



Appeal Decision

Site visit made on 2 February 2021

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH

an Inspector appointed by the Secretary of State

Decision date: 19th February 2021

Appeal Ref: APP/T5150/C/20/3244766

Flats 1-6, 870 North Circular Road, Neasden, London NW2 7TE

- 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 Shane Woods against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice, numbered E/16/0691, 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 unauthorised change of use") AND Without planning permission, the erection of a single storey rear extension to the premises ("the unauthorised development").
- The requirements of the notice are to:
 - 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) (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decision

1. It is directed that the enforcement notice be varied in SCHEDULE 5 by replacing "6 months" with "9 months" as a result of the appeal succeeding under ground (g), and corrected in SCHEDULE 4 by:
 - removing "/or" from STEP 1;
 - adding "from inside bedrooms" to the end of the sentence in STEP 2; and by
 - replacing "a bathroom on the first floor, and a WC on the ground floor" by "a bathroom/WC on the first floor" in STEP 4.
2. Subject to this variation and corrections the appeal is otherwise dismissed and the enforcement notice is upheld.

Application for costs

3. An application for costs was made by the Council of the London Borough of Brent against Mr Shane Woods, and is the subject of a separate Decision.

Procedural matter

4. Due to the risk of Covid-19 transmission amid the current pandemic, the site visit was not accompanied (ASV) but was carried out as an Access-Required Site Visit (ARSV). The appeal property had been vacated in advance, and there was no discussion of the appeal with the person allowing access.

Ground (b)

5. For an appeal to succeed under this ground, the burden of proof is on the appellant to persuade me on the balance of probabilities that matters stated in the notice which may give rise to a breach of planning control have not occurred.
6. The appellant's case, in essence, is that the alleged change of use has not occurred as a matter of fact because the property has been changed to a C4 HMO¹ occupied by 6 people with no self-contained flats. There is no dispute that a single storey extension has been erected to the rear of the premises.
7. The appellant argues that the whole of the property has been in use as nothing but a C4 HMO since December 2016, and that while each unit of accommodation has an en-suite bathroom and toilet, the occupants share 2 communal kitchens. This is as stated in his response to the Planning Contravention Notice (PCN) dated 2 March 2017. He disputes that any unit of accommodation has had all three basic amenities (toilet, personal washing facilities and cooking facilities) available for the exclusive use of its occupants which would represent a self-contained flat².
8. However, the Council has produced evidence (by way of officer notes and photographs) of a visit it carried out on 26 November 2019 that shows that 2 of the flats which the officers were able to access had all three basic amenities. The notes, which I have no reason to doubt, record that Flat 1 had cooking facilities in the form of a toaster and a microwave or conventional oven as well as a fridge, kitchen sink and kitchen cupboards. The notes also record that Flat 4 had cooking facilities, in the form of a microwave and an oven as well as a kitchen sink and a fire blanket. The appellant says that the photographs are not clearly labelled and implies that cooking facilities shown could be within the communal kitchens. However, I am satisfied that photographs presented within the Council's evidence do correspond closely with the officer's notes of what was found within units of accommodation. The officer's notes also record that other units of accommodation had no cooking facilities.
9. I place significant weight on the Council's evidence which indicates a mixed use of the appeal property as self-contained flats and an HMO, as alleged. Notwithstanding that the appellant highlights a clause of the tenancy agreements forbidding "cooking or keeping cooking facilities in the room", I find as a matter of fact and degree that the property had been in use as

¹ Use Class C4 of the Town and Country (Use Class) Order 1987 as amended (UCO) is defined as "Use of a dwellinghouse by not more than six residents as a house in multiple occupation".

² Section 254, Housing Act 2004.

alleged in the notice. It is not a constituent part of success under this ground to show that somebody else other than the appellant caused the matter as stated in the notice to have occurred, but rather that it had not occurred. The appellant has failed to show this on the balance of probabilities, and accordingly the appeal under ground(b) does not succeed.

Ground (c)

10. For an appeal to succeed under this ground, the burden of proof is on the appellant to persuade me on the balance of probabilities that matters stated in the notice (if they occurred) do not constitute a breach of planning control.

Change of use

11. The appellant says there has not been a breach of planning control as regards his stated change of use from a single dwelling house to a C4 HMO because it benefited from general planning permission by reason of Part 3, Class L of the General Permitted Development Order 2015 as amended (GPDO).
12. However, notwithstanding what was said in the PCN response, the appellant has submitted very limited evidence to show that the appeal property has ever had a single primary use as a C4 HMO.
13. The 6 submitted tenancy agreements for Flats 1-6 are ambiguous in that the tenancies are not explicitly for rooms within an HMO but rather are explicitly referred to as 'houses' (clause 1) and 'private single-family residences' (clause 2). Further, while 4 have clause 4 as previously discussed forbidding cooking and cooking facilities within the room there are 2 that do not. Therefore, I apply limited weight to the tenancy agreement evidence as regards its value in showing C4 single use of the property.
14. The appellant mentions an HMO licence in his submissions, but did not provide it as evidence. Accordingly, I am not in position to consider what relevance the stated licence has in relation to the use of the property, whilst also being aware that some HMO licensing schemes do encompass properties containing self-contained flats.
15. While the appellant's evidence of C4 use is not persuasive, the Council has provided significant evidence to counter the appellant's version of the stated use of the property. Notwithstanding the appellant's claim that his application to the Valuation Office (VO) in October 2016 to have the units separately banded for Council Tax was to make it easier for the tenants to pay their bills, the disaggregation for Council Tax purposes is commonly sought of, and accepted by the VO, on the basis of the formation of self-contained units and I find this to be the more likely explanation. Further, the formation of self-contained units is supported by Energy Performance Certificate (EPC) documentation provided by the Council which identifies them as separate dwellings on 18 January 2018. I do not accept the appellant's argument that the energy performance assessor was not a planning professional and therefore was not suitably qualified to assess whether the units were self-contained dwellings. The requirement to obtain an EPC is associated with the definition of a dwelling within the legal framework³ which also requires the energy assessor to be a member of an accreditation scheme approved by the Secretary of

³ The Energy Performance of Buildings (England and Wales) Regulations 2012; Regulation 2(1) "dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling.

State⁴. There is also the significant evidence of the November 2019 Council visit evidencing that at least some of the units were in use as self-contained dwellings.

16. Accordingly, I do not find on the balance of probabilities that a change of use from a single dwelling-house to a C4 HMO has occurred which would benefit from the general planning permission afforded by Part 3, Class L of the GPDO as argued by the appellant. There is no express planning permission for a material change of use to flats, or to a mixed use of HMO and flats, and no general planning permission is provided by the GPDO. Accordingly, I am not satisfied that a breach of planning control has not occurred and the ground (c) appeal fails in relation to the material change of use.

Rear extension

17. The appellant's case in relation to this operational development, which he says extends 6 metres beyond the rear wall of the property, is that it is lawful because of Prior Approval application 15/4786. That proposal was described by the appellant as a "single-storey kitchen/dining room extension" (as shown in the plan accompanying the application) and neighbours were consulted on an extension to the dwelling-house before the Council determined on 11 December 2015 that Prior Approval was not required by the GDPO. Accordingly, the appellant's position is that the extension is lawful through the permitted development provisions of Part 1, Class A of the GDPO.
18. There is a dispute between the main parties as to when the extension referred to in the notice was completed, and the Council argues that the development is in any respect not that was subject to any Prior Approval application.
19. The appellant says that the extension was substantially completed by June 2016, but his own photographic evidence contradicts that version. The photograph dated 2 July 2016 (Appendix E of the appellant's statement) shows in my view that work was still being undertaken to complete the development, with what appears to be a significant amount outstanding. The appellant suggests that his version of events is confirmed because the plans for his application for a Lawful Development Certificate shows the extension as existing, that those plans were not challenged by the Council and that an officer site visit had taken place on 7 July 2016 to confirm the plans. However, the officer report does not confirm the existence of a completed extension but instead refers to the property being unoccupied (therefore unable to confirm whether a single-household dwelling) and undergoing refurbishment. I also note the Google streetview photograph taken in October of that year showing what appears to be a contractor's van on the front drive. The registration with the VO was at the end of that month, which as I have said in my finding under ground (b), is evidence which I consider more likely than not to indicate the creation of self-contained dwellings.
20. Given the above, and my finding under ground (b), I find it more likely than not that the extension was operational development which was built to facilitate an unauthorised material change of use. The fact that the Council officers found a self-contained dwelling within it on their November 2019 visit (Flat 4, with Flat 3 inaccessible) adds weight to this finding as do the 2018 EPC assessments. For the same reasons, I do not accept that the extension built

⁴ Regulation 22(1)

was that subject to Prior Approval application 15/4786 which related to a kitchen/diner extension to a single dwellinghouse but rather it was built unlawfully to house the creation of new dwellings which were occupied as such following its completion. The ground (c) appeal therefore fails in all aspects.

21. The appeal decision⁵ submitted by the appellant does not affect my decision, since it concerns the principle that C4 HMOs are dwellinghouses which benefit from permitted development rights under the GPDO. My decision does not engage or contradict that principle, since I am not satisfied that the appeal property was ever in use as a C4 HMO.

Ground (f)

22. For an appeal to be successful under this ground, I must be satisfied that the steps required in the notice to achieve its purpose are excessive.
23. It is clear from the way the requirements of the notice have been drafted that its purpose is to remedy the breach of planning control rather than injury to amenity. It properly seeks to do this by ceasing the unauthorised use, removal of works facilitating that use and restoring the land to its condition before the breach took place.
24. It is a well-established legal principle that where the purpose of the notice is to remedy the breach of planning control, then in the absence of an appeal on ground (a), general planning considerations cannot be considered when determining an appeal on ground (f) and the notice cannot be varied to attack its substance. A notice requiring the recipient to return the land to its condition before the breach took place cannot be turned into a notice requiring something less by reliance on the power available to an Inspector under s176(1) of the Act to vary the terms of the notice.
25. Accordingly, as there is no ground (a) appeal, it is not possible for me to consider the merits of the appellant's proposal to reduce the depth of the extension to 3 metres. It should also be noted that permitted development rights do not apply in the case of unlawful development, and in any case they have been lost in respect of the appeal property which in my judgement currently has a nil lawful use, due to more than one unauthorised material changes of use occurring⁶ (from single household dwelling to flats in 2016, to HMO and flats as found in 2019). Permitted development rights can only be reinstated by returning the property to a lawful status through the grant of planning permission or the passage of time.
26. In remedying the breach of planning control, the notice is not excessive in requiring discontinuance of the unauthorised use and the removal of works integral to and facilitating it. This includes the extension in its entirety. It was held in *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598 that where an notice is issued in respect of an material change of use, and works were carried out to facilitate the material change of use, the notice may require that the works are removed in order that the site is restored to its previous condition and the breach is thereby remedied. As I have found that the extension was built as part and parcel to the unlawful change of use, and integral to it, it is not excessive for the notice to require its removal.

⁵ APP/Q1445/X/14/2213371

⁶ *Fairstate Ltd v FSS* [2005] JPL 1333

27. The appellant says that the notice is too onerous and prescriptive in requiring a very specific internal configuration in STEP 4. However, the notice can properly require that the land be restored to its condition before the breach took place and therefore it is not excessive for it to specify the internal configuration known to have been in place at that time.
28. The sales particulars from 22 July 2014 provide evidence of the internal arrangement before the breach, and therefore it is appropriate for STEP 4 to require this. Accordingly, the notice requirements are not excessive in any regard and the appeal under ground (f) fails. However, I am using my powers to correct STEP 4 of the notice as the sales particulars reference a bathroom/WC on the first floor rather than a bathroom on the first floor and a WC on the ground floor as specified in the notice. Also, I am correcting STEP 1 to ensure that the use required to be discontinued is the same as the unlawful use as described in the alleged breach of planning control. I am also correcting STEP 2 to make it clear that the facilities to be removed are from inside bedrooms and that it does not conflict with STEP 4 in relation to the kitchen and bathroom/WC to be provided as before the breach.

Ground (g)

29. To succeed under this ground, I must be satisfied that the period for compliance specified in the notice falls short of what reasonably should be allowed.
30. The appellant suggests 12 months is reasonable as he says that with 6 tenants to evict and with the on-going pandemic, 6 months is insufficient and would cause significant stress and difficulty for the tenants as well as for him. He says that the tenants would likely experience greater than usual difficulty in finding alternative accommodation. It is further argued that once the tenants have moved on time will be needed for finding and funding tradesmen to carry out the work, and for the works to be undertaken.
31. While I accept detailed evidence put forward by the Council that there is no evidence of a shortage of nearby alternative accommodation at comparable or cheaper rents, it is a current legal requirement amid the pandemic that landlords must give significantly greater notice to tenants than would otherwise be the case. Taking all the circumstances into account, including the time reasonably required to organise and complete the work upon vacation by the tenants, I find that 9 months would be fair and reasonable and accordingly I am using my powers to vary the notice to this effect.
32. The appeal under ground (g) therefore succeeds to this extent.

Conclusion

33. For the reasons given above I conclude that the appeal should not succeed except to a limited extent under ground (g). I shall uphold the enforcement notice with a variation and corrections.

Andrew Walker

INSPECTOR