



Appeal Decision

Site visit made on 14 June 2021

by Hilary Orr MSc, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 June 2021

Appeal Ref: APP/C5690/C/20/3247984

Land at 190 Lee High Road, London SE13 5PL

- 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 Menahem Lahav against an enforcement notice issued by the Council of the London Borough of Lewisham.
- The enforcement notice, numbered ENF/19/00316, was issued on 15 January 2020.
- The breach of planning control as alleged in the notice is without the benefit of planning permission the material change of use of the property to use as four self-contained flats.
- The requirements of the notice are:
 - 1) Cease the use of the property as four self-contained flats;
 - 2) Remove all kitchen fixtures and fittings from flats one to four (inclusive) in their entirety including kitchen worktops, cupboards, sinks and cooking facilities from the rooms;
 - 3) Make good all damage resulting from the compliance with the requirements of this notice;
 - 4) Remove all materials, debris, waste and equipment resulting from compliance with the above requirements of this notice from the land.
- 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) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Decision

1. It is directed that the enforcement notice is corrected and varied by:
 1. The deletion of the words "Without the benefit of planning permission the material change of use of the property to use as four self-contained flats", and the substitution with the words, "Without the benefit of planning permission the material change of use of the property to use as four self-contained flats and one bedsit.", at paragraph 3. of the notice; and
 2. The deletion of steps 1) to 4) at paragraph 5. of the notice, and the substitution of the following steps:
 1. Cease the use of the property as self-contained flats; and
 2. Restore the property to its condition prior to the breach, by removing all cooking equipment from each occupied unit.

3. Subject to the correction and variations, the appeal is dismissed and the enforcement notice is upheld.

Reasons

4. For the avoidance of doubt, I should explain that as there is no appeal under ground (a), the planning merits of the development are not relevant to this appeal.

Ground (b)

5. The appeal is proceeding on ground (b), that the matters alleged in the notice have not occurred. This is one of the legal grounds of appeal and therefore the burden of proof is on the appellant.
6. It is the appellant's case that the allegation in the notice is incorrect for two reasons. Firstly, that the allegation refers to four self-contained flats, whereas there are five units in total. The Council in their enforcement report, refer to their findings at the various site inspections. It is clear from these, that they were aware that there were five units, albeit that the numbering they used does not equate to the door numbers. Nevertheless, four of these units were equipped with an en-suite bathroom, microwave, fridge, sink and kitchen cupboards. The unit referred to as flat five did not have a microwave or cooking facilities, so the notice alleged four self-contained flats rather than five.
7. Whilst I have no reason to disagree with the general approach taken by the Council, I acknowledge that the allegation, as drafted, is unclear. Nonetheless, I consider that it can be corrected without causing injustice to the parties.
8. The appellant further submits that the use of the property remains a house in multiple occupation (HMO). S.254 of the Housing Act 2004 sets out the meaning of a HMO. The criteria include; (a), that the building, or part thereof, consists of one or more units of accommodation, not consisting of a self-contained flat or flats; and (f), that two or more of the households who occupy the living accommodation share one or more basic amenities, or the living accommodation is lacking in one or more of the basic amenities. From the evidence, before the subject alterations were carried out, the use of the five bed-sits met these criteria.
9. The evidence provided by the Council, is that the matter was brought to light by their Private Sector Housing Team, following an inspection on 19 December 2018. This found that the cooking equipment had been removed from the communal kitchen, with cooking facilities provided in four of the units. The subsequent site inspection carried out on 21 November 2019, further confirmed that four of the units had a stove and microwave. The communal kitchen on the ground floor, was equipped with two fridges and washing machines, but no cooking equipment.
10. At the time of my site visit, four of the five units were occupied. All of the rooms had lockable doors. Each unit was provided with a sink and two kitchen cupboards, a fridge, an en-suite bathroom, with sink shower/bath and toilet. I did not see any cookers, microwaves or other cooking equipment in any of the five units. The ground floor had a communal kitchen with six electric rings, a limited range of kitchen cupboards, sink and drainer, fridge/freezer, one chair and a small wooden table. There were also several small electrical appliances such as a toaster and sandwich maker.

11. A number of sworn Statutory Declarations have been submitted by the appellant and I give these significant weight. The statutory declaration from Alin Christian Nitu, refers to two distinct operations, with two separate invoices. The first was to remove the ground floor kitchen in September 2019, followed by the second, to install a new kitchen into the same room in December 2019.
12. I also note that the e-mail thread between the Council and the appellant during November and December 2018 (at appendix B of the appellant's statement), indicates that the subject kitchen was not a shared kitchen, but a laundry room for the flats and that the oven had been recently removed. I am thus not satisfied from the evidence, that the removal of the communal kitchen and provision of the cooking equipment in four of the five units, came about simply as a result of upgrading the shared facilities.
13. I acknowledge that the cooking facilities have now been removed from the units, and the occupants have been advised that all cooking is to take place in the communal kitchen.
14. Nonetheless, I am satisfied that on the balance of probability, during the period leading up to the issue of the notice, four of the five units, contained the necessary facilities for private domestic existence, behind a lockable door with no available shared cooking facilities. Subject to the above correction to the notice, the appeal on ground (b) therefore fails.

Ground (c)

15. This is another legal ground where the appellant must demonstrate that the matters stated in the notice do not constitute a breach of planning control. It is the appellant's case that there has been no change of use. This appears to be on the premise, that the change from the original single family dwelling, to a Class C4 HMO did not require planning permission, and the property has remained as a small HMO throughout.
16. I have already found that the allegation on the face of the issued notice, as corrected, has been carried out. S174(2)(c) is worded in the present tense and an appellant may rely upon matters occurring since the date of issue of the notice, to show that, at the time of the decision, what was alleged does not amount to a breach of planning control. However, in such cases the development to be considered is that alleged by the notice.
17. In this case the notice relates to the material change of use of the property to provide self-contained flats, rather than the original change of use from a single dwelling to a C4 HMO. Whilst the microwaves and stoves have now been removed from the units, and the shared kitchen refitted, this does not alter the nature of the original allegation, and the ground (c) appeal must be considered in that context.
18. In the period leading up to the issue of the notice, there were a total of four flats at the property, with a fifth bed-sit. Each new flat comprised a single room with basic cooking facilities, a small range of kitchen storage cupboards, a fridge, a bathroom, with a toilet, a shower/bath and a wash basin. The rooms all had lockable doors. The three basic amenities were therefore available in each flat for the exclusive use of its occupants.
19. Where an HMO is converted into self-contained flats, with only internal works and no increase in the number of units, it is necessary to consider the effect of

- the alterations on the overall character of the use of the property, to determine whether a material change of use has occurred. It is acknowledged that the alterations were only made to the inside of the building, and the overall number of units and residents have not increased.
20. However, these changes resulted in the creation of four individual dwellings, the character of which, falls within Class C3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, as amended. To my mind, the use of the property as four self-contained flats and one bedsit, is significantly different in character, to its previous use as a small Class C4 HMO.
21. The limited size of the rooms may, to some extent, limit the number of occupants able to live in each flat. However, the formation of four separate dwellings, would allow a significant number of additional residents to live at the property, without the need for planning permission or licensing control. The comings and goings of additional residents would result in additional noise and disturbance for neighbours and existing residents in the property. Moreover, the lack of on-site parking would be likely to lead to increased pressure for parking on this and neighbouring streets.
22. The provision of cooking equipment into each room, would result in changes to day to day living practices. With each household, taking responsibility for the disposal and recycling of waste, there would be additional pressure for separate bins. This would lead to the proliferation of bins stored on the frontage of the property. Thus, there would be a clear visual and environmental effect, that would be detrimental to the amenity of the wider area.
23. Pulling all of the above points together, I find that, on the balance of probability, the change of the four individual HMO rooms, into self-contained flats resulted in a material and definable change in the character of the use. I consequently find that the conversion into self-contained flats represents a material change of use falling within the scope of s55(1). That change requires express planning permission, and this has not been obtained. Consequently, the appeal on ground (c) fails.

Ground (f)

24. In appealing ground (f) the appellants need to demonstrate that the requirements of the notice exceed what is required to remedy the breach of planning control, or injury to amenity, depending on the purpose of the notice. The appellant argues that it is not uncommon for HMO units to have some kitchen equipment, although they may also share the communal kitchen.
25. 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 as the case may be, to remedy injury to amenity (s173(4)(b)). In this case the notice requires that the use should cease, and specific steps are to be taken to restore the property. The purpose of the notice is therefore to remedy the breach of planning control.
26. The scope of the notice is limited by s173(4)(a) and (b). This means that where planning permission has not been granted for the development, the power is simply to restore the land to its previous condition. However, it is well established in case law, that the notice can legitimately require the removal of

works integral to, and solely for, the purpose of facilitating unauthorised development.

27. From the evidence the property appears to have been occupied as a small HMO since at least 2014. The substance of the evidence provided in the statutory declarations indicate that since 2015, each unit had en-suite bathroom facilities, a small kitchenette with a fridge, sink and kitchen cupboards, but no individual cooking facilities or equipment. I have no evidence from the Council to suggest that this was not the case.
28. Consequently, I have no evidence before me to demonstrate that the installation of the kitchen worktops, cupboards and sinks either facilitated, or were integral to, the later change of use to self-contained flats.
29. Accordingly, I find that on the balance of probability, the requirements of the notice exceed those necessary to remedy the breach of planning control. I shall therefore vary the requirements of the notice at paragraph 5, to require that the use of the property as self-contained flats ceases, and the removal of the cooking facilities and equipment from the occupied units. As a result of my finding, requirements 3) and 4) are no longer necessary and should be deleted.

Conclusion

30. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variations.

Hilary Orr

INSPECTOR