
Appeal Decisions

Site visit made on 4 May 2021

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 11th June 2021

Appeal A: APP/W2465/C/20/3259271

Land at 88 Tudor Road, The Loft, Leicester, LE3 5HY

- 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 the Company Secretary of My Urban Homes Ltd against an enforcement notice issued by Leicester City Council.
- The enforcement notice was issued on 11 August 2020.
- The breach of planning control as alleged in the notice is:
Without planning permission the unauthorised change of use from large house in multiple occupation to 8 self-contained flats at the Property.
- The requirements of the notice are: -
 - 5.1 Cease the use of the property as 8 self-contained flats
 - 5.2 Remove all fixtures and fittings
 - 5.3 Remove all resultant material arising from step 2 from the siteOR
 - 5.4 Alter the property to reflect the layout and elevations shown on planning permission 20172377
 - 5.5 Remove all resultant material arising from alterations.
- 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. (1990 Act)

Summary Decision: The appeal succeeds in part and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.

Appeal B: APP/W2465/W/21/3266854

Land at 88 Tudor Road, The Loft, Leicester, LE3 5HY

- The appeal is made under section 78 of the Town Country Planning Act 1990 against the failure of the local planning authority to give notice within the prescribed period of a decision on an application for planning permission following the failure of the applicant to submit further information, plans, drawings or other evidence required by a direction made by the local planning authority under section 62 of the Town and Country Planning Act 1990 and Regulation 4 of the Town and Country Planning (Applications) Regulations 1988.
- The appeal is made by Mr R Patel against Leicester City Council.
- The application Ref No: 20202251 is dated 11 November 2020.
- The development proposed is conversion of building to provide student accommodation in the form of eight (8x) rooms with enhanced facilities and an outdoor communal area.
- The information alleged by the Council to be necessary is:
 - Amendments to sections 5, 7, 9, 14 and 16 of the application form;
 - The fee required is 7 x £462, £3234, but only £462 has been paid;
 - The proposal does involve external changes to provide the entrance to the courtyard and the planning statement should be amended to explain this;
 - A Statement of Student Need;
 - A Sustainable Drainage Strategy.

Summary Decision: The appeal is dismissed.

Procedural Matters and Background – both appeals

1. There are 2 appeals before me that relate to the same site. In addition my findings in relation to Appeal A have a bearing on my findings in relation to Appeal B. As such, and to avoid duplication, I have dealt with the decisions together.
2. I have taken the address of the appeal property from the appeal form associated with Appeal A. The postcode is slightly different within the evidence relating to Appeal B but it is clear that the postcode stated within Appeal A is more accurate. The address in the enforcement notice reflects the address in the banner heading with the postcode and Leicester transposed.
3. The appeal property is a traditional end of terrace, 2-storey building, and the walls have a rendered finish. The evidence before me indicates that the property was used as a warehouse on the ground floor with a flat in residential use on the first floor prior to planning permission¹ being granted in 2018 (the 2018 permission). That planning permission was granted on 25 June 2018 for a change of use to a house in multiple occupation (HMO) for up to 7 people, a single storey extension at rear, conversion of a garage to a bedroom and alterations to the front and side elevations subject to a number of conditions.
4. In 2019 the Council served a Planning Contravention Notice (PCN) in relation to an alleged breach of planning control of unauthorised change of use from large HMO to 8 Flats. The appellant's response to that PCN states that the communal area has been relocated and that it was the valuation officer that stated that the communal area was a flat. This he contends has led to the confusion between the Council's departments.
5. In August 2020 the Council issued the enforcement notice that Appeal A relates to. In November 2020 after the enforcement notice had been issued a planning application for the conversion of the building to provide student accommodation in the form of eight rooms with enhanced facilities and an outdoor communal area was submitted. This planning application was not validated by the Council and the appeal form states that the Council failed to give notice of its decision within the appropriate period because of a dispute over provision of local list documentation.
6. However, whilst some of the information required by the Council to make the planning application valid was related to local requirements some of the matters relate to national validation requirements. I consider that the dispute is one related to national and local list requirements and I have therefore determined Appeal B on this basis.

The Notice – Appeal A

7. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority. Section 55 of the 1990 Act states, amongst other things, that "development," means the making of any material change in the use of any building. To ensure that the description

¹ Application No: 20172377

of the alleged breach reflects section 55 of the 1990 Act I consider that the wording '*unauthorised change of use*' within the description of the alleged breach should be corrected to '*unauthorised material change of use*'. It is clear from the evidence before me that both parties understand what is alleged by the description of the alleged breach. As such, I can carry out these corrections without injustice to the parties.

8. The first requirement is to cease the use of the property as 8 self-contained flats. This presents problems, since it could allow the use of the building as a different number of flats. The appropriate wording would be to cease the use of the property as self-contained flats. However, the requirements of the enforcement notice must not purport to stop the appellant from doing something they are entitled to do without planning permission including right of reversion under section 57(4) of the 1990 Act. If the lawful use of the building includes the residential use of the first floor of the building this could be treated, as stated above, as a single dwellinghouse. Consequently, I do not consider that correcting the wording of requirement 5.1 to delete the number '8' would stop the right of reversion cited above. As such, I intend to correct requirement 5.1 by deleting the number '8' from it.
9. An enforcement 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 permitted development, or be immune from enforcement, so that the land is restored to its condition before the change of use took place. To ensure that requirement 5.2 only relates to the removal of fixtures and fittings integral to the use as 8 self-contained flats I intend to correct the requirement by adding the wording '*that facilitated the material change of use to 8 self-contained flats*' at the end of the requirement. Furthermore, if any operational development was carried out for some other lawful use prior to the material change of use it would be unnecessary to require its removal to remedy the breach. This is a matter between the appellant and the Council.
10. To clarify what material is required to be removed by 5.5 I intend to add the wording '*undertaken in step 3 from the site*' at the end of that requirement.
11. Both parties have been given the chance to comment on these corrections and whether they can be carried out without injustice to either of them. I consider that they can be carried out without injustice to the parties.

The ground (b) and (c) appeals - Appeal A

12. These grounds entitle the appellant to argue that, in respect of any breach of planning control which may be constituted by the matters stated in the enforcement notice, those matters have not occurred (ground (b)) and/or those matters (if they occurred) do not constitute a breach of planning control (ground (c)). In these grounds of appeal 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 and/or that if they occurred that they do not constitute a breach of planning control. If the local planning authority has no evidence of its own, or from others, to contradict or otherwise make his version of events less than probable, there is no good reason to dismiss an appeal on any legal ground provided the appellant's evidence alone is sufficiently precise and unambiguous.

13. The appellant has stated that the 2018 permission was for a large HMO and that it is accepted that at some point the internal layout has changed. He maintains that the use remains as an HMO albeit with enhanced facilities (en-suite and kitchenette). Communal facilities on the ground floor are cited.
14. The Town and Country Planning (Use Classes) Order 1987 as amended (the UCO) defines an HMO for the purposes of Class C4 as not including a converted block of flats to which section 257 of the Housing Act 2004² applies, but otherwise having the same meaning as in section 254 of that Act. Thus, a building converted into self-contained flats is expressly excluded from the UCO definition of an HMO. It is apparent from section 254 that a building is not a HMO for Class C4 purposes if certain exceptions³ apply, which are not relevant in this case. In addition, an HMO would not exist where at least two households in occupation did not share, or the living accommodation was lacking in, one or more 'basic amenities'. The latter is defined in subsection 254(8) as a toilet, personal washing facilities or cooking facilities. The UCO definition applies only to Class C4 HMOs (occupied by three to six people). However, there is no logical reason to presume that a large HMO falls to be defined differently, other than in terms of the number of occupiers.
15. Whilst what matters is what existed at the time the notice was issued, I saw from my site visit that the property contained a relatively large area on the ground floor that had very little in it, shown as the courtyard on the plans attached to the enforcement notice. During my visit, I also saw that there are 5 units of living accommodation on the ground floor and that there are a further 3 units of living accommodation on the first floor. Each unit of accommodation has its own lockable 'front door', kitchen, which includes a worktop and cupboards, a sink and an oven, microwave and hob, together with domestic appliances including a fridge and an en-suite WC/shower room. Each unit also has its own address and the Council has stated that Council Tax records indicate that the use as 8 separate units began in 2019. There is no reason for me to believe that was not the case at the time the notice was issued.
16. There is reference to a washing machine being visible in the courtyard area when the Council visited the property at some stage. Nevertheless, the presence of cooking facilities and en-suite WC/shower rooms means that each unit of living accommodation does not lack in one or more basic amenities. Consequently, as a matter of fact and degree, each unit of accommodation is physically and functionally separate from the rest and each comprises a separate residential planning unit.
17. The description of the alleged breach states that the material change of use is from a large HMO to 8 self-contained flats. However, the evidence before me in relation to the lawful use of the property is ambiguous. The Council's Enforcement Report states that the lawful use is as a warehouse and residential flat. Yet, it goes on to state that the alleged breach of planning control is a material change of use from large HMO to 8 self-contained flats. The appellant

² As amended by the Housing Act 2016.

³ In summary, these exceptions are the following; it is occupied by persons forming part of a single household, or it is occupied by persons in a manner other than as their main residence, or occupation of the living accommodation by those persons is not the only use of that accommodation or no rent or other consideration is provided.

states that the layout of the property has been altered at some stage to provide the enhanced facilities in each unit of living accommodation.

18. It appears that the Council accepts that the property was occupied and used as a large HMO prior to its occupation and use as 8 self-contained flats. Moreover, the 2018 permission relates to a large HMO for up to 7 people. Nevertheless, the Council have also stated that a number of the conditions have not been discharged and that the development has not been carried out in accordance with the approved plans. There is little evidence before me to indicate whether the property was occupied and used as a large HMO prior to its use as 8 self-contained flats.
19. Furthermore, an enforcement notice alleging a material change of use need not recite the previous use. Therefore, I intend to delete the wording '*from large house in multiple occupation*' from the description of the alleged breach. Taking into account all of the above, I find, as a matter of fact and degree, that the property had been converted and subsequently used as 8 self-contained flats by the time the notice was issued. Each flat constitutes a separate planning unit given their functional and physical separation. It follows that the matter alleged in the corrected notice factually occurred. As such, the appeal on ground (b) fails.
20. What is meant by 'development' is set out in section 55(1) of the 1990 Act and includes the making of a material change in the use of any buildings or other land. The use as 2 or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used, having regard to section 55(3)(a) of the 1990 Act.
21. In the absence of firm evidence to suggest otherwise, the lawful use of the property is, on the balance of probability, likely to be as a warehouse with a residential flat above. Therefore the first floor of the building was, more likely than not, in use as a self-contained flat with all the facilities required for day-to-day private domestic existence. It is reasonable to consider, based on the evidence before me, that the use of the first floor would have been as a single dwellinghouse that was physically and functionally separate to the warehouse below. Consequently, the warehouse and residential uses of the property would have formed 2 separate planning units.
22. The creation of self-contained flats on the first floor has subdivided the original single dwellinghouse into more than 2 separate dwellinghouses. The creation of flats on the ground floor has facilitated 5 separate planning units in residential use when compared to the warehouse use. Overall, in this scenario the lawful use constituted 2 separate planning units whereas the breach of planning control results in the creation of 8 separate planning units. The character of the use as 8 self-contained flats is significantly different to the lawful use of the property and is likely to have on and off-site planning consequences requiring a merits assessment. Moreover, the sub-division of the single dwellinghouse in the property flies in the face of section 55(3) of the 1990 Act.
23. Even if I am wrong and the lawful use of the building is as a large HMO, the use of the building as self-contained flats has resulted in the formation of 8 separate residential planning units. Whereas, the use as a large HMO is one planning unit in a Sui Generis use. The use as 8 self-contained flats has

planning consequences in relation to the nature of the occupation of those planning units. Even though, each flat may be occupied by students, the living conditions of the residents are materially different to that of the residents occupying the building as a large HMO. This is because the restrictive size of some of the flats and the lack of outlook and single aspect of some has, as a matter of fact and degree, a significantly different impact on the living conditions of the occupants. Furthermore, the flats could be occupied by more than one person introducing a significant change in occupancy and/or the pattern of use of the building.

24. Based on the evidence before me, I consider that in either of the scenarios the creation and subsequent use of the property as 8 self-contained flats constitutes a material change of use that requires express planning permission. Planning permission has not been obtained for the alleged matter therefore it constitutes a breach of planning controls. I conclude that the ground (c) must fail.

The ground (f) appeal – Appeal A

25. An appeal under ground (f) is on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
26. The purposes of an enforcement notice are set out in Section 173 of the 1990 Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). S173(4)(a) enables the Council to seek to remedy the breach by: making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land; discontinuing any use of the land; or restoring the land to its condition before the breach took place. As the enforcement notice requires the use as 8 self-contained flats to cease and that works be carried out, I consider the purpose is to remedy the breach of planning control.
27. The appellant argues that requirement 5.4 relates to altering the property to reflect the layout and elevations of the 2018 permission and that is operational development and the enforcement notice relates to a material change of use. However, as stated above, if the works or operational development are integral to a material change of use an enforcement notice can require them to be removed/altered. The question of what is necessary to remedy the breach of planning control depends on the facts of the case.
28. As explained above, making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land can be utilised to remedy a breach. The 2018 permission is extant until 25 June 2021. However, even though it is clear from the evidence before me that the Council intended requirement 5.4 to give the appellant the choice to comply with the 2018 permission, the wording of the requirement would not ensure that. As such, I intend to delete the wording of requirement 5.4 and replace it with *'alter the property to comply with the terms of the planning permission 20172377 dated 25 June 2018 including the conditions subject to which that permission was granted'*. As the appellant

would have the choice as to which course of action to take requirement 5.4 is not excessive. The appeal under ground (f) therefore fails.

The ground (g) appeal – Appeal A

29. That any period specified in the notice in accordance with section 173(9) of the 1990 Act falls short of what should reasonably be allowed.
30. The appellant has stated that the property is rented to students and that it would be disruptive to require them to leave the property while works are commenced and that an additional 9 months, i.e. 15 months overall, is required given the current Covid-19 pandemic. The Council accepts that a longer period may be acceptable.
31. The physical works required to cease the material change of use are not extensive. However, I acknowledge that the current occupants would need to move out to enable the requirements to be met. Nevertheless, in my experience, students would generally not be in residence at a property during the semester breaks from University.
32. Whilst, I acknowledge that the Covid-19 pandemic and the 'lockdown' response to it could have made it more difficult to meet the requirements the Government's 'roadmap' out of lockdown appears to be on course. Nonetheless, the appellant may wish to submit a new planning application for an alternative scheme given my findings below.
33. I consider that in these circumstances that a reasonable period for compliance would be 9 months whilst also taking into account the Council's reasons for issuing the notice. I will therefore extend the period of compliance to 9 months. The appeal on ground (g) succeeds to that extent.

The Section 78 Appeal – Appeal B

Main Issue

34. Whether the planning application as originally submitted is valid and if so whether the proposed development would be acceptable.

Reasons

Whether the planning application as submitted is valid

35. Paragraph 016 of the Planning Practice Guidance (the Guidance) sets out what is required to make a valid application for planning permission. It includes a completed application form, compliance with national information requirements, the correct fee, and provision of local information requirements.
36. The period within which the Council must issue a decision does not begin to run until it receives a valid application and the prescribed fee. There is no mechanism prescribed for the resolution of disputes as to the quantum of the fee, and the applicant's remedies where liability or quantum is in dispute are either to seek a declaratory ruling from the High Court, or to appeal on the grounds of non-determination and, in so doing, seek the view of the Secretary of State as to whether he has jurisdiction on the matter.
37. In November 2020 a planning application was submitted to the Council. The application was described as the conversion of building to provide student

accommodation in the form of eight (8x) rooms with enhanced facilities and an outdoor communal area. On the 19 November 2020 the Council wrote to the appellant's agent stating that a number of items were required to validate the application.

38. The agent responded to that letter on 15 December 2020 disputing that the application form had not been completed incorrectly, that the submitted fee was correct, a number of additional items/plans were submitted and it was disputed that; the Planning Statement needed to be amended; a Statement of Student Need and a Sustainable Drainage Strategy were required.
39. The appellant's agent then served a notice under Article 12(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended) (DMPO) on 21 December 2020. On 4 January 2021, the Council advised that; amendments to sections 5, 7, 9, 14 and 16 of the application form were required; the fee required is 7 x £462, £3234, but only £462 has been paid; the proposal involves external changes to provide the entrance to the courtyard and the planning statement should be amended to explain this; a Statement of Student Need and a Sustainable Drainage Strategy would be required to enable the application to be validated.
40. The key area of contention regarding the validity of the application relates to the description of the development, the associated information within the application form and the appropriate fee associated with the application. I acknowledge that the description of the development should not be altered by the Council without discussing the amendments with the applicant. Moreover, checking the accuracy of the description of development should not delay the validation of an application.
41. Nevertheless, the Council must ensure that the description of the development accurately reflects what is shown within the supporting information to that application. This enables the correct fee to be applied, the Council to fully understand the proposal which they are being asked to appraise/decide upon and makes it easier for members of the public to also understand/appreciate the proposal.
42. The plans submitted with the application of the proposed development indicate that the building would be divided into 8 studios or units of living accommodation with an outdoor courtyard. The layout of those units of accommodation and the 'basic amenities' within them appears to be largely the same as I observed at the site visit. It is evident that the Council considered that these units of accommodation were to be treated as separate dwellinghouses. Whereas, the appellant considers that they should not.
43. Given my findings within Appeal A, I consider that, as a matter of fact and degree, the Council was correct in its assessment of the type of development that was proposed as part of the planning application. As such, with the inaccurate information within the application form a full appraisal of key relevant planning matters such as living conditions of future occupiers of the property, character and appearance of the area and waste management would not be possible. Furthermore, the type of development proposed has direct implications on the appropriate fee required. The Council were correct to determine that the appropriate fee fell within Category 11 '*The change of use of a building to use as one or more separate dwellinghouses*' of The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and

Site Visits) (England) Regulations 2012 (as amended). As such, the appropriate fee for the development proposed was not paid.

44. There is no need for me to consider whether the local list requirements meet the statutory tests as it would not alter my decision.

Conclusion – Appeal B

45. In light of all the above, I conclude that the application does not satisfy the national requirements, having particular regard to the application form and the appropriate fee. As such, the application is not valid. Having concluded this, it is not possible for me to appraise the proposal. For the above reasons, I conclude that the appeal is dismissed.

Formal Decisions

Appeal A

46. It is directed that the enforcement notice is corrected and varied by:

- Deleting the wording '*unauthorised change of use*' within the description of the alleged breach and replacing it with '*unauthorised material change of use*';
- Deleting the wording '*from large house in multiple occupation*' from the description of the alleged breach;
- Deleting the number '8' from the wording of requirement 5.1;
- Adding the wording '*that facilitated the material change of use to 8 self-contained flats*' at the end of requirement 5.2;
- Deleting the wording of requirement 5.4 and replace it with '*alter the property to comply with the terms of the planning permission 20172377 dated 25 June 2018 including the conditions subject to which that permission was granted*';
- Adding the wording '*undertaken in step 3 from the site*' at the end of requirement 5.5;
- The deletion of 6 months and the substitution of 9 months as the time for compliance.

47. Subject to the corrections and variations the enforcement notice is upheld.

Appeal B

48. The appeal is dismissed.

D. Boffin

INSPECTOR