



Appeal Decision

Site visit made on 20 October 2020

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 20th November 2020

Appeal Ref: APP/T5150/C/20/3245153

121 Crest Road, London, NW2 7NA

- 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 Richard Lewis (Berkeley London Investments Limited) against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice, numbered E/17/0015, was issued on 11 December 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises to a House in Multiple Occupation (HMO) and flats.
 - The requirements of the notice are 1. Cease the use of premises as flats and/or a House in Multiple Occupation (HMO), and its occupation by more than ONE household; 2. Demolish the rear extension and remove all items and debris arising from that demolition, and remove all materials associated with the unauthorised use and development from the premises; 3. Remove all internal partitions items, materials and debris associated with the unauthorised change of use, including the removal of all kitchen, en-suite bathrooms/shower rooms and toilets; 4. Restore the internal configuration to the original layout before the unauthorised use took place. For the avoidance of doubt, this should include a kitchen, dining room and lounge on the ground floor, bedrooms on the upper floors, a bathroom on the first floor and a WC on the ground floor.
 - 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), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered
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Decision

1. It is directed that the enforcement notice be corrected by: the deletion of the wording of Schedule 4, Step 1 in its entirety and replacement with the words "Cease the use of premises as a House in Multiple Occupation (HMO) and flats".
 2. It is directed that the enforcement notice be varied by: a) the insertion of the words "with the exception of one kitchen, and one bathroom and toilet" at the end of Schedule 4, Step 3; and b) the deletion of Schedule 4, Step 4 in its entirety.
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3. Subject to this correction and variations the appeal is dismissed and 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.

The Notice

4. I have corrected Schedule 4, Step 1 to require that the mixed use of the premises as HMO and flats cease. This reflects the unlawful use alleged in the notice and as such I am satisfied that this correction can be made without causing injustice to either party.

Planning Permission Reference 20/0924

5. Planning permission for "Proposed change of use of the premises to a 5 room HMO for 5 individuals with the provision of a communal kitchen and communal lounge area; and the retention of the existing ground floor rear existing extension" was granted on 25 August 2020 ("the 2020 Permission"). This is a material consideration in the ground (a) appeal and the deemed application for planning permission.
6. Section 180 of the 1990 Act provides that where, after the service of an enforcement notice, planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with the permission. In this case the 2020 Permission has been granted after the service of the notice.

Ground (b)

7. An appeal on this ground is on the basis that the matters alleged in the notice, in this case the material change of use of the premises to a House in Multiple Occupation and flats, has not occurred. It is not disputed that the property was a single dwellinghouse prior to being purchased by the appellant in 2016. The appellant stated on the appeal form that "the property is in use as a six room HMO and not as alleged in the notice" which accords with the appellant's response to the planning contravention notice dated 16 February 2017. The relevant date for the consideration of the use in an appeal under ground (b) is the date of the issue of the notice (11 December 2019), and not any subsequent date, including the date of the site visit.
8. The relevant definition of an HMO is found in section 254(2)(f) of the Housing Act 1987 as two or more households who occupy living accommodation and share one or more basic amenities or the living accommodation is lacking in one or more basic amenities. Basic amenities are a toilet, personal washing facilities and cooking facilities.
9. It was evident during the site visit, that whilst there was a communal kitchen on the first floor, each bedroom had an en-suite shower room and its own small kitchen sink and fridge unit with storage cupboards. The evidence submitted by the Council states that during a site visit on 1 June 2017 it found cooking facilities in one unit and that during a site visit on 26 November 2019 it found cooking facilities, including ovens and a hob in 2 units, the inference being that the occupants of those rooms at that time would have had no need

to use the communal kitchen facilities. It is not clear from the evidence submitted which rooms within the appeal property had the additional oven and hob facilities but the Council has submitted that there appears to be a fluidity in how the units within the property have been used. Case law states that a mixed use can subsist where different elements are not associated with particular parts¹. Cooking facilities within the original rooms as described by the Council were not evident during the site visit, but as set out above, this is not the relevant date for the purposes of this ground of appeal.

10. The appellant registered the property as 6 flats on the Council Tax Valuation List from 26 November 2016 and had its performance rated as 6 units for the Energy Performance Certificate purposes. The copies of the tenancy agreements provided by the Council refer to Flat 2 and Flat 4 and show the rents payable at the higher housing benefit level, applicable for a self-contained flat and not a room within an HMO. The appellant has confirmed that the housing benefit paid for all of the units is at this higher rate. These facts, when considered with the Council's evidence regarding the cooking facilities present within some of the rooms, support the allegation that the property has not been used solely as a house in multiple occupation.
11. In this case, the allegation in the notice is the material change of use to a mixed use. It is for the appellant to prove on the balance of probability that the matters alleged in the notice have not occurred, that is that the property has not been a mixed use as flats and HMO. Taking all of the evidence into account, I am satisfied on the balance of probability that it has not always been necessary for the residents of all of the rooms to use the shared facility in the property, i.e. the communal kitchen, for day to day domestic existence. It is likely that some of the rooms have been used at certain times as separate units of accommodation as alleged by the Council and that the property has therefore been in a mixed use. I have been referred to other appeal decisions regarding similar issues by both parties and taken these into account, but the use of a property turns on its specific facts. The appellant has not proved on balance that the matters alleged in the notice have not occurred and the appeal on this ground cannot therefore succeed.

Ground (c)

12. To succeed on this ground, the appellant must show on the balance of probability that the matters alleged in the notice do not constitute a breach of planning control. The appellant's case is that the use of the property as an HMO with 6 occupants is a lawful change of use from a single dwellinghouse under the Town and Country Planning (Use Classes) Order 1987 as amended² ("the UCO"). However, as set out in the preceding paragraphs relating to the ground (b) appeal, I have found the mixed use alleged in the notice to be proven on the balance of probability, and the change to a mixed use is sui generis and is not covered by the UCO.

¹ R. (on the application of Westminster City Council) v Secretary of State for Communities and Local Government, [2014] EWHC 1248 (Admin).

² Class C3 to C4, Town and Country Planning (Use Classes) Order 1987

13. The appellant's case regarding the rear extension is that it benefitted from permitted development rights under the Town and Country Planning (General Permitted Development) (England) Order 2015("the GDPO") as development within the curtilage of a dwellinghouse. I have found that the property was in a mixed use containing one or more flats, and therefore not within the definition of a dwellinghouse³. The appellant needed to prove that the appeal property was in use solely as a House in Multiple Occupation under Class C4 (and therefore a dwellinghouse) at the time that the rear extension was built in order to be able to benefit from permitted development rights under Schedule 2, Class A, of Part 1 of the GDPO. However, as precise and unambiguous evidence has not been provided regarding the timing of the construction of the rear extension or that the rest of the house was being used as at that time as an HMO with 6 or fewer residents there is insufficient proof on the balance of probability that the rear extension was erected as permitted development. The appeal on this ground is therefore unsuccessful overall.

Ground (a) and the deemed application for planning permission

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

- whether the development provides adequate living conditions for existing and future residents, with particular reference to internal living space and external amenity space;
- the effect of the development on the living conditions of nearby residents;
- the effect of the development, and in particular the rear extension, on the character and appearance of the area; and
- whether the development is contrary to policy protecting family housing.

Living Conditions of Occupiers

15. The deemed application for planning permission is for the change of use of the premises to a House in Multiple Occupation and flats. The individual units, if used as self-contained flats, are all extremely small and fall well below space standards as set out in the DCLG's Technical Housing Standards, Policy 3.5 of the London Plan 2016 and Policies DMP18 and 20 of the London Borough of Brent Development Management Policies 2016 (which are all part of the development plan for the borough). In addition, only two of the rooms had access into the rear garden and they did not seem to have a delineated area of exclusive use within the garden. The outdoor area to the front of the house directly adjoins the main street and busy road and does not provide any exclusive outdoor space. The lack of provision of external private amenity space is also a failure to provide acceptable living conditions and contrary to Policies DMP1 and DMP19 of the Development Management Policies Document.

³ Article 2, GDPO " "dwellinghouse"...does not include a building containing one or more flats..."

Living Conditions of Nearby Residents

16. The appeal property is a two storey dwellinghouse situated on a predominantly residential street. The material change of use of the property to flats/HMO is likely to increase the comings and goings to the property overall when compared with use as a single dwellinghouse. This could, along with additional refuse, and increases in noise and disturbance, cause harm to the living conditions of nearby residents. However, the 2020 Permission is a material consideration as it has been accepted that the use as a 5 person house in multiple occupation is acceptable in planning terms. The property is only suitable for 5 residents and the introduction of an additional occupant would cause inadequate living conditions which could have implications in terms of disturbance and environmental impacts on the neighbouring properties. I do therefore find that the harm of the use of the property as a mixed use including separate flats would be materially greater than if compared to the fallback position of the 2020 permission and would not be in accordance with policies DMP1 and DMP20 of the Development Management Policies which are intended to secure the housing needs of the borough with units of an acceptable quality.

Rear Extension and use as Accommodation with Shared Facilities

17. The rear extension does not benefit from planning permission and the notice required it to be removed as it facilitates the unauthorised mixed use of the property.
18. The 2020 Permission is a material consideration in relation to the operational element of the development in terms of the rear extension, and it is clear that the Council does not therefore object to the appearance of the extension. The fallback position is that the rear extension has permission associated with the use of the appeal property as an HMO for 5 people or less. I find it likely that the fallback position would be implemented if the deemed application for planning permission is not granted and I therefore give significant weight to the 2020 Permission. However, the rear extension when used to facilitate the mixed use of the property including separate units does cause material harm in terms of the character of the area and is not in accordance with Policies DMP1, DMP18 and DMP20 of the Development Management Policies Document.

Policy

19. The Council's case is that the change of use to the mixed use of flats and HMO results in the loss of a family dwelling which is in conflict with Policy CP21 of Brent's Core Strategy 2010 and Policy DMP17. The change of use does result in a loss of a family-sized home contrary to the development plan policies which are intended to meet housing need within the borough. The Council have accepted in relation to the 2020 Permission that the loss of the family housing would be acceptable as the 5 person HMO would be in accordance with Policy DMP20. As the Council have accepted in principal that a shared use would be acceptable as long as adequate living standards are provided, I have given this conflict little weight.

Conclusion on ground (a) and the deemed application for planning permission

20. I have given weight to the 2020 Permission and the fallback position as a material consideration, but I find that the development causes material harm to the living conditions of the occupants and of the neighbouring residents, and to the character and appearance of the area which is contrary to the Core Strategy, Development Management Policies and London Plan Policies as set out above. The appeal on ground (a) and the deemed application for planning permission therefore fail.

Ground (f)

21. An appeal on this ground is on the basis that the steps required by the notice exceed what is necessary to remedy any breach of planning control. The appellant's argument on this ground is that the rear extension was erected pursuant to Class a of Part 1 of the GDPO when the property was in use as an HMO and was therefore lawful prior to any unauthorised change of use. I have dealt with the argument regarding whether the extension was built pursuant to permitted development rights previously and have found that this was not proven. It is well established that works to facilitate the material change of use can be required to be removed. The rear extension facilitated the unauthorised mixed use of the property and the requirement to remove it is therefore not excessive.
22. I have taken account of the appeal decisions provided by the appellant which provided that similar steps in a notice requiring a specific layout were overly prescriptive, but, each case turns on its own facts. I have varied Requirement 1 on the notice as set out previously and in this case Requirement 4 does exceed what is necessary to remedy the breach as a specific layout is not necessary. I have therefore removed Requirement 4 and varied Requirement 3 so that the notice requires one kitchen and one bathroom and toilet only in the premises.
23. The appeal on ground (f) is therefore partially successful. The grant of planning permission for the retention of the extension means that the notice ceases to have effect in that respect in any case.

Ground (g)

24. The appellant has requested a longer period for compliance but has not provided any specific evidence as to why a longer period would be required in this case and 6 months is an adequate timescale taking into account the harm to the living conditions of the occupants and nearby residents. The Council has indicated that it is aware of its powers to extend the compliance period and the appeal on this ground is therefore unsuccessful.

Zoë Franks

INSPECTOR