
Appeal Decision

Site visit made on 28 October 2020

by John Whalley

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

Decision date: 16 November 2020

Appeal reference: APP/A5270/C/19/3243943

2 High Street, Acton, London W3 6LJ

- The appeal is made by Mr Muhammad Sohaib Anwar under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the London Borough of Ealing Council.
- The notice was issued on 21 November 2019; reference No. EN170559CU.
- The breach of planning control was: Without planning permission, the material change of use of the premises to a mixed use as seven self-contained flats and an HMO and the erection of a rear roof extension.
 - The requirements of the notice are:
 1. Cease the use of the premises as a mixed use as seven self-contained flats and an HMO;
 2. Remove the kitchen and drainage connections from the seven self-contained flats;
 3. Remove the bathroom and drainage connections from the seven self-contained flats;
 4. Remove all internal doors, locks and partitions that facilitate the mixed use of the premises as seven self-contained flats and an HMO;
 5. Demolish the rear roof extension; and
 6. Remove all resultant debris.
- The period for compliance with the requirements is 3 months.
- The appeal was made on ground (d).

Summary of decision: The enforcement notice is corrected and upheld

Appeal property

1. The appeals concern the end of terrace residential property at No. 2 High Street, Acton. At the time of the appeal site inspection, the property was in a mixed use as 7 flats and a house in multiple occupation, (HMO). It consisted of 5 non self-contained bedrooms, 2 of which were in the basement, 2 on the ground floor with a shared kitchen and shower room. Another non self-contained bedroom was on the first floor.
2. There was one self-contained flat with use of a rear courtyard on the ground floor. There were 2 self-contained flats on the first floor; 3 self-contained flats and a shared bathroom on the second floor and one self-contained flat within the extended roof space on the 3rd floor. Each of the self-contained flats consisted of a small bedroom, kitchen facilities either separate or within the bedroom, and a separate shower with hand wash

basin and W.C. All self-contained flats were secured by their own private door.

The enforcement notice

3. The enforcement notice refers to the alleged breach of planning control having occurred within the last ten years. The Council said the notice should have referred to the 4 year immunity period in respect of the erection of the rear roof extension, (s.171B of the Act).
4. They suggested alternatives to correct the notice. Firstly, reason 1 for issuing the notice could be amended to read: "*The alleged breach of planning control in respect to the erection of the rear roof extension has occurred within the last four years, and the alleged breach of planning control in respect to the material change of use of the premises to a mixed use as seven self-contained flats and an HMO has occurred within the last ten years.*".
5. Or, they said a second option would be to amend the alleged breach of planning control to remove reference to the erection of the rear roof extension. The alleged breach of planning control in that instance would be: "*Without planning permission, the material change of use of the premises to a mixed use as seven self-contained flats and a HMO.*" If that option was adopted, the Council asked that requirement 5 of the notice, requiring demolition of the rear roof extension, be retained. That was because the rear roof extension facilitated the use of one of the 7 self-contained flats as alleged in the breach of planning control.
6. In the Council's view, there would be no injustice arising from either amendment to the notice. That was because the 4 year immunity period was less than the 10 year period. Also, the Appellant had not claimed that the rear roof extension was immune, nor provided evidence to that effect.
7. I consider the first suggestion preferable. It makes clear the distinction between the periods in which to gain immunity from enforcement action. It would amount to no more than a minor correction to the reasons for issuing the notice. No injustice to the Appellant arises, especially as he made no case for ground (d) immunity in respect of the roof extension or for the flat within the extended roof.

The appeal on ground (d)

8. An appeal on ground (d) says that at the date the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.
9. The alleged breach of planning control set out in the notice is: *Without planning permission, the material change of use of the premises to a mixed use as seven self-contained flats and an HMO and the erection of a rear roof extension.* Section 171B(b) of the Act sets out the time limits for taking enforcement action against an alleged breach of planning control. The periods relevant to this case are: 10 years in relation to the change of use of the property to a mixed use as 7 self-contained flats and an HMO, (s.171B(3)). For the construction of the roof extension, the period is 4 years, (s.171B(1)). Where there has been a breach of planning control consisting in the change of use of any building to use as a single

dwellinghouse, no enforcement action may be taken after the end of the period of 4 years beginning with the date of the breach. (s.171B(2)). The 4 year period in s.171B(2) applies to notices alleging a material change of use by the sub-division of a residential building. "Building" is defined in s.336(1) as including any part of a building. Flats are dwellinghouses for the purposes of the Act. Each subdivided flat at No. 2 has the available protection of the 4-year rule.

10. The Appellant, Mr Anwar, asserted that 6 of the self-contained flats at No. 2 High Street had become immune from action by the passage of time by more than 4 years' continuous use. He made no case that the mixed use of the entire property at No. 2 had acquired immunity from enforcement action. That was because he said the property was physically divided into 6 flats and an HMO use in 2011, less than 10 years prior to the issue of the notice. Also, work to build the rear roof extension that now incorporates Flat 7, was started in 2017. Therefore, no claim of immunity either for the roof extension or for Flat 7 was made.
11. It follows that for each of the 6 separate self-contained flats to gain immunity from enforcement action, Mr Anwar has to show, in the case of each flat, that its occupation and use as a separate residential unit started more than 4 years before the enforcement notice was issued and that it continued to the extent that the Council could have taken enforcement action in respect of that individual flat any time in that period. The case of *Thurrock BC v SSETR & Holding* (COA 27.2.02, J 1080) is authority for that position. Unlike the situation where, with regard to an existing lawful residential use, a dwellinghouse could be unoccupied for sometimes lengthy periods of time without losing that lawfulness, (*Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461). Where the use was unlawful, if that use ceased during the 4 year period, the time accrued up to the unoccupied point would not count towards immunity. The "clock" would restart if and when the unlawful use recommenced.
12. Mr Anwar said the building contractor who carried out the works to construct and fit out the self-contained flats could show when they were completed. He also submitted a number of tenancy agreements in respect of the 6 flats. He said those agreements showed uninterrupted use of the flats for the last 4 years. The agreements showed who occupied each flat and when.
13. I agree with the Council that tenancy agreements alone do not provide evidence of use. On their own they do not demonstrate continuity of occupation. Also, the Council suggested there were some doubts about the credibility of the tenancy agreements. They noted - below:

Ground floor rear flat: tenancy agreements said Muhammad Tayyab occupied it from 20 August 2015 to 19 August 2016; Katarzyna Kotynia occupied from 28 August 2016 to the present.

First floor front flat: tenancy agreements said Dariusz Rafal Mordzak occupied the flat from 28 August 2015 to the present. Mr Dhak said this tenant has lived in there for 8 years. But agreements were not signed from late 2011.

First floor rear flat: tenancy agreements said Martyna Sobol occupied the flat from 28 June 2015 to 25 June 2018. Meaghen Elizabeth Shier Flint occupied

the flat from 5 February 2019 until 4 February 2020. No evidence of occupation of the flat from 26 June 2018 to 4 February 2019 was provided.

Second floor front flat: tenancy agreements said Mouloud Brahimi occupied this flat from 15 March 2015 to 10 March 2020. He occupied this flat for 6 years. No evidence of Mr Brahimi's occupation prior to 15 March 2015 was provided. The tenancy agreements were only signed from 15 March 2015, not from when it was claimed Mr Brahimi first occupied the flat.

Second floor rear flat: tenancy agreements said Joelma Barbosa Silva was in occupation from 24 February 2015 to 23 February 2016. Shabnam Karimzada occupied the flat from 27 February 2016 to 26 February 2017. Jago Murphy Hallet Miller occupied the flat from 9 September 2017 until 8 September 2018. Semiramida Manoila occupied the flat from 22 September 2018 to 21 September 2019. No evidence of use of the flat onwards from 22 September 2019 was provided.

Second floor side flat: tenancy agreements said Ona Zygavicute occupied the flat from 18 June 2015 to 16 June 2017. Aurimas Jakubauskas occupied the flat from 12 July 2017 to 11 July 2018. Roberta J Galluci occupied the flat from 9 August 2018 until 8 August 2019. Fatima Zohra Bouras Douja occupied the flat from 11 August to the present date.

14. The Council said there were further deficiencies in Mr Anwar's supporting evidence. He had not explained why he was able to provide copies of bank statements from May 2012 to April 2013, but not from February 2015 to the present date, when the tenancy agreements from 2015 onwards said all rent would be paid via bank transfer. The Council further said that all the self-contained flats were banded for council tax purposes within the last four years. The electoral roll did not split the subject property into separate flats in 2015 and 2016. Instead, there was a single property listed. A Council record of a Housing Service Request of a visit in October 2016 showed there were 7 HMO rooms and 4 flats in the property. Mr Anwar had stated on the Planning Contravention Notice that there were 5 self-contained flats, 3 non-self-contained flats and 11 occupants. The Council said their officer's visits found 7 self-contained flats, 5 non-self-contained flats and 18 occupants.
15. Mr Anwar's response was that he had all the bank statements showing rental income received from 6 self-contained flats from September 2011 onwards. He could send them to the Planning Inspectorate if needed. Had he known in 2011 that he would have to deal with this kind of enquiry he could have asked each tenant to provide details of each rent payment. The previous tenants could be asked to attend the visit of the Planning Inspector to witness Mr Anwar's claim.
16. Prior to my site visit, I had noted Mr Anwar's offer to provide witness evidence at my site visit. That offer seemed to be based upon a misunderstanding of the written representations appeal procedure. The situation was clarified by an e-mail from the Planning Inspectorate prior to the site visit to Mr Anwar which said, (amongst others): *The purpose of the site visit is for the Inspector only to see development in the notice. There will be no opportunity for anyone to discuss the merits of the cases nor to give evidence.*
17. On the evidence before me, it has not been shown that, on the balance of probabilities, all or any of the 6 self-contained flats have accrued a 4 year continuous residential occupation that leads them to be immune from

enforcement action. There appear to be gaps in occupation, especially where tenancies have ended and new tenancies started. There are inconsistencies of numbers of flats seen during inspections; there are difficulties tying each individual flat to tenants and periods of occupation and no evidence from tenants to support continuity of occupation during a particular tenancy. It may be that Mr Anwar could provide additional and more persuasive evidence as his representations suggest. However, I can only deal with what is before me. I have concluded that it is insufficient to allow the ground (d) appeal in respect of any of the No. 2 High Street flats.

18. In the case of *Ravensdale Ltd v SSCLG* [2016] EWHC 2374 (Admin) the High Court held that an appellant seeking to make out a lawful use pursuant to ground (d) must take care that sufficient evidence is provided which meets the balance of probabilities test that there has been a continuous use for the relevant immunity period. In that instance, it was not irrational for the Inspector to conclude that the sparse nature of the declarations and the "patchy" evidence of lettings was insufficient to satisfy the onus of proof. There is no general duty on a decision-maker when dealing with ground (d) appeals or lawful uses to explain what evidence might have satisfied him, or her, as opposed to making a decision on the basis of the evidence provided.
19. I conclude that the Appellant, Mr Anwar, failed to show, on the balance of probabilities, that the independent residential use of any of the self-contained flats at No. 2 High Street, Acton had become lawful by the time the enforcement notice was issued. No case was made that the mixed use of the entire property at No. 2 as seven self-contained flats and an HMO and the erection of a rear roof extension had acquired immunity from enforcement action. The appeal on ground (d) fails.

FORMAL DECISION

20. The enforcement notice is corrected by the deletion of the words: "*The alleged breach of planning control has occurred within the last ten years.*" in para. 4.1. of page 1 of the notice and the substitution therefor of the words: "*The alleged breach of planning control in respect to the erection of the rear roof extension has occurred within the last four years, and the alleged breach of planning control in respect to the material change of use of the premises to a mixed use as seven self-contained flats and an HMO has occurred within the last ten years.*".
21. Subject to that correction the appeal is dismissed and the enforcement notice is upheld.

John Whalley

INSPECTOR