



Appeal Decision

Site visit made on 22 June 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th July 2021

Appeal Ref: APP/D1780/C/20/3265501

Land at 47 Tennyson Road, Southampton SO17 2HF

- 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 Nick Sahota of Homelife Lettings Ltd against an enforcement notice issued by Southampton City Council.
- The enforcement notice was issued on 19 November 2020.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from a 7 person house in multiple occupation (HMO) to 4 self-contained flats.
- The requirements of the notice are: (i) Cease the use of the land as self-contained flats; (ii) Remove from the flats marked A, C and D on the plan attached to the notice all appliances and the kitchenettes, to include the kitchen cupboard storage units, worktops and sinks that enables (*sic*) the use as self-contained flats; (iii) Remove the internal walls shown on the attached plan and the fittings and fixtures enclosed by the walls so as to facilitate access to the shared facilities to the rear of the property; and (iv) Remove from the land all resultant materials.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(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.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with variation in the terms set out below in the Formal Decision.

Ground (c) appeal

1. The ground of appeal is that the matters alleged in the enforcement notice do not constitute a breach of planning control. It is for the appellant to show that their appeal should succeed on this ground, the relevant test of the evidence being on the balance of probability.
2. The appeal site contains an end of terrace residential building with accommodation arranged over three floors. Planning permission was granted for conversion of the building from a seven bedroom HMO to four self-contained flats on 11 February 2014¹ (the permission). Condition 1 required development to commence within three years, i.e. before 11 February 2017.
3. The appellant argued that development of the four flats had begun before expiry of the period specified in condition 1. In a Statutory Declaration (SD), a joint owner of the site stated that between October and December 2016

¹ Appeal Ref: APP/D1780/A/13/2205485.

various works had been carried out in accordance with the approved drawings. The works were described as removing a kitchen wall on the ground floor and installing structural support to provide a new living/bedroom/kitchen, carrying out first fix electrics and installing new plumbing and foul drainage runs to serve new flats. Exhibited with the SD was a copy of the approved drawing, on which the alignment of drainage and the position of a 'new' manhole had been added later by hand. Also exhibited were copies of contractor's invoices and a company job sheet relevant to the works, all dating from late 2016.

4. Both main parties referred to s56(1) of the Act, which concerns when development should be taken to be '*initiated*'. However, the only context in which that subsection applies is in relation to compensation under Part V of the Act. At s56(2), the Act states that for the purposes of the provisions mentioned in subsection (3), development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. The provisions in subsection (3) to which subsection (2) applies include where, as in this case, the permission is subject to a time-limited condition. Therefore, only s56(2) is relevant to this appeal.
5. What is meant by a '*material operation*' for the purpose of s56(2) is defined in s56(4) and includes at paragraph (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b). The latter is defined as the digging of a trench which is to contain the foundations, or part of the foundations, of a building. The definition also includes at paragraph (e) any change in the use of any land which constitutes material development.
6. Removing the kitchen wall together with new electrical and plumbing installations affect only the interior of the building and so do not fall within the definition of a material operation, even if such works were undertaken in association with the change of use to flats. I am given to understand that the use as flats began at or about July 2020. Therefore, only the drainage works are relevant for the purpose of assessing whether a material operation was carried out before the date the permission would otherwise have expired.
7. The job sheet exhibited with the SD refers to a '*new manhole/drainage inside to the two flats on the ground floor... to allow future connections to the first floor*'. According to that document, it took 2-3 staff a total of 35-40 hours '*on and off over 3 weeks*' to undertake the drainage works. Whilst a copy of the drawing referred to in the job sheet showing the extent of the drainage works was not supplied, the annotated drawing exhibited with the SD shows a section of drainage pipe around 4 m in length laid under part of the ground floor between the new kitchen and bathroom in flat A, leading to a 'new' manhole.
8. The scale of the drainage works shown on the annotated drawing is not insignificant. The job sheet indicates that the drainage works took appreciable amounts of time and labour to carry out. In the manhole there is a drainage pipe running underneath part of the rear wall of the building along a similar alignment to that shown on the appellant's annotated drawing. Based on the depth, it is not unreasonable to conclude that the drainage pipe would have to have been installed underground. In order to install the drainage pipe, it would in all likelihood have been necessary to excavate a reasonably deep trench beneath the floor in flat A and through part of the building foundations. There is no firm evidence to suggest that the drainage works were less extensive

than that described in the appellant's evidence. In particular, there was nothing which would suggest that the drainage pipe was largely routed through an underfloor void in the building. Therefore, I find the scale and duration of the drainage works to go well beyond that which might reasonably be described as *de minimis*. Although the drainage works were not shown on the approved drawings, they are clearly part and parcel of and integral to, the use as flats. For example, in the absence of a drainage connection flat A would lack the facilities required for day-to-day private existence, this being the defining characteristic of a dwellinghouse. There is no firm evidence which might show that the drainage works were undertaken at a different date to that referred to in the appellant's evidence or in respect of a different scheme of development.

9. A photograph supplied by the Council shows it is highly likely that what the appellant described as a 'new' manhole had been in existence since at least 2013. However, from inspection of the manhole it was apparent that the structure had been altered and rebuilt significantly, in all probability during the drainage works. In my view, it is highly probable that reference to a 'new' manhole was simply used as shorthand. In any event, the pre-existence of the manhole does not alter my conclusion regarding the overall scale of the drainage works. The absence of any Building Control inspections before October 2019 is perhaps unsurprising, as the Council's own evidence shows that work on converting the building to four flats did not continue after the drainage works were undertaken, the use as an HMO continuing until at or about March of that year. I am also mindful that condition 4 attached to the permission required approval by the Council of a plan showing the boundary treatment before the development commenced. However, as the boundary treatment is a minor detail which does not go to the heart of the permission, failing to comply with condition 4 before carrying out the drainage works does not affect whether the development was begun. As a result, none of the above matters have any bearing on my findings.
10. Taking all the above factors into account, I am satisfied that the drainage works constituted a material operation for the purposes of s56(2), that they are comprised in the development and that the development in the permission had therefore begun. The available evidence in that respect is clear and convincing. The Courts have held that it is possible to commence development for the purposes of s56 and thereby meet a deadline forming a condition of the permission but then later to deviate from the permitted works in a manner that later becomes an enforcement issue, without retrospectively altering the fact that the commencement of the development had occurred for s56 purposes².
11. Be that as it may, for their ground (c) appeal to succeed the appellant must also show that the works carried out subsequently are not in breach of planning control. During my site visit, I observed that the internal layout of flats C and D on the first floor is appreciably different to that shown on the approved drawings. Flat D has been substantially increased in size to provide a second bedroom, albeit currently used as a study, with a corresponding significant decrease in the size of flat C. The approved drawings show four one-bedroom flats, not three flats with one bedroom and one flat capable of providing two bedrooms. The magnitude of the deviation from the approved drawings has had planning consequences in terms of the living conditions of the existing and

² *Hussain v SSCLG* [2017] EWHC 687.

future occupiers of flats C and D. The planning considerations might well have been different, had the Council been in the position to determine a planning application made on the basis of the size of flats C and D as built. To my mind, it is most likely that the deviation from the approved drawings occurred at some stage during the conversion of the building to four flats. There was little evidence to indicate otherwise. This all leads me to conclude that the development as a whole is unauthorised. Therefore, whilst the available evidence shows that the development was begun, in the absence of a further grant of express planning permission what has been done subsequently is not authorised.

12. For the above reasons, the appellant has been unable to show to the required standard that the change of use to four flats is not in breach of planning control and the ground (c) appeal fails.

Ground (f) appeal

13. The ground of appeal is that the requirements of the notice are excessive.
14. There are two purposes which an enforcement notice can seek to achieve. The first is to remedy the breach of planning control that has occurred. The second is to remedy any injury to amenity caused by the breach. The notice did not specify whether one or both of the above purposes were relevant. However, the notice requires the use as four flats to cease and the removal of works which facilitate that use. Therefore, the purpose of the notice must be to remedy the breach. In this context, restoring the site to its condition before the breach took place is reasonable and is not excessive.
15. Even so, enforcement action is intended to be a remedial process. Whether the planning difficulties could be overcome at less cost and disruption than total cessation of the unauthorised flat use and removal of the associated works is therefore a relevant consideration. Where deviations from an approved scheme have resulted in the development as a whole being unauthorised, provided the planning permission is still extant and it is physically possible to complete the development, as in this case, the breach can also be remedied by making the development comply with the terms, including conditions and limitations, of the permission.
16. The differences between the flats as built and the approved scheme are clear and the remedial works required to comply with the permission are therefore readily apparent. As a result, the alternative remedy set out above would be sufficiently precise in order to remedy the breach. Furthermore, requiring the alternative remedy would be sufficiently clear for there to be no uncertainty as to what must be done to comply with the notice.
17. Consequently, whilst I find that the steps required are not excessive for their purpose, I shall vary the notice as set out above as an alternative remedy to the breach and the ground (f) appeal succeeds to that extent.

Conclusion

18. For the reasons given above, I conclude that the ground (c) appeal should not succeed and I shall uphold the enforcement notice with variation.

Formal Decision

19. It is directed that the enforcement notice be varied by inserting the following requirements after step (iv) in paragraph 5:

"OR:

- v) *"Make the development comply with the terms (including the conditions and limitations) of the planning permission granted on 11 February 2014 for conversion from 7 bedroom HMO to 4 no. self-contained flats (Application Ref 13/01084/FUL)".*

20. Subject to this variation the enforcement notice is upheld.

Stephen Hawkins

INSPECTOR