

Appeal Decision

Site visit made on 11 August 2021

by M Madge DipTP, MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25th AUGUST 2021

Appeal Ref: APP/U5360/C20/3254071

73 Lower Clapton Road, London E5 0NP

- 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 S Ludmir of Havenmill Corporation Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice, numbered 2016/0273/ENF, was issued on 15 May 2020.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the outbuilding to use as a residential dwelling and the material change of use of the basement of the main building to use as a residential dwelling.
- The requirements of the notice are:
 1. Cease the use of the outbuilding as a self-contained dwelling;
 2. Cease the use of the basement level of the main building as a self-contained dwelling;
 3. Remove all kitchen and bathroom fixtures and fittings that facilitate the use of the outbuilding as a self-contained dwelling;
 4. Remove all kitchen and bathroom fixtures and fittings that facilitate the use of the basement level of the main building as a self-contained dwelling; and
 5. Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises.
- The period for compliance with the requirements is 8 months.
- The appeal is proceeding on the grounds set out in section 174(2)(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.

Summary of Decision: The appeal succeeds in part on ground (d) and the enforcement notice is upheld with corrections in the terms set out in the Formal Decision.

Appeal on ground (d)

1. To succeed on this ground it needs to be shown that the use of the outbuilding as a single dwellinghouse and the use of the basement of the main building as a single dwellinghouse began more than 4 years before the notice was issued. The use of each single dwellinghouse would have to have begun on or before 14 May 2016, the material date. The relevant test is on the balance of probability and the onus of proof rests with the appellant.
2. The appellant claims that the use of each self-contained flat began before the material date and the use as single dwellinghouses has been continuous. For clarity, I will consider each dwelling separately.

The outbuilding

3. Iustin Catalin Sticlaru is identified as being the tenant of the outbuilding at the date the breach occurred. He has provided a sworn declaration, which confirms his continuous occupation of the outbuilding throughout the period 3 March 2016 to April 2017. The rent payment statement confirms that his last payment was for the period 3 February 2017 to 2 March 2017. In the absence of any explanation for the discrepancy between Mr Sticlaru's recollection of events and the rent payment statement, I find it more likely that Mr Sticlaru would have vacated the outbuilding on 2 March 2017 as this was the end of his tenancy period and no further rental payments were made beyond that date.
4. Other documents show that Cecille Dreyer was the tenant and paid rent for the outbuilding between 22 June 2017 and October 2018. Ms Dreyer's tenancy was followed by Annabelle Lydie Prost's tenancy and rental payments from 26 October 2018 until 28 January 2021 and I understand Ms Prost to still be in residence.
5. Following Mr Sticlaru's departure, the evidence shows that the outbuilding was refurbished. While no specific details have been provided as to what manner of works were involved with the '*upgrade and renovation of existing studio flat*'¹, it would be reasonable to conclude that the works went beyond cleaning, painting or decorating as a Building Control Surveyor was appointed and an Initial Notice applied for. The upgrade and renovation works were commenced in April 2017 and completed in June 2017².
6. It was held in *Thurrock BC v SSETR & Holding [2002] EWCA Civ 226* that a use can only become lawful if it continues throughout the relevant period, such that the Council could have taken enforcement action at any time. A use may only be dormant if it has acquired lawfulness³. If an unlawful use ceases and is then recommenced, the 4-year period required for immunity begins with the act of recommencement.
7. In this case, Mr Sticlaru's occupation did not achieve immunity from enforcement action. The outbuilding was unoccupied for most of March, all of April and May, and much of June 2017. This is not an insignificant period, regardless of whether Mr Sticlaru's occupation ended on 2 March 2017 or in April 2017. As an application was made under the Building Control regime, it follows that there may have been times during this period that the Council could not have taken enforcement action as there is nothing to show that it retained facilities normally required for day-to-day private domestic existence⁴. I find this to be a significant break in occupation, which would result in the immunity period starting on 22 June 2017.
8. For the reasons given above, the use of the outbuilding as a residential dwelling has not achieved immunity in accordance with s171B (2).

The basement of the main building

9. Marius Gerghel is identified as being the tenant of the basement of the main building at the date the breach occurred. He has provided a sworn declaration,

¹ Wilkinson Construction Consultants, approved inspectors – Initial Notice application form

² Eliyohu Anshel Babad's Sworn Declaration

³ *Panton & Farmer v SSETR & Vale of White Horse DC [1999] JPL 461*

⁴ *Gravesham BC v SSE (1982) 47 P & CR 142*

which confirms his tenancy of the basement of the main building throughout the period 10 March 2016 to February 2017. The rent payment statement confirms that his last payment was for the period ending 27 February 2017. While tenancy agreements do not prove occupation, taken with confirmation of the rental payments, I find it more than likely that Mr Gerhel occupied the basement of the main building throughout this period.

10. Other documents show that the basement flat was rented by Marisol Del Rocio Barros Jimenez and Miguel Angel Vera Isla between 28 March 2017 until 27 September 2018. Daniel Thomas Bone's tenancy and rental payments cover the period from 20 November 2018 until 19 August 2020 and I understand that Mr Bone is still in residence.
11. While there has been a lapse in use between one tenancy ending and the next beginning, there is no evidence to suggest that these lapses amount to anything more than the time taken to secure a new tenant. I find these lapses in occupation, while amounting to a number of weeks in total, to be *de minimis*. As such, during these lapses, the Council could have taken enforcement action against the breach. The period from the breach of planning control to the material date exceeds 4 years and the continuous use of the basement of the main building as a residential dwelling has achieved immunity.

Other matters

12. The Valuation Office documentation refers to undertaking an external assessment of a property, should they need to see it. It seems unlikely therefore that they relied upon anything other than previously submitted data to calculate the rates payable on the commercial element of the property, as claimed by the appellant. Any reference within the valuation to the basement and outbuilding being in commercial use would only prove that the tenant of the commercial property is paying inflated rates, as confirmed by the appellant.
13. While the statutory declarations may not follow the exact wording set out in the Statutory Declarations Act 1835, they do include sincere declarations that have been witnessed by legal representatives. The weight afforded to these documents has not therefore been significantly diminished.

Conclusion on ground (d)

14. For the reasons given above, the use of the basement of the main building as a residential dwelling has achieved immunity from enforcement action, but the use of the outbuilding as a residential dwelling has not. The appeal on ground (d) succeeds to this limited extent.

Appeal on ground (f)

15. To succeed on this ground, it should be shown that the steps required exceed what is necessary to remedy the breach of planning control or the injury to amenity, whichever may be the case.
16. Due to the partial success on ground (d), the ground (f) appeal relates only to the use of the outbuilding. The requirements seek to remedy the breach of planning control.
17. The appellant claims that "*The shop owner used to reside in the outbuilding which also had proper cooking facilities which were also used in conjunction*

with the café use". However, no evidence has been provided to demonstrate that the outbuilding contained kitchen and bathroom facilities before Mr Sticlaru's occupation. In the absence of any evidence to corroborate the claimed association with the café, such as a sworn declaration from the appellant or any other party, I find it less than probable that the outbuilding contained kitchen and bathroom facilities before the breach occurred. The requirements do not therefore exceed what is necessary to remedy the breach of planning control.

18. For this reason, the appeal on ground (f) fails.

Appeal on ground (g)

19. To succeed on this ground it should be shown that the compliance period specified falls short of what should reasonably be allowed.

20. A period of 8 months is specified and during this time the tenant would need to vacate, and the fixtures and fittings would need to be removed. The appellant claims that it may take longer to comply with the requirements due to on-going Covid 19 issues. However, the appellant advises that the tenant could vacate the premises within 6 months, which would leave a further 2 months to remove the kitchen and bathroom fixtures and fittings and clear them away from the site. These timescales fall within the specified compliance period, which I find to be reasonable.

21. For this reason, the appeal on ground (g) fails.

Overall conclusion

22. For the reasons given above, the appeal on ground (d) shall succeed in respect of the use of the basement of the main building as a residential dwelling, but otherwise I shall uphold the notice with a correction.

Formal decision

23. It is directed that the enforcement notice is corrected by:

The deletion of the words "the material change of use of the basement of the main building to use as a residential dwelling and" from section 3. THE BREACH OF PLANNING CONTROL ALLEGED.

And varied by:

The deletion of all the words in section 5. WHAT YOU ARE REQUIRED TO DO and the substitution of the words:

- 1. Cease the use of the outbuilding as a self-contained dwelling;*
- 2. Remove all kitchen and bathroom fixtures and fittings that facilitate the use of the outbuilding as a self-contained dwelling; and*
- 3. Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises.*

Subject to the correction and variation, the enforcement notice is upheld.

M Madge

INSPECTOR