
Appeal Decision

Inquiry Held on 2 June 2021

Site visit made on 3 June 2021

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10th August 2021

Appeal Ref: APP/A5840/C/20/3257301 68 East Dulwich Grove, London SE22 8PS

- 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 Altan Ramadan against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The enforcement notice was issued on 07 July 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the Property by subdividing the Property to create 12 self contained dwelling flats (six studio flats on the ground floor, four studio flats on the first floor and two studio flats on the second floor) ("the Unauthorised Use").
 - The requirements of the notice are:
 - 5.1 Cease the use of the Property as the Unauthorised Use.
 - 5.2 Remove the following building works:-
 - 5.2.1 all of the stud partitions walls which have been inserted to facilitate the Unauthorised Use;
 - 5.2.2 all of the kitchens (including for the avoidance of doubt hobs, ovens, fridges, microwaves, kitchen work tops and cupboards, wall tiling, sockets and switches at work top level, plumbing and electricity connections) which have been inserted to facilitate the Unauthorised Use;
 - 5.2.3 all of the bathrooms (including for the avoidance of doubt showers, baths, hand basins, toilets, plumbing and electricity connections, partition walls and doors) which have been inserted to facilitate the Unauthorised Use;
 - 5.2.4 any electrical wiring, gas pipes, water pipes and services which has been inserted to facilitate the Unauthorised Use; and
 - 5.2.5 any electricity, gas meters, water meters, consumer units, fuse boxes and housing cupboards which has been inserted to facilitate the Unauthorised Use.
 - The period for compliance with the requirements is 12 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b) and (c) 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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Decision

1. The appeal is allowed, and the enforcement notice is quashed.

Application for costs

2. At the Inquiry an application for costs was made by the Council of the London Borough of Southwark against Mr Altan Ramadan. This application will be the subject of a separate Decision.

Procedural matters

3. All oral evidence to the Inquiry was given on oath or sworn affirmation.
4. The appeal was originally lodged under grounds (b) and (c). However, the appellant has since clarified in writing that he wishes to proceed on ground (b) only. I have therefore determined the appeal on ground (b) only.

The appeal on ground (b)

5. To succeed on this ground, the onus is upon the appellant to demonstrate on the balance of probabilities that the allegation has not occurred as a matter of fact.
6. The main issue is whether there has been a material change of use of the property by subdividing the property to create 12 self-contained dwellings. However, there is no dispute that the building has not actually been occupied as 12 self-contained dwelling flats. In light of this, this appeal on ground (b) focuses on whether a change of use to 12 self-contained dwelling flats has occurred without there being any actual use.
7. The appellant states that the established use of the property is as five flats and has been used as five flats for a period well in excess of ten years. The Council do not agree and state that this has not been proven by the appellant. However, this is not a matter which falls within the scope of this appeal under ground (b), and I note that the requirements of the notice would not prevent its future use as 5 flats if that is the lawful use. For the avoidance of doubt, I do not state or imply a view on the lawful use of the site.
8. A material change of use is a single event, it is not a gradual process or a continuing state of affairs¹. The Impey case², as confirmed in the Supreme Court in Welwyn-Hatfield³, held that a material change of use may take place when physical works are carried out for the proposed use in advance of the activity which constitutes the proposed use occurring. Therefore, a change of use could take place as a result of the physical works, but as confirmed in Welwyn-Hatfield it is necessary "to look at the matter in the round and to ask what use the building has or of what use it is"³. "The physical state of these premises is very important, but it is not decisive. Actual or intended or attempted use is important but not decisive"². It is a matter of fact and degree as to when the change of use occurs.
9. Given that the notice alleges the material change of use to create 12 self-contained dwelling flats, it is necessary to consider what constitutes a 'dwelling'. Gravesham⁴ is the lead case on defining a dwelling from where springs the idea that a dwelling is a building that ordinarily affords the facilities required for day to day private domestic existence. This is a question of fact and both actual use and the physical characteristics needs to be considered. I understand the term 'flat' for town-planning purposes to denote a part of a building that has the characteristics of a dwelling in its own right, that is to say the ability to afford to those who use it the facilities required for day-to-day

¹ Cynon Valley Borough Council v Secretary of State for Wales (1987) 53 P. & C.R. 68.1

² Impey v SSE and Lake District SPB [1984] 47 P & CR 157.

³ Welwyn Hatfield BC v SSCLG and Beesley [2011] UKSC 15.

⁴ Gravesham BC v SSE [1984] 47 P&CR 143

- private domestic existence. It would satisfy the Gravesham test if it would generally be considered by reasonable people to comprise such a dwelling.
10. Applying all of the above principles to the current appeal, and in the absence of any occupation of the building as 12 self-contained flats, then each of the units should at the very least be able to function adequately as a dwelling with all the facilities provided for day-to-day living.
 11. The Council consider that their own observations during their site visit in September 2018 showed that works were decisively underway to convert the building to multiple self-contained units, and I also note that a number of rooms had been subdivided with 'first fix' installed, which appears to match the layouts of the floor plans which the appellant handed to officers during their site visit. The floor plans were entitled "Retrospective Change of Use of the whole house into an HMO". Furthermore, the witness for the appellant belatedly confirmed in cross examination, contrary to the appellant's written evidence, that that was the intended purpose of the buildings works.
 12. Nevertheless, from all the evidence submitted, including the Council's photographs, this is very much a 'development in progress' and there plainly aren't any self-contained units provided with all the facilities for day to day living. Indeed, if the works were intended to be for the purposes of creating 12 self-contained flats, it has not reached a point where any of these units have been provided and are useable as such and further fit-out works would be required to facilitate this. For example, there are:
 - A. No sanitary facilities for any self-contained flats.
 - B. No kitchen areas or cooking facilities for any self-contained flats.
 - C. No living areas/bedrooms have been created within each of the sub-divided units.
 13. The Council's witness accepted the absence of these facilities in cross examination, and he went further, accepting that the property was not capable of occupation at the date the Notice was issued. In his Proof of Evidence⁵ he also stated that the property was "close to being ready for occupation" but was not yet ready. This was an important point in so far as it confirms that not only has there been no actual occupation as 12 flats, but also that the property was not useable for such residential purposes when the notice was issued.
 14. The appellant has not been consistent in his evidence about the intended purposes of the building, in so far as it was originally claimed in his written evidence that all works were for the renovation of the building for 5 flats, whereas during cross examination the appellant's witness stated that the appellant was indeed carrying out the works for the "11 bedroom HMO scheme⁶", until this was refused in 2019. The Appellant's witness also confirmed in cross examination that certain building works were carried out after the Council's site visit in September 2018 which differed from the written evidence which states that the appellant stopped work, pending the resolution of the Council's dispute. Nevertheless, that does not detract from the other

⁵ Paragraph 5.13

⁶ Council ref: 19/AP/0232 for the change of use from 5 self-contained residential flats (Class C3) to 11 room HMO (Sui Generis) refused on 28 May 2019.

evidence of this case, the physical characteristics of the property, that the property was not useable for residential purposes when the notice was issued, combined with the fact that there has been no actual occupation as self-contained flats. Therefore, despite the inconsistencies in the appellant's own evidence, I find that the facilities for day to day living for separate flats did not exist when the notice was issued.

15. The Council have supported their case by stating that the previous use has clearly come to an end. However, that does not mean that another use necessarily begins, as a material change of use requires a new use to be introduced. That has not occurred.
16. As such, having carefully considered all of the evidence before me, I conclude, on the balance of probabilities, as a matter of fact and degree, that a material change of use as alleged in the notice had not occurred when the notice was issued, and the appeal succeeds on ground (b).
17. Under section 176(1)(a) of the 1990 Act, I have the power to correct, vary or amend the notice provided I am satisfied that there is no injustice caused to either party. As the building is not occupied and given the current condition of the building, it is not clear what use the building had at the date of issue of the notice. Therefore, it is not possible for me to identify the correct use of the property with any degree of certainty. In these circumstances and having regard to my conclusions on appeal (b), I shall not seek to correct the notice. Rather, I shall quash it.

Conclusion

18. For the reasons given above, I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed.

R Satheesan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Matthew Henderson of Counsel

He called Alex Martin, Senior Planning Consultant
 for Lyondale Planning

FOR THE LOCAL PLANNING AUTHORITY:

Richard Turney of Counsel

He called Philip Ridley, Planning Officer for the
 Council of the London of Borough of
 Southwark Council

DOCUMENTS SUBMITTED DURING THE INQUIRY

- 1 Appellant's opening submissions
- 2 Letter to David Bowes dated 28 June 2019 from Alex Martin of Lyondale Planning
- 3 Council's closing submissions
- 4 Appellant's closing submissions