



Appeal Decision

Site visit made on 12 November 2020

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 December 2020

Appeal A Ref: APP/T5150/C/20/3245606 Flats 1-6, 5 Tatam Road, London NW10 8HT

- The appeal is made under section 174 of the Town and Country Planning Act 1990 ('the Act') as amended by the Planning and Compensation Act 1991.
 - The appeal is made by London Star Investments Ltd against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 18 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 mixed use as House in Multiple Occupation (HMO) and flats ("the unauthorised change of use") AND Without planning permission, the erection of a single storey extension to the rear of the premises ("the unauthorised development")
 - The requirements of the notice are:
 - STEP 1 Cease the use of the premises as flats and/or a House in Multiple Occupation (HMO), and its occupation by more than ONE household.
 - STEP 2 Remove all internal partitions, items, materials and debris associated with the unauthorised change of use, including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets.
 - STEP 3 Demolish the unauthorised 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.
 - STEP 4 Restore the internal configuration to the original layout before the unauthorised change of 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.
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Appeal B Ref: APP/T5150/C/20/3250446 Flats 1-6, 5 Tatam Road, London NW10 8HT

- The appeal is made under section 174 of the Town and Country Planning Act 1990 ('the Act') as amended by the Planning and Compensation Act 1991.
 - The appeal is made by London Star Investments Ltd against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 9 March 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a single storey extension to the rear of the premises ("the unauthorised development")
 - The requirements of the notice are:
 - STEP 1 Demolish the single storey rear extension and remove all items and debris arising from that demolition.
 - STEP 2 Remove all materials associated with the unauthorised development from the premises.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (g) of the Town and Country Planning Act 1990 as amended.
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Decisions:

Appeal A: APP/T5150/C/20/3245606

1. It is directed that the notice should be corrected by deleting the following words from Schedule 2 of the notice: 'mixed use as House in Multiple Occupation (HMO) and flats ("the unauthorised change of use")' and its replacement with 'a House in Multiple Occupation (HMO)'.
2. Subject to the above correction, the appeal is allowed and the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the change of use of the premises to a House in Multiple Occupation (HMO) and the erection of a single storey extension to the rear of the premises on land at Flats 1-6, 5 Tatam Road, London NW10 8HT referred to in the notice.

Appeal B: APP/T5150/C/20/3250446

3. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the erection of a single storey extension to the rear of the premises on land at Flats 1-6, 5 Tatam Road, London NW10 8HT referred to in the notice.

Applications for costs

4. An application for costs was made by London Star Investments Ltd against the Council of the London Borough of Brent in respect of Appeal B, reference APP/T5150/C/20/3250446. This application is the subject of a separate Decision.

Procedural Matter

5. The appeals were submitted in the name of Mr Richard Lewis. The Council state that Richard Lewis has provided no evidence of a relevant interest in the appeal premises. The appellant states that the property is owned by London Star Investments Ltd and its active director at Companies House is Mr Richard Lewis. The agent was instructed by the director of the relevant company and had intended to appeal on behalf of the company. The error came about as a consequence of the appeal form which requires a name of a person.
6. As set out in the case of *The Queen on the Application of Jonathan McKay v First Secretary of State (For Planning Inspectorate) v Wycombe District Council* [2005] EWCA Civ 774, the Court ruled that the Planning Inspectorate, instead of turning away an appeal, should have reached a proper conclusion that in order to prevent injustice the appeal should have been heard, because it was clear what the intention had been despite the error in the procedural requirement.
7. Although directors have no right of appeal, due to the inadequacy of the appeal forms, in the interests of openness and fairness, it would be wrong to deprive an appellant of its right of appeal given the facts and the criminal sanction that goes hand in hand with an enforcement notice which has taken effect. The error made was identified and amended quickly, and the appeals should

therefore proceed to determination under the company name London Star Investments Ltd.

Ground (b)

8. An appeal under ground (b) is made on the basis that those matters (a breach of planning control) have not occurred. The appellant's case under ground (b) is made in relation to Appeal A and the alleged change of use. The onus of proof is firmly on the appellant to show that some or all of the alleged matters had not in fact occurred by the time the notice was issued, on the balance of probabilities.
9. The main thrust of the appellant's case under ground (b) is that the property is in use as a 6 bedroom House in Multiple Occupation (HMO). The Town and Country Planning (Use Classes) Order (UCO) 1987 (as amended) sets out that for the purposes of Class C4 a "house in multiple occupation" does not include a converted block of flats to which section 257 of the Housing Act 2004 applies but otherwise has the same meaning as in section 254 of the Housing Act 2004.
10. It is not disputed that the accommodation is occupied by persons who do not form a single household as their only or main residence, that their occupation of the living accommodation constitutes the only use of that accommodation and rents are payable in respect of the living accommodation. What is in dispute is whether or not the building includes self-contained units which would not meet the definition of an HMO for the purposes of the UCO.
11. I saw that there are six units of accommodation, each with a lockable door. The Council alleges the premises is a single planning unit in mixed use as flats and shared HMO accommodation. It is established in *Gravesham*¹ that premises can be properly regarded as being used as a dwellinghouse where they are a single, self-contained unit of occupation which contains the normal facilities for cooking, eating, washing and sleeping associated with use as a dwellinghouse.
12. In my view, such accommodation would generally be regarded as a separate planning unit, distinct from any other part of the building therein and would not therefore comprise a single planning unit in mixed use as flats and shared HMO accommodation. I accept it is possible for part of a property to be used as a dwellinghouse and the overall property to be in mixed use, as was the case in *Scurlock*². However, it will be a matter of fact and degree having regard to the layout and function of the building concerned.
13. The Council state that there appears to be some fluidity in the use of the units and the use of the remaining communal accommodation, though it is not clear how it reached this conclusion. Although the Inspector in relation to appeal reference APP/A5270/C/18/3193115 found there to be a degree of fluidity, this was based upon the case specific facts and evidence before him. It is not uncommon for changes to occur during the course of an investigation or following the issue of an enforcement notice. A breach does not need to be framed so as to accommodate future changes, rather it needs to describe those matters which appear to the local planning authority to constitute the breach of planning control at the time the notice was issued. This is important, not least

¹ *Gravesham BC v SoSE and Another* QBD 8 November 1982 (1984) 47 P. & C.R. 142

² *Scurlock v SSE* [1977] 33 P&CR 102

because the terms of the deemed planning application flow from the matters alleged in the notice.

14. The Council asserts that at least 5 of the units have contained all the facilities required for day to day domestic existence, including cooking facilities and at least 1 has been used as a self-contained dwelling. However, it is not clear from the evidence which units the Council consider contained facilities required for day to day domestic existence or constituted a self-contained dwelling and the appellant raises concern about the notice in this regard.
15. Whilst it is a well-established principle that a notice should not fail on the basis of a mere technicality³, a notice must tell the recipient fairly what they have done wrong and what they must do to remedy it. The notice does not, in my view, do this. Nevertheless, I have wide powers of correction, subject to the test of injustice under s176 of the Act.
16. The property is laid out with 4 en-suite bedrooms on the ground floor and a kitchen and two en-suite bedrooms and a kitchen on the first floor. There are separate electricity meters for each of the units. Three of the bedrooms at the ground floor and two bedrooms at the first floor have lockable doors which provide direct access into the kitchen on their respective floor. Each bedroom has a worktop with fridge. The room identified as 'Bedroom 3' on drawing 'TR.05.EX.01 Existing Floor Plans' also has a sink within an alcove off the bedroom, the remaining bedrooms just have sinks within their en-suite bathrooms. No cooking facilities were present within the rooms at the time of my visit.
17. The Council visited the premises on 3 December 2019 and inspected the accommodation behind 3 of the units. One unit is stated to have contained cooking facilities which were 'in use', one did not and a third contained a stored oven. A photograph provided by the Council shows an electric hob in one of the units. This appears to be 'Bedroom 5' as shown on drawing 'TR.05.EX.01 Existing Floor Plans'. This room does not have a sink, except for a modest bathroom sink in the en-suite. Another photograph shows a microwave box stored on top of a wardrobe.
18. Both kitchens were well-equipped and appeared well used at the time of my visit. I accept that the presence of a communal kitchen does not preclude use as flats⁴. However, given the layout of the property and the direct access that 5 out of the 6 units have to a kitchen, I consider it highly unlikely that an occupant would choose to use the very limited facilities within a unit and not the facilities provided in the shared kitchens. Indeed, occupants of a number of the units have to pass through a kitchen to access their respective bedrooms.
19. The very limited washing facilities afforded by 5 of the units would, in my view, necessitate use of one of the communal kitchens. I accept that the appeal is concerned with the current use of the premises, as set out by the Inspector in respect of APP/T5150/C/16/3175229. Photographs taken by the Council⁵ resemble that which I observed on site and I have no reason to believe the layout of the rooms have been modified since the enforcement notice was issued.

³ Eldon Garages Ltd-v- Kingston upon hull County Borough Council [1974] 1 All ER at 375 and Bracken v East Hertfordshire D.C CO/0686/00

⁴ As found by the Inspector in respect of APP/T5150/C/17/3183003

⁵ Appendix 11 of the Council's Statement of Case

20. The Council has provided a rental listing for a unit within the property dated 13 June 2017. The accommodation is described as 'a brand new ground floor fully self contained studio flat...and comprises...a spacious double room and bathroom. Property boasts, en-suite shower, communal laundry facilities, shared kitchen and lovely garden'. Even if the rent secured by the appellant is commensurate with the Local Housing Allowance benefit cap for a self-contained unit, I find the listing provided far more instructive. It is clear from the details provided that, despite its description, the unit would not be fully self-contained but would rely on one of the shared kitchens for day-to-day living. This is consistent with what I saw on site and supports the appellant's position that the property is an HMO.
21. The appellant has provided statutory declarations signed by three of the tenants at the property which state they cook in the communal kitchens and do not have cooking facilities or sinks in their rooms. Each declaration confirms that the rooms had a bathroom or en-suite. The Council suggests that the documents are manifestly inaccurate since each unit contains at least one sink. However, the statements confirm that the bedrooms do not have a sink, which, with the exception of 'Bedroom 3', is consistent with what I saw on site. It would be highly unusual for an en-suite bathroom not to be fitted with a sink. I do not therefore, consider the documents are manifestly inaccurate and in my view, they support the appellant's contention that the property has been in use as an HMO.
22. Electrical Installation Certificates have been provided for each of the 6 units, dated 20 March 2017. The certificates indicate that 5 of those units included an oven and hob, in addition to kitchen sockets and the sixth had just kitchen sockets. The appellant suggests that the testing officer listed some of the facilities within the communal kitchens as being within the rooms. Given that all but one of the units has an interconnecting door to a kitchen and there is no separate certificate for the communal kitchens, I consider this is a reasonable explanation.
23. The property was registered as 6 flats with the Valuation Office, with effect from 10 January 2017. The appellant has provided Government guidance on how domestic properties are assessed for Council Tax bands. The guidance advises that HMOs with adapted letting rooms, so that they have their own kitchenette or separate shower/bath and wc, will be given their own band even though they may share some facilities. As such, the registration cannot, of itself be determinative.
24. Similarly, whilst Energy Performance Certificates (EPC) have been provided for Flats 1-6 at 5 Tatam Road, this is also not, of itself, determinative since the assessor is charged with determining the energy performance of the property, not whether the units are dwellinghouses for the purposes of the Act.
25. I have had regard to the various decisions commended to me by both the Council⁶ and appellant, however, each decision must turn on its own facts. Whilst the appellant has not provided tenancy agreements, I do not consider such an omission is necessarily fatal to the appellant's case.

⁶ Appendix 12 of the Council's Statement of Case

26. I accept that people may adapt or use unlikely or unusual buildings as their home or dwellinghouse, as set out in *Gore*⁷ and note the Council's concern regarding the development of micro flats which blur the lines between HMOs and flats and accept that, as set out in *Ullah*⁸, that uses falling within the general category of "residential" can be materially different. However, having carefully considered the evidence put forward by both parties, I conclude, on the balance of probabilities, the premises comprises an HMO.
27. Thus, for the reasons given above, my conclusion is that the notice should be corrected by deleting the following words from Schedule 2 of the notice: 'mixed use as House in Multiple Occupation (HMO) and flats ("the unauthorised change of use")' and its replacement with 'a House in Multiple Occupation (HMO)'. This would address the appellant's concerns regarding the notice and I am satisfied that this would not cause any injustice to either party. The ground (b) appeal succeeds to that extent.

Ground (c)

28. An appeal on ground (c) is made on the basis that those matters (if they occurred) do not constitute a breach of planning control. In respect of both Appeal A and Appeal B, the appellant's case is that the extension was built pursuant to permitted development rights under Class A of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(GPDO). Since the allegation is the same in this respect, I shall deal with them together.
29. On 17 November 2016, the LPA issued a decision letter stating that Prior Approval is not required in relation to a larger rear extension extending beyond the rear wall of the original house by 6m, reference 16/4352. The appellant states that the rear extension was built pursuant to this prior approval before converting the property to a 6 room HMO comprising of four rooms and a communal kitchen on the ground floor and another two rooms and a communal kitchen on the first floor. However, I have been provided no substantive evidence to confirm this.
30. Conditions set out under A.4.(11)(b) of the aforementioned Order require that the development is carried out in accordance with the information provided under sub-paragraph (2). The prior approval would have involved the erection of a single storey extension to the rear to create an open plan family room and kitchen/diner. The extension which has been constructed comprises two en-suite bedrooms and a kitchen. I have seen nothing which leads me to believe that the works were carried out in stages and can only conclude, therefore, that the development was not built in accordance with the information provided under sub-paragraph (2).
31. The appellant's case in respect of the use, Appeal A only, is that the property was converted to an HMO under Class L of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 (as amended)(GPDO). Class L permits development consisting of a change of use of a building from a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order, to a use falling within Class C4 (houses in multiple occupation) of that Schedule.

⁷ R (oao Gore) v SSCLG & Dartmoor NPA [2008] EWHC 3278 (Admin)

⁸ Birmingham Corporation v MHLG & Ullah [1964] 1 QB 178

32. However, s3(5) of the GPDO states that the permission granted by Schedule 2 does not apply if (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful. Since the building has been unlawfully extended, the change of use of the dwelling to a Class C4 HMO would not be lawful. Accordingly, the ground (c) appeal must fail.

Ground (a)

33. Whilst it is not open to me to grant planning permission for a use substantially different to the use the subject of the notice, as set out in *Ioannou*⁹ and *Richmond upon Thames*¹⁰, the terms of the deemed application are directly derived from the corrected allegation, which relates to the use of the premises as an HMO and the erection of a single storey rear extension.
34. The appeal on ground (a) is made in relation to the use under Appeal A and the extension under both Appeal A and Appeal B. The main issues of the appeal are:
- The effect of the development on the living conditions of occupiers; and
 - The effect of the development on the living conditions of neighbours with particular regard to noise, disturbance and outlook; and
 - The effect of the development on the availability of family housing in the area.
 - The effect of the extension on the character and appearance of the area.

Reasons

35. The Council has granted planning permission reference 20/0922 dated 9 September 2020 for the 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 with retention of the existing ground floor rear extension. S180 of the Act states that where, after the service of a copy 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 that permission.
36. Although I have found that the conversion of the property to a 6 bedroom HMO was not lawful, were the appellant to remove the extension, or implement planning permission 20/0922, the building would no longer be unlawful for the purposes of Article 3(5) of the GPDO. It would then be possible for the appellant to convert the property to a six bedroom HMO and, if the conversion was carried out after the implementation of permission 20/0922, retain the single storey rear extension. I consider the appellant is very likely to exercise his permitted development rights in this way.

Living conditions: Occupants

37. Policies DMP1 and DMP20 of the London Borough of Brent Development Management Policies (DMP)(2016), Policy 3.5 of the London Plan (2016)¹¹ and

⁹ *Ioannou v SSCLG* [2014] EWCA Civ 1432

¹⁰ *Richmond upon Thames LBC v SSE* [1972] 224 EG 1555

¹¹ And the referenced nationally described space standards (2015)

the Brent Design Guide (SPD1)(2018) all seek to ensure that development is of an acceptable standard in terms of living standards and Policy DMP19 seeks external private amenity space. The bedrooms all appeared to be single occupancy and meet or exceed the required space standards for bedrooms set out in the nationally described space standards. Overall, the internal accommodation appears relatively spacious with outdoor space provided to the rear.

38. Significantly, there would be no material difference between the development enforced against and that which the appellant would be able to do under permitted development rights. Given the above, I conclude there would be no harm to living conditions arising from the development and no conflict with Policies DMP1, DMP19 and DMP20 of the DMP, Policy 3.5 of the London Plan and SPD1 in this regard.

Living conditions: Neighbours

39. In respect of off-site impacts caused by the use of the property, there would be no material difference between the development enforced against and that which the appellant would be able to carry out under permitted development rights. Although the rear extension is not stepped in at the rear, as required by Residential Extensions & Alterations SPD2 (2018), the appellant would be able to construct the extension under planning permission 20/0922 and so there would be no material difference between this and the development enforced against.
40. Accordingly, there would be no harm to the living conditions of neighbours either as a result of the use of the premises as a 6 bedroom HMO or from the erection of the single storey extension to the rear of the premises and no conflict with Policy DMP1 of the DMP.

Family housing

41. Policy CP21 of the London Borough of Brent Core Strategy (CS)(2010) seeks to protect existing accommodation that meets known needs and Policy DMP17 of the DMP seeks to maintain family size housing by only allowing conversion where certain criteria are met. The Council refers to Policy DMP16 of the DMP in its enforcement notice issued in respect of Appeal B. However, Policy DMP16 is concerned with resisting housing loss and sets out the circumstances under which the net loss of residential units will be supported and is therefore not relevant in this case.
42. Whilst the appeal scheme does not meet the criteria set out within Policy DMP17, and therefore conflicts with Policy DMP17 and CP21, the appellant could lawfully convert the premises to an HMO, either through implementation of an extant planning permission or under permitted development rights. The fallback position is a significant factor weighing in favour of the development.

Character and appearance

43. The extension is single storey and is located to the rear of the property, views of which are limited from the public domain. The appellant would be able to construct the extension under planning permission 20/0922 and so there would be no material difference between this and the development enforced against. Accordingly, there would be no harm to the character and appearance of the

area and no conflict with Policy DMP1 of the DMP in this regard, which seeks development which complements the locality.

Conclusion

44. Whilst I have had regard to the findings of other Inspectors in relation to cases referenced by the Council¹², the circumstances of this case are different. Thus, for the reasons given above, I conclude that the appeals under ground (a) should succeed and planning permission will be granted. The appeal on grounds (f) and (g) do not therefore need to be considered.

M Savage

INSPECTOR

¹² Appendix 12 of the Council's Statement of Case submitted in support of Appeals A and B: 3137960, 3190564, 3185937, 3204349, 3193115, 3138588, 3138227, 3176717, 3155655, 3183003 and Appendix 15 of the Council's Statement of Case submitted in support of Appeal B: 2179136, 2179140, 2177760.