



Appeal Decisions

Inquiry Held on 11 May 2021

Site visit made on 27 May 2021

by Katie Peerless Dip Arch RIBA

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

Decision date: 3rd June 2021

Appeal Ref: APP/A5270/C/20/3245479 27 Seaford Road, LONDON W13 9HP

- 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 Akelius UK Twelve Ltd against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice, numbered EN180803CU, was issued on 11 December 2019.
 - The breach of planning control as alleged in the notice is the material change of use of the premises to five self-contained flats.
 - The requirements of the notice are 1. Cease the use of the premises as five self-contained flats; 2. Remove the kitchen and drainage connections from four of the self-contained flats; 3. Remove the bathroom and drainage connections from four of the self-contained flats; 4. Remove all internal doors, partitions and locks that facilitate the use of the premises as five self-contained flats; and 5. Remove all resultant debris.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended (TCPA).
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Decision

1. The appeal is allowed on grounds (f) and (g), and it is directed that the enforcement notice be varied (a): by the deletion of requirements 2 - 5 and the substitution of the following requirements: 2. Either: (a) remove either the kitchen or bathroom facilities from each of the 5 flats and provide shared facilities to enable the property to be used as a C4 HMO or (b) remove the kitchen facilities from 4 of the flats to enable use as a C3 dwelling house; 4. Remove all resultant debris. (b): by the deletion of 3 months and the substitution of 6 months as the period for compliance with step 1 and 12 months as the period for compliance with steps 2 - 4. Subject to these variations the enforcement notice is upheld.

Procedural matters

2. At the Inquiry, the appellants confirmed that they wished to withdraw the appeals originally made on grounds (b) and (c).

Main Issues

3. I therefore now consider the main issues on in this case to be:

on ground (d): whether the use is immune from enforcement action through the passage of time and, if it is not;

on ground (a): the effect of the development on:

- (i) the character and appearance of the surrounding area;
- (ii) the living conditions of (a) neighbouring occupiers with particular reference to noise and disturbance and (b) occupiers of the property with particular reference to noise and disturbance and living and amenity space standards.

If these grounds fail then, on ground (f), the main issue is whether the requirements of the notice exceed what is necessary to rectify the breach of planning control or any injury to amenity and on ground (g), whether the time for compliance is reasonable.

Site and planning history

- 4. The appeal property is a semi-detached house in a road of similar properties that has been sub-divided into 5 self-contained units. There are 2 such units on each of the ground and first floors and one in the roof space. Each unit has a shower room/WC and a built-in kitchen sink and cooking facilities.
- 5. The property was granted a Certificate of Proposed Lawful Use as a C4 House in Multiple Occupation in 2014. The plans associated with that application show what is now the rear ground floor unit as a shared space containing cooking facilities and a dining area.

Reasons

Ground (d)

- 6. There is no dispute between the parties that the property contains 5 self-contained flats and that the period for immunity from enforcement action is 4 years. The relevant date by which the change of use of the premises to five self-contained flats would need to have occurred is 11 December 2015, 4 years before the date of issue of the enforcement notice.
- 7. There is disagreement between the parties about when the flats were first created and also whether any periods of subsequent vacancy would have the effect of 're-starting the clock' on the period of immunity. The Council has not produced any evidence of its own to contradict the submissions of the appellants; its case is that the evidence to support the claim is not sufficiently clear on the balance of probabilities and that, together with the periods of vacancy that occurred during the relevant period in all of the flats, this indicates that immunity from enforcement action has not been achieved.

Date of change of use to 5 flats

- 8. On 15 May 2015, a visit by a Valuation Officer from the Borough's Council Tax Department found that the only unit in the property with cooking facilities was that on the rear of the ground floor (flat 5). He recorded that in this unit was not occupied and contained a kitchen with an integrated cooker and 2 microwaves. He noted that 3 of the other 4 units were occupied.
- 9. By June of that year, the appellants submit that flat 5 had been rented out as a self-contained unit and have produced an Assured Shorthold Tenancy Agreement (AST), dated 26 June 2015, relating to this use and an Energy Performance Certificate (EPC) dated 25 June 2015 which, I am told, is required to be in place before a flat can be rented out.

10. A check-out inventory dated 27 June 2017 records that the tenants named on the 2015 agreement moved out on that date. I am satisfied that there is sufficient evidence to demonstrate, on the balance of probabilities, that Flat 5 was first occupied as a self-contained flat prior to December 2015.
11. However, from 26 June 2015, if flat 5 was privately occupied, the tenants in the other flats would have lost the ability to use the cooking facilities in that unit. This means that between 15 May and 11 December 2015, some form of cooking facility and a kitchen sink would need to have been available in these units for them to be considered as self-contained flats.
12. The Council speculate that facilities in other flats could have been used by the occupants of flats 1 – 4 but the only flat found to be vacant in the visit in May 2015 was flat 2. However, evidence in the form of ASTs suggest flat 2 was occupied by the relevant date of December 2015, as was flat 4, and there is no evidence to suggest that any tenants were having to use cooking facilities in other parts of the building.
13. Although the Council suggests that ASTs are not sufficient proof of occupancy, I consider that, in the absence of any contradictory evidence, they are enough to meet the 'balance of probability' test. They are evidence of an agreement to rent the property and once the agreement has been signed, it is more likely than not that the tenant would make use of the property they are paying for and on which they would also have paid a deposit.
14. The appellant company did not purchase the property until October 2017 so all the evidence of occupation prior to that date has been provided by previous owners (apart from details of those tenants that were in occupation at the time of purchase). Pre-purchase plans produced after a survey of the property in February 2017 show self-contained facilities in all of the units. However, the only available plans prior to the relevant date are those produced to demonstrate the use of the premises as a C4 HMO, dated May 2014.
15. The appellant's Team Leader Architecture also gave evidence on oath that, by the time he visited the property in November 2017, immediately after purchase by the appellant company, all the units were self-contained with cooking facilities. The same Valuation Officer who visited the property in 2015 and gave evidence to the Inquiry, visited again in August 2018, when he described it as 5 self-contained flats and did not record any lack of cooking facilities as he had specifically done previously. Although he says he cannot recall seeing the moveable hobs that appear in some photographs of the units from this time, it seems highly unlikely that some flats had cooking facilities and the others did not, especially as there had been a time in August 2016, as evidenced by the AST records, when all the units were occupied at the same time.
16. Flat 1 had, according to the ASTs provided, a tenant on a 12 month lease living there from 18 July 2014. Another tenant moved in, according to the relevant AST, on 7 April 2016 and was in residence when the appellants bought the property. This flat was empty between 7 October 2018 and 22 February 2019 for refurbishment.
17. Flat 2 was occupied from prior to the relevant date until June 2018. It was refurbished between June 2018 and 28 August 2018 and was marketed from that date until it was occupied by a new tenant from 17 October 2018 to 19 June 2019. It was re-let in September 2019 on a 12 month lease.

18. Flat 3 was occupied from 19 July 2014 on a 12 month lease. The next available AST runs from 22 July 2016 to July 2017 and was refurbished from the date of purchase until 4 August 2018. It was then marketed and re-let in October 2018 to tenants who moved out on 11 July 2019. A new tenant moved in on 1 September 2019 on a 12 month lease and was still in residence at the time of preparation of the appellants' proofs of evidence.
19. Flat 4 was occupied from 12 August 2015 on a 12 month lease. It was refurbished from purchase to 4 August 2018 and re-let from 11 November 2018 to 9 August 2020.
20. Flat 5 as noted above was rented out from 26 June 2015 to 27 May 2017 and then from 1 June 2017 to 3 August 2018. It was refurbished between 14 August 2020 and 22 February 2019 and re-let on 1 April 2019 on a 12 month lease. It was re-let from 1 August 2019 to 14 March 2020.
21. It can therefore be seen that, whilst all the flats had tenants at some point during the relevant period, there is no documentary evidence to show that flats 1 and 3 were occupied on 11 December 2015. A statutory declaration from an employee of Dandi Living, who did not give evidence at the Inquiry, states that the premises was '*in use as 5 self-contained residential units from about 19 June 2015*'. There is nothing more in the declaration to indicate what the witness considered '*in use*' and '*self-contained*' to entail and whether this means that the units had actually been converted to flats, as defined in planning terms, and were all occupied as such by this date. Neither does it confirm that they were occupied on the relevant date in December.
22. Although the appellants submit that it is most likely that the tenants in flats 1 and 3 renewed their ASTs on expiry and point to other examples where the owners of the property did extend the tenancy agreements, there are no such agreements produced for these particular flats. If they remained empty on the relevant date, by the time there is documentary evidence of a new tenant, flat 1 would have been empty for almost 9 months and flat 3 for just over a year.
23. If the tenancies were not renewed, the appellants submit that it is extremely unlikely that the flats would have remained unoccupied for such lengths of time. Nevertheless, this scenario relies heavily on conjecture and, while the Council has produced no specific evidence of its own to contradict this speculation, the position on the relevant date, in my opinion, still remains ambiguous. Whether or not the 2 units were converted into flats by 11 December 2015, there is no actual evidence of their occupancy and, if this was the case, the use enforced against (specifically 5 self-contained flats) had not begun and could not therefore have been enforced against at that time.

Effect of periods of vacancy

24. Even in the event that all the flats were occupied on the relevant date, the allegation against which the Council is seeking to enforce is a '*change of use of the premises to 5 self-contained flats*'. The Council considers that whilst any of the flats were empty, the use was not taking place and they could not, therefore, have enforced against it.
25. The appellants submit that it is the use of the building as a whole that is key to the ability to take enforcement action. They consider that, once the 5 flats had been created and first occupied, the period of immunity would not be re-set during periods of vacancy, for example during refurbishment, because it is the use of the whole premises that is being enforced against.

26. Once that use had commenced, provided that no other different or ancillary uses intervened, they believe that the Council could have taken enforcement action at any time during the 4 years after the use began. However, it seems to me that, during the time the appellant company was refurbishing the flats and there were periods when only some of the 5 flats were in use and the other rooms were unable to be occupied, the premises could not be legitimately described as '5 self-contained flats'. There is no dispute that each flat had breaks in occupancy whilst they were being refurbished and during these periods, therefore, the allegation of a change to 5 flats could not be established.
27. There would have been times when each flat was having its bathroom re-fitted and the kitchen facilities upgraded and it would consequently have been uninhabitable as a self-contained unit. Until all the flats were complete and occupied, the Council could not know what the use of the premises as a whole and of the individual units was going to be. Even if the other completed units in the building were self-contained, there was always a possibility that the uninhabited and unfinished units were going to be put to a different use, for example shared facilities for an HMO use.

Conclusion on ground (d)

28. I accept that each unit had, at some point during the relevant period, been used as a flat. However, when the periods of vacancy are taken together with the lack of clarity on the date of first use, I consider that the appellants' evidence is not sufficiently precise or unambiguous, on the balance of probabilities, to demonstrate that there was an uninterrupted period of 4 years during which the Council could have taken enforcement action against the use alleged. The appeal on ground (d) consequently fails.

Ground (a)

Character and appearance

29. The Council considers that the use as 5 flats, each of which could possibly contain 2 tenants, is materially different to the use as a C4 HMO where the number of occupants is limited to no more than 6 occupants. They submit that this increase would harm the character and appearance of the neighbourhood.
30. It is true that the road in which the appeal property is located is composed of typical 2 storey houses originally built as what are now classed as C3 family dwellings. However, they can be changed to class C4 HMOs without the need to apply for specific planning permission. At the site visit I saw that the only indication that the premises was in use as 5 flats were the multiple doorbells at the front door and the cycle store and multiple bins at the front of the building.
31. However, these features could be present if the house was used as a C4 HMO and are not indicative that a change of use has occurred. There is also a rooflight in the front roof slope but there are other examples in the street and this does not look out of place or indicate any specific use.
32. There is evidence that 3 of the flats have been rented out to couples and there is a possibility that this could be the case with the other 2. If there were 10 occupants rather than 6 in the house, there might consequently be more comings and goings, but this would not, I consider, be sufficiently harmful to the character of the neighbourhood to indicate a conflict with any relevant Development Plan policies.

Living conditions

33. The floor plans for the flats all show a double bed but they do not meet the space standards set out for new 2 person dwellings as set out in table 3.1 to policy D6 of the London Plan (March 2021) (LP) or table 3.3 of policy 3.5 of the Ealing Local Variation to London Plan, which is set out in the Ealing Development Management Plan Document (2013) (DPD). Neither do they provide the external amenity space required in the LP or the DPD.
34. The requirement for a 2 person flat is a floor area of 50sqm and that for a single person unit is 37sqm (if provided with a shower room rather than a bathroom as at the appeal property). The smallest unit (flat 3) is shown on the appellants' floor plans as being only 16.3sqm. The largest unit (flat 5) is 24.34sqm. It can therefore be seen that even if the units were occupied by a single tenant, they would still fall well short of the required available space.
35. While there is public open space available in local parks, the rear garden of the property is the only private amenity space available to the premises and this can only be accessed by the occupants of flat 5. Combined with the limited outlook available from the flats, particularly that from flat 4, and the significant departure from the required minimum space standards, I consider that the flats would not provide acceptable living conditions for the occupants.
36. In terms of the impact on neighbouring occupants, I consider that there might possibly be a greater impact in terms of noise transmission from a C4 use, where the occupants might be more likely to congregate together, particularly in the outside space, than from 5 individual units. I would not, therefore consider the impact on the living conditions of neighbouring occupants to be a reason for refusing permission for the 5 flats.

Other matters

37. The appellants point to the advantages of providing a greater density of living accommodation on the site and refer to the various policies that encourage making the best use of residential properties. I accept that the potential to house 4 additional occupants is a benefit of the proposal but do not consider it to be of sufficient weight to outweigh the conflict with the policy D6 of the LP, which seeks to ensure a high standard of design and amenity for new dwellings and sets out the minimum sizes for internal living areas and external amenity space standards required to achieve this.
38. I also note that the appellants claim there is a fall back position by which they could revert to a class C4 HMO which could house up to 6 occupants in 5 units. I will discuss whether this would be the case under the appeal on ground (f) but the appellants say that, should the appeal fail, they would remove the toilets from 2 of the flats and would provide shared facilities in what is presently a utility room.
39. Even if it is accepted that this could, and would happen, I still consider that limiting the occupancy of the house to 6 persons rather than 10 would be preferable in terms of the living conditions of the occupants. It would not increase the overall space within the individual rooms or provide any additional space where the occupants could socialise, but it would nevertheless ensure that only one occupant was using the limited space in at least 4 of the 5 rooms.

40. Therefore, I consider that planning permission should not be granted for the proposed change of use, even taking into account any fall back position, and the appeal on ground (a) fails and the deemed planning application is refused.

Ground (f)

41. I now turn to consider whether the C4 use had been implemented prior to the change of use brought about by the division in to 5 flats and conclude that it had. The evidence of the Council's Valuation Officer clearly noted a property with a shared kitchen and 4 separate bedrooms without cooking facilities, 3 of which were occupied in May 2015. There is nothing to indicate that the occupants at that time were connected in any way or were living as a single household.
42. Having concluded that there was also insufficient evidence to indicate that a change to self-contained flats had occurred by December of that year, I am satisfied that the most likely use of the premises was as a class C4 HMO on the relevant date. The appellants are therefore able to revert to that as the last authorised use of the building.
43. In these circumstances, I consider that the requirements to remove the kitchens and bathrooms from all but one of the rooms is excessive. There is nothing to prevent units in an HMO from having some private facilities and conclude that lesser steps could rectify the breach of planning control.
44. As noted above, the appellants claim that all that would be needed to convert the premises to a C4 HMO would be to remove the WCs from 2 of the flats and provide the facility in the ground floor utility room. However, I disagree that this would be sufficient. If only 2 of the rooms were converted in this way, there would still be 3 self-contained flats in the building, which would then be in a *sui generis* mixed use.
45. I will therefore vary the enforcement notice to require each room to be taken back to a unit that does not provide all the facilities required for day to day living, and thus prevent them from qualifying as self-contained flats. The appellants would then be given the choice of returning the house to a C4 use by providing shared facilities in the form of a kitchen or bathroom or reverting to a C3 dwellinghouse. The appeal on ground (f) succeeds to this extent.

Ground (g)

46. The appellants consider that 3 months is insufficient time to give notice to their tenants and to carry out the works required. I agree that it would be unlikely that the current tenants could be required to vacate the premises and the internal modifications carried out within this time frame. As I have found that the property does not need to be returned to a C3 dwelling house, I consider that 6 months would be sufficient time to regain occupancy of the majority of the flats, given the dates on the current tenancy agreements and this would bring about cessation of the current use.
47. In order to modify the units as required and to provide shared facilities, I consider a further 6 months would be reasonable. Also, as noted by the Council, under s.173A of the TCPA they have the ability to extend the compliance period should circumstances dictate. The appeal on ground (g) succeeds to this extent.

Conclusions

48. For the reasons given above I conclude that the requirements are excessive and reasonable periods for compliance would be 6 months for requirement 1 and 12 months for the remainder. I am varying the enforcement notice accordingly, prior to upholding it and refuse to grant planning permission on the deemed application.

Katie Peerless

Inspector

APPEARANCES

FOR THE APPELLANT:

Izindie Visagie	Solicitor, London Borough of Ealing
She called	
Chris Christopher	Council Tax Valuation Officer, London Borough of Ealing
James McDonnell BSc (Hons)	Planning Enforcement Officer, London Borough of Ealing

FOR THE LOCAL PLANNING AUTHORITY:

Alex Greaves	of Counsel, instructed by Christine Hereward, solicitor, for the appellants
He called	
Savas Akay B.Arch MA	Team Lead Architecture, Akelius UK Twelve Ltd
Julian Sutton BA (Hons) MSc MRTPI	JMS Planning and Development Ltd.