



Appeal Decision

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 July 2021

Appeal Ref: APP/A5270/C/20/3246717

Premises known as 2 Coldershaw Road, West Ealing, London W13 9DX

- 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 Jas Dhami against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice was issued on 9 January 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the property to a mixed use comprising three self-contained flats and an HMO and the operational development consisting of the construction of a rear extension.
 - The requirements of the notice are: 1. Cease the use of the property as a mixed use as three self-contained flats and an HMO; 2. Remove the kitchen and drainage connections from the three self-contained flats; 3. Remove the bathroom and drainage connections from the three self-contained flats; 4. Remove all internal doors, locks and partitions that facilitate the mixed use of the property as three self-contained flats and an HMO; 5. Demolish the rear extension; and, 6. 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)(c), (d), (f) and (g) 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.
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Summary of Decision

1. The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Procedural Matter

2. The appeal was to be heard by means of Public Inquiry. However, as the appellant's representatives had difficulties accessing the Inquiry as a virtual event, and, did not have a witness of fact to be called pursuant to the ground (d) appeal, the reason for an Inquiry fell-away. The parties then agreed that the appeal could be determined by means of written representations, subject to the making of final legal submissions.
3. Whilst the Council considered that a site visit was necessary, the appellant did not, although did suggest a virtual site visit could be undertaken, owing to the pandemic, if I considered it necessary. However, there is no ground (a) appeal before me and no matters of fact in dispute between the parties that would be resolved by means of a site visit.

4. I therefore do not consider there to be injustice to the parties from this course of action in the circumstances that have arisen, and I will therefore determine the appeal solely on the written evidence now before me.

The Enforcement Notice

5. To avoid a situation where an alternative number of flats at the property may not be caught by the notice, I shall correct the notice to omit reference to a specific number. I do not consider that injustice arises from this course of action as it does not make the notice more onerous.

Application for Costs

6. An application for costs was made by the Council of the London Borough of Ealing against Mr Jas Dhami. This application is the subject of a separate Decision.

The ground (c) appeal

7. For the appeal to succeed on ground (c) the onus is on the appellant to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. This could be because the matters alleged do not constitute development, planning permission has already been granted for the matters alleged in the enforcement notice or they are permitted development.
8. The appellant states the property was being used as 3 separate flats and a house in multiple occupation (HMO) and accepts it has been in the mixed use alleged. This accords with the view of the Council because it is contended there is a degree of fluidity in respect of the layout of the building which means all occupants have access to communal areas and so there is flexibility as to how the space within the property is used.
9. The appellant then contends that planning permission is not required for the use of a dwelling as an HMO. Whilst that might be the case, the allegation concerns a mixed use, not a use solely as a small HMO. An HMO cannot include flats within it. There is then very little evidence to demonstrate on the balance of probabilities that the mixed use does not require planning permission. Given the appellant accepts the alleged mixed use, there is no hidden ground (b) appeal.
10. The appellant then says that he is prepared to surrender his HMO licence, but neither this, nor his acceptance that the flats satisfy the definition within the Housing Act, assists his ground (c) argument.
11. The appellant has therefore failed to demonstrate on the balance of probabilities that the matter alleged, namely the mixed use, does not constitute development, that planning permission has already been granted for the matter alleged in the enforcement notice or it is permitted development.
12. The appeal on ground (c) therefore fails.

The ground (d) appeal

13. For the ground (d) appeal to succeed the onus is on the appellant to demonstrate, on the balance of probabilities, that at the time the enforcement notice was issued it was too late to take enforcement action against the matter stated in the notice.

14. The Council comments that although the notice is couched as a change of use of the whole property to a mixed use comprising flats and an HMO (rather than separate notices in respect of each relevant flat), thereby carrying a 10 year immunity period (as set out in s171B(3) of the Act), the relevant time limit for immunity in respect of each of the three flats is that in s171B(2) of the Act, namely, 4 years.
15. However, the Council contends that the property remains a single planning unit and has accordingly alleged a mixed use. As I have already noted, the appellant accepts this. That being so, for the purposes of the ground (d) appeal the appellant will need to demonstrate on the balance of probabilities a continuous period of 10 years for immunity of the mixed use. The Council cannot allege a mixed use and then disaggregate component parts of it for the purposes of considering immunity. No case law or authorities are before me to persuade me otherwise.
16. The evidence of the appellant is that he started managing the property in 2007. There are three flats on the ground floor, as well as a communal kitchen, with 4 letting bedrooms and two bathrooms on the first floor. There is then very little evidence to demonstrate on the balance of probabilities the use of the property for the mixed use alleged for a continuous period of 10 years.
17. Rather, the focus of the appellant's evidence concerns the 3 flats. There is very little evidence to demonstrate on the balance of probabilities when these were first created, in terms of having all the facilities required for independent day to day living. There are then a series of Statutory Declarations concerning the occupation of the 3 flats.
18. In respect of the front flat the evidence presented in the Statutory Declarations can be broadly summarised as occupation between March 2015 and January 2019, February 2019 to March 2019 and November 2019 until February 2020. In respect of the middle flat it is of occupation between 2 July 2014 and 28 February 2016 and 1 March 2016 and August 2018. In respect of the rear flat it is of occupation between September 2018 and February 2019 and there is then a further assertion that it has been used for more than four years.
19. The Council highlights contradictions in the appellants evidence in that responses to a Planning Contravention Notice differ or were absent in respect of evidence now presented. The same is also said in respect of an HMO licensing application made in 2017.
20. The Statutory Declarations are largely pro-forma documents and the Council calls into question their legitimacy as an accurate version of events. Whilst the appellant might be appalled by such allegations, he did very little to address them. Moreover, the evidence of the appellant is vague and ambiguous, with one tenant providing repeated declarations about having lived in different parts of the property. Whilst it is said this is because he moved in and out of the property, that is merely an assertion now provided on his behalf, as opposed his actual evidence.
21. The appellant had the opportunity, by means of the Public Inquiry convened on his behalf, to demonstrate his case on the balance of probabilities. His evidence, which would have been taken on oath and the subject of cross-examination, would, if sufficiently precise and unambiguous, have then been afforded significant weight. However, he failed to take that opportunity. This

- casts considerable doubt in my mind as to the quality and precision of the written evidence before me, which, in conjunction with the concerns raised by the Council, leads me to conclude that the evidence requires corroboration.
22. Irrespective of the period for immunity, the burden of proof remains on the appellant to demonstrate his case on the balance of probabilities. He has been given the opportunity to do so and his evidence could not be tested. As a matter of fact and degree, the appellant has not demonstrated on the balance of probabilities that at the time the enforcement notice was issued it was too late to take enforcement action against the matter stated in the notice. He has failed to discharge the necessary burden of proof.
23. The appellant says that he has sought documentation from the Council that they knew about the change of use from the outset. However, the onus is on the appellant to place any such evidence before me, and this has not been the case. The appellant has also had ample time since the issue of the notice in January 2020 in which to collate evidence or locate previous tenants.
24. In respect of the rear extension enforced against the appellant will need to demonstrate on the balance of probabilities that it was substantially complete by 9 January 2016, being 4 years prior to the issue of the notice.
25. The evidence of the appellant is that the Council was aware of the extension in 2013, as reference is made to it in a letter from a Regulatory Services Officer. The Statutory Declaration of Mr Dhami then refers to the events in 2013 that led to that letter being issued and a Statutory Declaration of Mr Short states that the building at the rear of the property has existed for more than four years.
26. However, the Council has provided photographic evidence which demonstrates on the balance of probabilities that there have been a series of rear extensions to the property between 2013 and 2019. The Council then highlights that they have only taken enforcement action against part of these extensions, being those they do not consider to be immune from enforcement action.
27. The evidence of the appellant is therefore vague and imprecise as, given the series of extensions, I do not know which parts the Council's 2013 correspondence or indeed the Statutory Declarations refer to. In the absence of precise and unambiguous evidence concerning the rear extension that is the subject of the notice, the appellant has not demonstrated on the balance of probabilities that at the time the notice was issued it was too late to take enforcement action.
28. The appeal on ground (d) consequently fails.

The ground (f) appeal

29. The purpose of the enforcement notice is to remedy the breach of planning control. Therefore, for an appeal on ground (f) to succeed it would be necessary for the appellant to explain why the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control and propose lesser alternatives steps.
30. The appellant contends that it is perfectly reasonable for bedrooms to have drainage facilities for a sink and that the removal of internal doors is excessive.

31. The removal of the kitchen and bathroom facilities from the flats is not excessive as these facilitate the use as flats and therefore the breach of planning control, namely the mixed use, enforced against. I am however not persuaded that the entirety of the drainage connections then also needs to be removed to remedy the breach alleged. It is accordingly excessive in this regard and I note there was no requirement to remove the corresponding water supply, which somewhat undermines the Council's position.
32. The notice then only requires the removal of internal doors, locks and partitions that facilitate the unauthorised mixed use. It does not require the removal of all such features and is therefore not excessive to remedy the breach of planning control.
33. I have already considered the lawfulness of the rear extension under the ground (d) appeal, and therefore it is not excessive to require its demolition in order to remedy that breach of planning control.
34. There could be regarded to be a hidden ground (f) appeal relating to the requirement to cease the HMO use. However, that cessation relates to the mixed use, as opposed a primary HMO use. It is therefore not excessive to require the cessation of the mixed use attacked by the notice. The Council has also highlighted that because it considers there to have been intervening unauthorised uses at the property, as both a small and large HMO, there is no lawful fallback position of the property as a dwellinghouse. However, the lawful position following compliance with the notice remains a subsequent matter for the appellant.
35. The appeal on ground (f) therefore only succeeds to the extent described above.

The ground (g) appeal

36. The appellant contends that the time given to comply with the requirements of the enforcement notice are too short and that six months would be appropriate as the rooms are rented to occupants who would need to find suitable alternative accommodation.
37. Whether or not the appellant has discussed the situation with the current occupants is largely irrelevant, as is the absence of evidence concerning the notice period of any tenancy. The requirements of the notice also require both cessation and physical works to be undertaken, even though they may not be extensive.
38. The appellant is entitled to assume success from his appeal, and even though the notice was issued in January 2020, this should not undermine his ground (g) position.
39. Whilst I appreciate the appellant may benefit financially from a longer compliance period, the six months sought is not excessive and strikes an appropriate balance between the need for the occupants to find suitable alternative accommodation and not unduly perpetuating the breaches of planning control.
40. The ground (g) appeal therefore succeeds to this extent.

Overall Conclusion

41. For the reasons given above I conclude that the appeal should only partially succeed on ground (f) as well as on ground (g). Accordingly, I shall uphold the enforcement notice with corrections and variations.

Formal Decision

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

- deleting the word 'three' from section 3
- deleting the word 'three' from requirement 5.1
- deleting the words '*and drainage connections*' from requirement 5.2
- deleting the words '*and drainage connections*' from requirement 5.3
- substituting '*6 months*' as the period for compliance

43. Subject to these corrections and variations the appeal is dismissed and the enforcement notice is upheld.

Paul T Hocking

INSPECTOR