mr Sumir Jolly against the decision of the Council of the London Borough of Lewisham.
 - The application Ref DC/18/107576, dated 6 June 2018, was refused by notice dated 2 May 2019.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is Lawful Development Certificate (proposed) in respect to the conversion of the flat occupying the ground floor and basement of 13 Farley Road SE6 to an HMO for up to 6 persons (Use Class C4).
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Appeal D: APP/C5690/X/19/3232389

13A Farley Road, London, SE6 2AA

- 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 Mr Sumir Jolly against the decision of the Council of the London Borough of Lewisham.
 - The application Ref DC/18/107657, dated 6 June 2018, was refused by notice dated 2 May 2019.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is Lawful Development Certificate (proposed) in respect to the conversion of the First Floor Flat (13A), 13 Farley Road SE6 to a House in Multiple Occupation for up to 6 persons (Use Class C4).
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Appeal E: APP/C5690/W/19/3242199

13 Farley Road, London, SE6 2AA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Sumir Jolly against the decision of the Council of the London Borough of Lewisham.
 - The application Ref DC/19/113540, dated 2 July 2019, was refused by notice dated 7 November 2019.
 - The development proposed is alterations and conversion of 13 Farley Road SE6, together with the construction of a part single/part two storey extension at the side and rear to provide 3 self-contained flats, together with the subdivision of rear garden; boundary treatment and cycle/refuse/recycle storages.
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Decisions

Appeal A - 3232725

1. The appeal is allowed on ground f, and it is directed that the enforcement notice be varied: by the deletion of the words "and all bathrooms except ONE"
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from requirement (c). Subject to this variation the enforcement notice is upheld.

Appeal B - 3232726

2. The appeal is allowed on ground f, and it is directed that the enforcement notice be varied: by the deletion of the words "and all bathrooms except ONE" from requirement (c). Subject to this variation the enforcement notice is upheld.

Appeals C and D – 3232390 & 3232389

3. The appeals are dismissed.

Appeal E - 3242199

4. The appeal is dismissed.

Preliminary Matters

5. I have followed the description of development for Appeal E provided by the Council and followed by the appellant when making his appeal.
6. No 13 Farley Road is a double fronted detached property that has been divided into two flats. One occupies the basement and ground floor and is known as 13, and the other occupies the first floor and attic and is known as 13A. This is agreed to be the lawful use of the building. The Council contend the two flats have each been further subdivided into 4 flats, giving a total of 8 flats in the building. The appellant denies this and claims the alleged 8 flats are not actual self-contained dwellings, but form a sui-generis use, that is they are not part of an HMO but nor are they separate flats, they are something in-between. This is the crux of appeals A and B, as separate notices have been issued against 13 and 13A.
7. Appeals C and D refer to applications for LDCs to establish that the original flats 13 and 13A can each be converted into an HMO for 6 people. This ought to be straightforward because obviously a flat is a dwelling and so can be turned into an HMO by virtue of Class L of Part 3 of Schedule 2 of the General Permitted Development (England) Order 2015. However, the applications were refused as at the time they were made (the year before the enforcement notices were issued) the Council contend flats 13 and 13A had already been subdivided into the four unlawful flats subject to the enforcement notices. If that is the case then I agree, the LDCs cannot be issued as an unlawful dwelling does not benefit from permitted development rights. The outcome of these two appeals largely turns on the outcome of appeals A and B.
8. Finally appeal E is to extend the property, get rid of the 2 flats and convert the building into 3 flats. A previous application and appeal to extend the property and convert it into 4 flats was refused in October 2019¹ and appeal E turns on whether the harm identified by the previous Inspector has now been overcome.
9. Before considering the various appeals, it is worth setting out the basis of my reasoning. I agree that the mere act of self-containment in itself does not trigger a material change of use but in this case the sub division of 1 flat into 4

¹ APP/C5690/W/19/3231827 Issued 29 October 2019

units (whether flats or a sui generis use) clearly has the potential to significantly increase the occupation of the building and associated comings and goings and is also contrary to the Council's policy² to resist conversion to single person dwellings and fall well below the space standards set out in the London Plan. There is no doubt there has been a material change of use.

10. The question is what has there been a change to? Section 254 of the Housing Act defines an HMO as a building where the occupants either share one or more basic amenities or one or more basic amenities are lacking. A basic amenity is defined as a toilet, personal washing facilities or cooking facilities. For a unit to be a dwelling it should meet the requirements of Gravesham³. This case held that the principle characteristic of a dwelling was that it provided the facilities required for day to day private domestic existence. There is a distinction between the Gravesham facilities and the s254 amenities and I assume it is this the appellant is relying on when he says the current cooking facilities consist only of a small ensuite kitchen facilities and so they do not comprise a fully functioning kitchen. Therefore the unit is not a flat but sui generis. In other words it has the basic amenities mentioned in s254 and so cannot be part of an HMO, but it does not have the facilities required for day to day private domestic existence as required by Gravesham so it is also not a dwelling. Therefore it must be something else, that is sui generis.
11. I have some sympathy with this argument. S254 is part of the Housing Act and defines, in law, exactly what is an HMO. But Gravesham was a court case concerning whether a property that was a holiday home was still a dwelling, and the courts held it was because it provided the day to day facilities required. This phrase is not specific but open to reasonable interpretation and many Inspectors have interpreted it to mean more than just plugging in a microwave and so turning a bedsit into a flat. However, that is not what has happened in this case. The Council's detailed photographs of each flat show that the kitchenettes comprise a sink and draining board, washing machine, fridge/freezer, built in oven and hob and in some cases a microwave. This seems to me to comprise a well stocked kitchen and I cannot see why it is not fully functioning. The flats therefore do have the necessary facilities for private day to day domestic existence and so are individual dwellings.
12. The fact that the rooms are small and cramped and fall well below the space standards of the London Plan does not stop them from being dwellings. I also note they are taxed separately as individual flats and have separate electricity supplies. This adds weight to my conclusion they are each a separate dwelling.

Appeals A and B

The Appeals on Ground (b)

13. It follows from the above discussion that this ground fails. Each lawful flat within the property has been converted into 4 flats as alleged in the notices.

The Appeals on Ground (a)

14. This ground is predicated on the basis that I find there are 8 flats in the building. The appellant argues that the lawful use of the property is two flats

² DMP 32(e)

³ Gravesham BC v SSE & O'Brien [1982] 47 P&CR 142

and each flat could become an HMO for 6 people without the need for planning permission. This is the fallback position. Therefore the subdivision into 8 one person flats would be better than 12 people occupying 2 HMOs.

15. I agree there is a desperate need for housing provision in London and the site is well located for walking and cycling, however, I am less convinced by the fallback argument. Given that an HMO would need to provide at least one shared basic facility, which is usually a kitchen, it is difficult to see how a further 6 people could be accommodated in the remaining space in each of the lawful flats. No evidence has been provided to suggest how this would be accomplished, or whether it would be economically attractive to do so. I am not convinced therefore that two 6 person HMOs are a realistic fallback.
16. The individual flats are small and cramped and fall well below the space standards for a 1 person 1 bedroom flat and this is not disputed. The outside amenity space is also very small for 8 flats. No cycle and inadequate refuse storage facilities are provided. These facilities could be created in the rear garden area, but this would further reduce the available amenity space. None of this is contested by the appellant. I do not think that the need to increase housing density is sufficiently persuasive to allow clearly sub-standard accommodation, particularly where the fallback position is likely to be the same or lower density of occupation.
17. Consequently, I consider the retention of four flats in each of Nos13 and 13A Farley Road would be contrary to policy DMP32 of the Council's Development Management Local Plan (2014) and to the NPPF, which requires homes to be of a high quality.

The Appeals on Ground (f)

18. The appellant's ground (f) argument is that the requirement to remove all the bathrooms except for 1 is excessive. The requirements in both notices are the same. The use of the property (ie each of the 2 lawful flats) must be returned to either a self-contained flat or an HMO. Given the LDCs it is clearly the intention of the appellant to return each flat to use as a C4 HMO and it is equally clear this is acceptable to the Council. Consequently, the removal of the bathrooms as well as the kitchens is excessive. As long as the kitchen is a shared facility the flat would be an HMO and it would not be unreasonable for each bedroom to be ensuite. To this extent the ground (f) appeal succeeds for both appeals.

The Appeals on Ground (g)

19. The appellant argues the flats are let to tenants provided by a housing partnership that deals with vulnerable people seeking accommodation. The current commercial agreement with the partnership has no break clauses and does not expire until January 2025. It is not clear whether the appellant is suggesting the compliance period should be extended to 2025, but he goes on to say the period is unrealistic as it fails to consider the welfare of the occupants.
20. The fact that the appellant has entered into a commercial arrangement with no break clause is entirely a matter for him. However, the welfare of the occupants is a very important consideration. No evidence has been provided

as to why they could not be rehoused by the housing partnership and 6 months is generally considered to be a sufficient period to enable someone, especially with help, to find somewhere else to live. No explanation has been provided as to why these particular tenants would struggle, so I see no reason to extend the compliance period.

Appeals C and D

21. The two certificates were applied for in June 2018, but decisions were not issued until May 2019 and were quickly followed in June 2019 by the enforcement notices. The officer's report for both LDCs notes that the property was under investigation for suspected conversion into 8 flats and this was apparent from an officer's visit in April 2018. It is from this date that photographic evidence is available showing the conversion to flats.
22. This is not contested by the appellant, who argued, as discussed above, they were not flats but a sui generis use. As I have not agreed with this argument, but have found they were flats, it must follow that at the date the applications were made the use of the property was unlawful. As permitted development rights only accrue to lawful uses then the question posed by the LDC application, whether a change to an HMO would be lawful can only be answered in the negative.
23. It is of course undisputed that a lawful C3 dwelling use can be converted to an HMO falling within Class C4 as that is allowed for by Class L of Part 3 of the GPDO. The enforcement notices that I shall uphold (subject to variation with regards to the removal of bathrooms) allows for the reversion of the use to either a single dwelling or an HMO for up to 6 people, so once complied with either use would be lawful. However, the LDC process asks a specific question, on the date the application is made, would a change to an HMO be lawful and the answer is no, because the current use is unlawful. I shall dismiss both appeals.

Appeal E

24. This appeal is a s78 application for the conversion of the whole property at No13 into 3 flats, along with an enabling extension. It follows a previous application and appeal, referred to above, for an extension and 4 flats that was refused. The reasons the Inspector found against that proposal were that the creation of a lightwell was out of character; the two storey extension would overshadow the neighbours on both sides and be overbearing; 3 of the flats were below the minimum standards for floorspace; the outlook from the basement bedroom would be unacceptable; there was no storage space in flat 3 which would also be north facing; single occupancy flats were contrary to Council policy; and the amenity space for flats 3 and 4 was unacceptable.
25. The current proposal is for three flats, flat 1 on the ground floor no longer utilises the basement and is a 3 bedroom 6 person unit. Flat 2 occupies the rear of the first floor (and the proposed extension), is a single occupancy flat. Flat 3 is double bedroomed. All three flats exceeds the minimum space standards. The application was refused because flat 2 was single occupancy and flats 2 and 3 had inadequate amenity space.

26. It is correct that flat 2 is for single occupancy. DMP32 of the Council's Development Management Local Plan (2014) states at 4(e) "*Single person dwellings will not be supported other than in exceptional circumstances. Developments will be required to have an exceptional design quality and be in highly accessible locations*". Nothing has changed since the previous Inspector found there were no exceptional circumstances to allow two single person flats in the previous proposal. The appellant's argument seems to rest on the fact that there is now only 1 such flat which is a suitable compromise as they also providing 2 larger flats. This ignores the fact the building already provides 2 large flats without the need for a policy objectionable single occupancy one. No explanation as to why the Council's policy is not applicable in this case has been made, nor any argument that there are the exceptional reasons required to set it aside. The flat is thus contrary to DMP32.
27. The rear garden is to be subdivided into two sections. The first, adjacent to the house provides a patio and garden area for flat 1. The second, behind the first is accessed down an alley beside the house and provides a bicycle store and communal space for flats 2 and 3. The appellant argues the Council have misread the plans and the reason for refusal is misguided, but it is correct there is no "private" amenity space for flats 2 and 3. According to the Council communal space would be acceptable as long as it was of generous size and good quality. The space is the same as that proposed in the previous appeal, which was also to be shared by a single person and a two-person flat. The Inspector found the living space was not generous and not of good quality, particularly as it was only accessed down a long, narrow side alley. Nothing has changed since then and I have no reason to reach a different conclusion from that Inspector, particularly as access from flat 3 would involve going down two flights of stairs, out of the front of the house and then round the back, down the side alley, hardly an attractive proposition. The proposal would not provide suitable outdoor amenity space for the occupiers of flats 2 and 3.
28. No particular benefits have been suggested other than providing an extra small flat as part of a residential mix. However, this mix includes a single person flat that is expressly excluded by the Council's policies. The appellant also suggests this to be a reasonable compromise. But it is unclear what that compromise is. The 8 flats are unlawful and will be removed once the enforcement notice is complied with, leaving 2 flats or 2 HMOs, either of which would be preferable to the unsatisfactory appeal proposal before me. No conditions have been suggested that would overcome the harm I have identified and I shall dismiss the appeal.

Conclusions

29. I shall dismiss the appeals A and B and uphold the enforcement notices but shall vary the requirements to allow the ensuite bathrooms to remain. I shall dismiss appeals C and D and refuse to issue a LDC and dismiss appeal E and refuse to grant planning permission.

Simon Hand

Inspector