



Appeal Decision

Site visit made on 10 November 2020

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19th November 2020

Appeal Ref: APP/A5840/C/20/3249797

Ground floor and basement of 370 Old Kent Road, London SE1 5AA

- 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 R Summerskill of HPM 1 Limited against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The enforcement notice was issued on 14 February 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, the carrying out of unauthorised development by the material change of use of the Ground Floor and Basement Property from office use (Class A2) to a mixed use as a dwellinghouse and for non domestic storage.
 - The requirements of the notice are:
 - 5.1 Cease the use of the Ground Floor and Basement Property as a dwelling and for non domestic storage.
 - 5.2 Remove the obscure glazing from the frontage windows.
 - 5.3 Remove the Kitchen
 - 5.4 Remove the partitioning of the rear bedrooms at ground floor level
 - 5.5 Remove the storage container from the rear car park.
 - 5.6 Remove from the site and properly dispose of any rubbish or material arising from compliance with steps 5.1 to 5.5 above.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. It is directed that the enforcement notice is corrected by deleting "from office use (Class A2)" from the breach of planning control alleged in paragraph 3 of the notice; deleting "rear" from paragraph 5.4 of the requirements of the notice and varied by the deletion of 6 months as the period for compliance and its substitution with 12 months. Subject to these corrections and variations, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

2. Since the appeal was lodged, The Town and Country Planning (Use Classes) Order 1987 (the Order) has been amended. For the sake of simplicity, I have referred to land uses in this decision as they appeared in the Order prior to the above amendment.

3. Under the ground (a) appeal, the appellant states they are seeking planning permission for "a self-contained live/work unit comprising Class B8 or A1, A2, B1". A "proposed" layout drawing to this effect has been provided. This does not reflect the layout I saw at my site visit or that which has been described by the Council in its evidence.
4. A deemed planning application is for the development which has been carried out. It derives its terms directly from the words of the allegation, that is the matters stated in the enforcement notice as constituting a breach of planning control. Planning permission may be granted only for those matters or part of those matters.
5. In this context "part of those matters" does not include one or other of the components of a mixed use, only the mixed use itself. So I am unable to consider the merits of an entirely residential use or an entirely storage use or another development that is not the development alleged or part of it. Any other scheme must be considered by the Council in the first instance. I have determined the appeal on this basis, ie based on what has occurred as described in the notice.
6. The appellant states that the Council's decision to initiate formal enforcement action was unnecessary. But in accordance with section 172(1)(b) of the 1990 Act, it is entirely a matter for the Council to decide whether enforcement action is expedient or not. The appellant's concerns in this regard are not matters for me to consider in an appeal under section 174 of the 1990 Act.
7. My attention has been drawn to emerging policies of the New Southwark Plan 2017. But the information provided indicates there is uncertainty about this emerging plan and I do not know if there are unresolved objections to the emerging policies referred to. Accordingly, they could be subject to change or the plan could be found unsound. So I accord limited weight to the emerging policies referred to.

The Notice

8. There is a dispute between the parties over the lawful use of the appeal premises. The Council considers a Class A2 (financial and professional services) use had continued for a period in excess of ten years prior to the breach and so had become immune for the purposes of section 171B(3) of the 1990 Act.
9. The appellant has stated the lawful use is for live/work purposes, following a grant of planning permission, ref 97/AP/1362, on 8 December 1997, for: "Use of ground floor as a business with ancillary residential or a retail unit with ancillary residential".
10. The Council states it is not clear if the above permitted use ever operated on the site and considers there is nothing to suggest it remains lawful and capable of being revived. The appellant has provided information indicating the appeal premises were live/work. But the appellant has also said it is likely it was used as an administrative head office, probably for a mix of Class A1 and B1 and even possibly for Class D1 and/or Class D2 activities ie most likely for sui generis purposes. A previous occupant has said it was only used as an office. But it is not clear what type of office it might have been for the purposes of the Order, eg whether it was A2 or B1.

11. In any event, it is clear the unauthorised use does not reflect that permitted in 1997 or an office use. A notice alleging a material change of use need not recite the previous use. It is open to me to omit the previous use from the allegation in the notice, drawing on my powers under section 176(1) of the 1990 Act. I am satisfied this will not cause injustice to the appellant or the Council and if the appellant wishes to ascertain whether any particular use would be lawful, they may make an application under section 192 of the Act.
12. There is also a dispute between the parties over the breach alleged in the notice. The Council considers the breach to be a material change of use to a mixed use as a dwellinghouse and for non-domestic storage. This reflects evidence provided by the Council and my observations at my site visit. So I am satisfied this is an accurate description of the unauthorised use.
13. The appellant accepts that the existing use is not permitted and considers the breach is a live/work use, specifically, use of the appeal premises for a mixed residential and Class B8 (storage) use, contrary to condition 2 of the above 1997 planning permission. That condition stated:

"The work area on the ground floor hereby approved shall be used for no other purpose than retail or uses falling within Class B1 of the Town and Country Planning (Use Classes) Order 1987 in association with the residential part of the unit as shown on the submitted plans hereby approved and shall not be used for any other purpose or used as self-contained flat independent of the work element without the prior written consent of the Local Planning Authority."
14. I do not accept the appellant's argument in this regard for 3 reasons. Firstly, a mixed residential and storage use does not comply with the definition of live/work units¹ contained within the glossary of the Southwark Plan 2007 (the Southwark Plan). Secondly, there is no evidence any occupant of the appeal premises carries out their job on the appeal premises.
15. Thirdly, in my judgement, the existing unauthorised use is materially different to what was permitted in 1997. I therefore consider the breach is development without the required planning permission, pursuant to section 171A(a) of the 1990 Act, rather than a breach of condition pursuant to section 171A(b) as is suggested by the appellant. I particularly consider this to be the case given the appellant's more recent comments about the appeal premises having been used as an administrative head office. This reflects the previous occupant's comment that it was only used as an office.
16. The Council has drawn my attention to an error in paragraph 5.4 of the notice. I consider it is necessary to correct this to avoid ambiguity and that based on the cases put to me, this can be done without injustice to either party.

Reasons

The ground (a) appeal

17. Paragraph 4.2 of the enforcement notice contains 4 paragraphs stating why the Council considers it expedient to have taken enforcement action. I consider these reflect 4 main issues for the ground (a) appeal. Whilst paragraphs 4.2.1

¹ Live – Work Units: A dual use unit comprising separate but interconnected B1 use class and a residential dwelling. Both units must be able to operate in isolation. The concept of live – work units does not extend to home-working, which can be carried out from any residential dwelling within the C3 Use class.

and 4.2.2 of the notice both refer to 'vitality' and 'appearance' I consider that together they raise 2 discrete main issues.

18. The main issues in the ground (a) appeal are:

- the effect of the appeal development on the appearance of the area including the Cobourg Road Conservation Area;
- whether the appeal development provides an acceptable standard of accommodation, particularly with regard to outlook, light and outdoor space;
- the effect of the appeal development on the vitality and viability of the remaining businesses on the terrace; and
- the effect of the appeal development on flood risk.

Appearance of the Area

19. The appeal site occupies part of a building within an early Victorian terrace at Nos 358-384 Old Kent Road. It is within the Cobourg Road Conservation Area and so is a designated heritage asset. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 therefore requires me to pay special attention to the desirability of preserving or enhancing the character or appearance of the conservation area.
20. The Council has published a Conservation Area Appraisal (CAA) for this conservation area. It identifies the appeal building as part of a single and largely unaltered run of buildings that remains as a grand and unified single composition. The CAA describes the group as a fine terrace of 'shops' with two domestic storeys above, typical of the commercial architecture of the 1830s and 40s and designed as a single set piece.
21. According to the CAA, the shopfronts of this terrace are largely complete and have original pilasters, consoles, and dentil cornices with facias below. Notwithstanding that non-retail uses are seen within the group at ground floor level, I have no reason to disagree with the above descriptions and I consider the shopfront of the appeal site forms an integral part of the significance of the heritage asset. It is prominently sited on a busy road.
22. From the information provided, the glazed part of the shopfront has previously been used as a window display in association with the use which was being carried out. Since the previous occupier vacated the premises and the ground floor has become used for residential accommodation, the shopfront of the appeal site has ceased to serve its original purpose and a dead window frontage is now presented to the street. In my judgement, this is a consequence of the unauthorised material change of use and is harmful to the appearance of the area, including the conservation area.
23. With regard to the statutory test set out above, the Council has raised no concerns in respect of character and I see no reason to either, given character and appearance are not the same.
24. I have considered whether re-siting the non-domestic storage element of the mixed use to the front of the ground floor, perhaps by means of a condition, may alleviate this harm. But I consider it would not, as in my judgement, storage would be no less harmful than residential accommodation in this location, in respect of this main issue.

25. Given the size of the appeal site's shopfront glazing within the context of the conservation area as a whole, I consider less than substantial harm to the appearance of the conservation area has been caused. Nevertheless, any harm to the significance of a designated heritage asset should require clear and convincing justification and in accordance with paragraph 196 of the Framework, I must weigh the harm against the public benefits of the proposal.
26. No public benefits have been identified by the appellant. The appeal development provides a mix of residential accommodation and non-domestic storage. But in my view, these are not public benefits of sufficient weight to outweigh the harm to the conservation area.
27. I have taken account of the planning permission, referred to in the evidence, relating to the ground floor and basement of No 384. But that property already had a lawful established use as residential, prior to the grant of planning permission referred to. So the circumstances of that case are not the same as those in the appeal before me and so that decision does not necessarily mean residential uses are acceptable along the parade of properties the appeal site forms part of, as has been suggested by the appellant.
28. I am aware the report for No 384 states that most of the commercial units behind the shopfronts have been converted into residential use. But no evidence has been provided that satisfies me such conversions were carried out lawfully and so I give this limited weight in my decision. I am also aware the same report states that the implementation of a privacy film on the shopfront glazing would not be considered detrimental to the significance of the conservation area. But this comment must be seen within the context of that site which already had an established solely residential use which the appeal site before me does not.
29. I conclude that the appeal development harms the appearance of the area, including the Cobourg Road Conservation Area. In this regard, it does not comply with Policies 7.4, 7.6 or 7.8 of the London Plan 2016 (as amended) (the London Plan), Strategic Policy 12 of the Core Strategy 2011 (the Core Strategy), Policy 3.12, 3.13, 3.15 or 3.16 of the Southwark Plan or the National Planning Policy Framework in this regard.

Standard of Accommodation

30. As I saw at my site visit, the ground floor front room is used as a bedroom. Opaque secondary glazing is fitted across the window so it has no outlook. Behind this room is another room which the Council's evidence demonstrates has also been used as a bedroom. This room has no external window and so lacks natural light.
31. At the rear of the appeal premises is an open plan kitchen and living area. The windows of this space directly abut car parking spaces which, at the time of my site visit, were occupied by a substantial storage container, identified in paragraph 5.5 of the enforcement notice. Whether occupied as I saw, or by parked cars, this arrangement results in poor outlook for this residential accommodation as it has no private amenity space that is defensible in front of these windows.
32. The appellant indicates the provision of private amenity space is not required for live/work developments. But I do not consider this relevant given the

appeal development is not a live/work unit for the purposes of the Southwark Plan, as set out above. The appeal development has clearly provided 2 double bedrooms. This is materially different to the proposal for No 384 that I have been referred to by the appellant. Based on the information provided, I see no reason why such residential accommodation should not be provided with at least some outdoor space, notwithstanding that in this case the residential accommodation is part of a mixed use.

33. I have taken into account the proximity of Burgess Park. But this makes no difference to my overall conclusion on this main issue given in this case the lack of any outside space significantly affects the outlook of the principal living area. Considering all of the above points, the appeal development does not provide an acceptable standard of accommodation, particularly with regard to outlook, light and outdoor space. It therefore does not comply with Policies 3.2, 3.11 and 4.2 of the Southwark Plan in respect of this main issue.

Vitality and Viability

34. Notwithstanding the dispute over the lawful use of the appeal premises, set out above, both main parties have applied Policy 1.10 of the Southwark Plan to the use which has been lost. Given the appeal site's street frontage and its history of having had a shop window display in association with the previous use, I am satisfied it is appropriate to assess the change of use in respect of Policy 1.10.
35. Currently, the appeal site is outside any designated town centre, local centre or protected shopping frontage. In such locations, Policy 1.10 permits a change of use from A Use Classes to other uses subject to the following criteria:
- i. The proposed use would not materially harm the amenities of surrounding occupiers; and
 - ii. The use that will be lost is not the only one of its kind within a 600m radius and its loss would not harm the vitality and viability of nearby shops or shopping parades; or
 - iii. The premises have been vacant for a period of at least 12 months with demonstrated sufficient effort to let, or have not made a profit over a two year period.
36. The reasons for the policy state that it is important for a range of essential local services to be available within easy walking distance of as many residences as possible; that local shopping parades provide a valuable service to the community they serve; and that the Council will seek to protect these local uses where they are the last available use of their type within a 600m catchment area.
37. The Council states commercial units should not be lost at this location without all aspects of Policy 1.10 being satisfied. But the wording of this policy means that only criteria i and ii or criteria i and iii must be satisfied. There is no evidence criteria i is not satisfied by the appeal development and no evidence pursuant to criteria iii has been submitted by the appellant. So criterion ii is crucial in determining whether the appeal development complies with Policy 1.10 or not.
38. It is common ground the appeal premises were previously occupied by Greenhouse Sports, a charity that provides sports programmes for young

people throughout London. The charity has since relocated to another London borough. In the context of criterion ii of Policy 1.10, there is no evidence whether the use lost was the only one of its kind within a 600m radius. Nor is there any evidence it was an essential local service, or that its loss has harmed the vitality and viability of nearby shops or shopping parades taking into account paragraph 4.2.1 of the enforcement notice refers only to the remaining businesses on this terrace, ie Nos 358-384. Moreover, as I saw at my site visit, the appeal site is well within 600m of numerous other essential local services.

39. Considering all of the above points, I find there is no conflict with Policy 1.10 of the Southwark Plan in respect of this main issue. So based on the information provided, I conclude there is no effect of the appeal development on the vitality or viability of the remaining businesses on the terrace.
40. The Council has drawn my attention to Policy 2.13 of the London Plan but this is not specific in respect of this main issue. My attention has also been drawn to the developing Old Kent Road Area Action Plan. But this is not adopted and there is no evidence it will not be subject to change so it carries limited weight in my decision. I have also been referred to a proposed development at Southernwood Retail Park. But from the information provided planning permission has not yet been granted for this development so it makes no difference to my decision.

Flood Risk

41. The evidence indicates the appeal site is within flood zone 3 and an area benefitting from flood defences. The appeal site has a basement. The Council considers this is vulnerable to flood risk and that a mixed use including residential increases vulnerability to flooding. The Council acknowledges that the basement has mainly been used for storage. This reflects my observations at my site visit and there is no evidence this is likely to change, despite the basement containing a shower and toilet (in addition to such facilities at ground floor level).
42. The appellant has suggested that certain areas of the property are used only as commercial, including the basement, and that this can be controlled by the imposition of a condition. The Council states that if the basement is solely commercial, the issue of increased vulnerability to flooding is significantly reduced and that a condition to this effect could be enforced by inspecting the basement. I have no reason to disagree with this approach, particularly in the absence of any objection to the appeal development from consultees in respect of this main issue.
43. The notice indicates the exception test, described in the National Planning Policy Framework (the Framework), is failed. But paragraph 164 of the Framework generally indicates that changes of use should not be subject to the exception test. Moreover, Planning Practice Guidance² places financial and professional services, offices and storage all in the 'less vulnerable' classification. So considering all of the above points, I am satisfied the appeal development has no effect on flood risk and is capable of being controlled by condition given the circumstances in this case. Accordingly, I find no conflict with Policy 5.12 of the London Plan or Strategic Policy 13 of the Core Strategy in this regard.

² Flood risk and coastal change - Paragraph: 066 Reference ID: 7-066-20140306

Other Matters

44. The appellant considers the appeal development fully complies with Policy 1.6 of the Southwark Plan. But this is not relevant as the appeal development is not a live/work unit for the purposes of the Southwark Plan.
45. The appellant states that if the lawful use of the appeal premises is Class A2 then the use can now be lost without the need for planning permission. Whilst this may be the case, this does not help the appellant's case as there is no evidence permitted development rights allow the use which is alleged in the notice or that the uses a Class A2 unit could change to would result in the harm identified above.
46. My attention has been drawn to Strategic Policies 1, 5 and 7 of the Core Strategy. But none of these are directly relevant to the main issues in this appeal and so I consider they do not weigh in favour of or against the appeal development in this case.

Conclusion on ground (a)

47. Whilst I have not found harm in respect of vitality and viability or flood risk, in my judgement there is conflict with the development plan overall due to the effect of the appeal development on the appearance of the area and the standard of accommodation provided. I therefore conclude the appeal on ground (a) fails.

The ground (f) appeal

48. Under section 173(4) of the 1990 Act, when serving an enforcement notice the Council may seek to (a) remedy the breach of planning control, or (b) remedy any injury to amenity which has been caused by the breach. Based on the requirements of the notice, the purpose of the enforcement notice in this case is to remedy the breach of planning control.
49. The appellant has stated that all that is required to remedy the breach is to cease using the premises for non-domestic storage or as a self-contained residential unit. But there is no evidence either of these uses on their own is lawful, nor would a requirement to this effect achieve the purpose of the notice.
50. The appellant has accepted the requirements to remove the kitchen and storage container if the ground (a) appeal fails.
51. The appellant considers the requirements to remove the obscure glazing from the frontage windows and the partitioning of the bedrooms exceed what is necessary to remedy the breach as it involves the removal of internal works that do not require planning permission. But a notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development or be immune from enforcement action.
52. The appellant states the secondary glazing on which a privacy film has been applied may have been installed over 20 years ago and that throughout the occupation of Greenhouse Sports either a privacy film was applied or privacy blinds were installed. But based on the information provided, I am not satisfied

this is the case and, in my judgement, blinds are materially different to obscure glazing.

53. Therefore, from my observations and the information provided, the opaque glazing and bedroom partitions are integral to and solely for the purposes of facilitating the unauthorised use, so the notice may require their removal and these requirements are not excessive.
54. The appellant states privacy film has been deemed acceptable elsewhere and considers it is not detrimental to the significance of the Cobourg Road Conservation Area. But the circumstances of the example given at No 384 are materially different to those of the appeal site, as I have set out above.
55. The appellant considers the requirement to remove rubbish and material arising from the other requirements, is too broad, vague and ambitious. But given the circumstances of this case, this is not an excessive requirement and from the information available, it is important for restoring the land to its condition before the breach took place.
56. I conclude no lesser steps have been suggested which would achieve the purpose of the notice, nor are there any which are obvious. As such, the appeal on ground (f) fails.

The ground (g) appeal

57. The notice was issued prior to the Covid-19 pandemic. As such the Council has agreed to extend the time period for compliance to 12 months, as requested by the appellant. But this is the maximum period I consider reasonable in the circumstances, for the current tenant to seek alternative accommodation and for the requirements of the notice to be complied with, even taking into account the Covid-19 pandemic and the combination of residential accommodation and non-domestic storage involved. I conclude the appeal on ground (g) succeeds to the above extent.

Conclusion

58. For the reasons given above, I conclude that the appeal does not succeed. I uphold the enforcement notice with corrections and a variation and I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

L Perkins

INSPECTOR