



Appeal Decisions

Site visit made on 13 July 2021

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 August 2021

Appeal A: APP/T5150/C/19/3232533 **22 Mora Road, London NW2 6TG**

- 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 Zein El-Abdin Moghnieh against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 10 May 2019.
- The breach of planning control as alleged in the notice is Without planning permission, the change of use of the upper floors of the main building at the premises from a single self-contained flat to four self-contained flats.
- The requirements of the notice are STEP 1 Cease the use of the first floor and loft level of the main building as more than a single self-contained flat; STEP 2 Remove from the land all fixtures and fittings associated with the unauthorised change of use of the first floor and loft level, including all but one kitchen and all but one bathroom; STEP 3 Remove from the land all waste and debris arising from compliance with the above steps.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (d) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement noticed upheld.

Appeal B: APP/T5150/C/19/3231555 **22 Mora Road, London NW2 6TG**

- 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 Zein Moghnieh against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 10 May 2019.
- The breach of planning control as alleged in the notice is Without planning permission, the material change of use of the existing outbuilding at the rear of the premises to a single dwellinghouse.
- The requirements of the notice are STEP 1 Cease the use of the outbuilding at the rear of the premises as a self-contained flat; STEP 2 Remove from the land all fixtures and fittings associated with the unauthorised change of use of the outbuilding as a self-contained flat, including the kitchen and bathroom; STEP 3 Remove from the land all waste and debris arising from compliance with the above steps.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (d) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement noticed upheld.

Appeal A

Preliminary Matter

1. The ground (c) appeal is that the matters alleged do not constitute a breach of planning control. The basis for the ground (c) appeal is that the change of use from a single dwelling (Use Class C3) to a House in Multiple Occupation (HMO) for up to six residents (Use Class C4) is normally permitted development under the terms of Schedule 2 Part 3 Class L of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
2. Thus the appellant implies by this that the appeal property is in use as an HMO, rather than as four self-contained flats. The appeal is therefore that the alleged breach of planning control has not occurred as a matter of fact. This is an appeal under ground (b) rather than ground (c), and accordingly I have proceeded on this basis.

The appeal on ground (b)

3. The appeal is that there has not been a breach of planning control. The relevant date is that of the issue of the notice. The burden of proof rests with the appellant, with the standard of proof being the balance of probability. In order to succeed the appellant would need to demonstrate that on the balance of probability the property is not in use as self-contained flats.
4. Section 254 of the Housing Act 2004 sets out the criteria to be met if a building or a part of a building is an HMO. The criteria include that it must consist of one or more units of living accommodation not consisting of a self-contained flat or flats and 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 basic amenities. "Basic amenities" is defined as a toilet, personal washing facilities or cooking facilities.
5. The Council previously served a Planning Contravention Notice (PCN) in relation to the alleged breach. In response the appellant's agent confirmed that each flat in the building contained its own kitchen and bathroom facilities, none of which were shared by more than one household¹. It was evident that this arrangement was still in place at the time of my visit, with each of the four upper floor flats being self-contained, including en-suite toilet, personal washing facilities and cooking facilities and not dependent on communal facilities. Each of the flats had lockable entrance doors.
6. Each of the units provide the facilities for day-to-day living including living and sleeping accommodation. Accordingly for the aforementioned reasons, on the balance of probability, the property is not an HMO but does consist of self-contained residential units. The ground (b) appeal therefore fails.

The appeal on ground (d)

7. The ground of appeal is that at the date when the notice was issued, no enforcement action could be taken in relation to the alleged change of use. In order to succeed on this ground it would be necessary for the appellant to show, on the balance of probability, that the use of the property as four self-contained flats had commenced at least 4 years before the notice was issued,

¹ Gattas Denfield letter dated 9 January 2019

that is by 10 May 2015, and had continued in such use over a four-year period. It must be shown that there has not been any significant interruption in the use, in order to demonstrate the necessary continuity.

8. In support of this element of the appeal, the appellant has provided a witness statement. The statement refers to the property being converted into separate flats in March 2007 and copies of receipts for building materials and items of furniture are provided which are said to relate to that project. Three tenancy agreements are also provided dated March 2007 and December 2009. A letter from EDF Energy Networks dated May 2009 has also been produced. The letter appears to refer to the fitting of new electricity meters that the appellant claims relate to the individual flats. He claims to have received the letter when the upper part of the property was split into "multiple separate dwelling houses".
9. With regard to the purchase of various building materials and furniture there is a lack of evidence in the receipts provided to link the various products to the alleged unauthorised development.
10. In terms of the tenancy agreements, the specific flat or flats to which they relate is uncertain and therefore ambiguous. Furthermore only a small number of such documents are provided and as such these records fall significantly short of demonstrating continuous use for each of the flats over the necessary immunity period.
11. The appellant's agent's letter of 9 January 2019, responding to the Council's PCN, stated that the loft extension, utilised by one of the flats the subject of this notice was completed by March 2007. However this would appear to be contradicted by undisputed aerial and site visit photographic evidence included with the Council's statement, indicating that the loft extension occurred sometime between June 2010 and May 2012. This is supported by the fact that the loft conversion was apparently only granted planning permission in January 2010; also that the plans associated with this application showed the existing layout as a two-bedroom flat, with the proposed plans indicating the addition of a loft floor bedroom for the same flat.
12. Furthermore, the date of the EDF Energy letter referred to above, if it was sent when the upper part of the property was split into multiple units, would contradict the March 2007 conversion date referred to in the same witness statement. In addition it is unexplained why the notes on the letter appear to show five meter reference numbers, therefore more than the number of flats created.
13. The witness statement claims that the flats have been used as separate dwellings since March 2007. However this is not a sworn statement, no sanctions will apply to it and in light of the above considerations I afford it only very limited weight.
14. The appellant has not therefore provided sufficient and unambiguous evidence to substantiate the claim that, on the balance of probability, the alleged use commenced on or before May 2015, or that such use continued over the entire immunity period, without any material break. The ground (d) appeal therefore fails.

15. It is the Council's case that there has been deliberate concealment, such that the normal immunity period test should not apply, in any event. In light of my findings above, however, there is no need for me to conclude on this matter.

The appeal on ground (f)

16. The ground of appeal is that the steps required by the notice to be taken are excessive. The objectives of the notice are to discontinue the use of the land and to restore the land to its condition before the breach took place. It follows that the purpose of the notice is to remedy the breach.
17. The appellant has raised the concern that the requirement to remove all associated fixtures and fittings with the exception of one kitchen and one bathroom would be excessive.
18. However, it seems to me that the existence of various fixtures and fittings including kitchens and bathrooms associated with each of the flats are part and parcel of facilitating the independent use of the units. If these fixtures and fittings were allowed to remain in place, they would make it unreasonably difficult to prevent the resumption of the unauthorised residential use. I have had regard to the case law cited in the 'Murfitt'², 'Somak'³ and 'Kestrel Hydro'⁴ cases, as referred to by the Council, which I consider supports the aforementioned findings. I therefore conclude that the requirements are warranted and proportionate measures in this case.
19. Given that the purpose of the notice is to remedy the breach of planning control, this can only be achieved by ceasing the use of the first floor and loft level of the main building as more than a single self-contained flat; by removing fixtures and fittings as required in the notice and by removing associated waste and debris. To require that does not, therefore, exceed what is necessary and the appeal on this ground must fail. I do not therefore concur with the view that Steps 2 and 3 should be deleted.
20. The appellant claims that the requirement to remove fixtures and fittings will interfere with the occupiers' rights under Article 5 and Article 8 of the Human Rights Act 1998. Article 5 refers to the right to liberty and security. No information is provided to persuade me that the enforcement action in this case would threaten this right. Article 8 states that everyone has a right to respect for private and family life, their home and correspondence. This is a qualified right, whereby interference may be justified in the public interest, but the concept of proportionality is crucial. I conclude for the aforementioned reasons that the requirements are reasonable and would not result in a disproportionate burden.

Conclusion

21. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

² Murfitt v SSE & East Cambridgeshire DC [1980] JPL 598

³ Somak Travel Ltd v SSE & LB Brent 1987 JPL 630

⁴ Kestrel Hydro v SSCLG & Spelthorne Borough Council [2016] EWCA Civ 784

Appeal B

The appeal on ground (d)

22. As with Appeal A it would be necessary for the appellant to demonstrate that the use of the outbuilding as a dwelling had commenced at least 4 years before the notice was issued, that is by 10 May 2015, and had continued in such use over a four-year period.
23. In support of his case the appellant has provided a witness statement. Within this statement the appellant says that the outbuilding has been used as a dwelling since at least 24 June 2014. A tenancy agreement, with the same date and extending for a three-year term, has also been provided in relation to the garden flat at the property. Correspondence, dated August, September and November 2014 from the Valuation Office in connection with the unit has also been submitted. This confirms the effective date for the garden flat in the Council tax valuation list to be 24 June 2014. Housing benefit records between June 2014 and January 2015 from the Council in relation to this property have also been submitted.
24. The Council has referred in its statement to the planning history of the site, including a previous appeal decision⁵ and various correspondence relating to the use of the outbuilding. It is apparent from these documents that the appellant's position was that the purpose of the outbuilding was for storage purposes, incidental to the main house; that it was erected as a storage facility and was being used for storage in June 2014 and in October 2014 and is not a dwellinghouse⁶; also that in December 2014 it was referred to as a building incidental to the main house and therefore permitted development⁷. Furthermore, in the appellant's agent's letter of 9 January 2019, responding to the Council's PCN, the current use is confirmed as a single dwellinghouse, which commenced in June 2016⁸.
25. The Council's evidence therefore reveals the appellant's evidence to be contradictory. As such I am unable to conclude, on the balance of probability, that it is sufficiently unambiguous to establish that the residential use of the outbuilding commenced on or before 10 May 2015.
26. Furthermore, notwithstanding the above, even if it was accepted that the independent residential use of the outbuilding commenced in June 2014, and notwithstanding the apparent continuity of housing benefit payments (which do not necessarily mean that the building was continuously occupied), the evidence provided fails to corroborate the claim that the use continued over the entire immunity period, without any material break. The appeal on ground (d) therefore fails.
27. The Council again refers to the possibility of deliberate concealment having occurred, such that the normal immunity period test should not apply. In light of my findings above, however, there is no need for me to conclude on this matter.

⁵ Appeal ref APP/T5150/C/14/3001936

⁶ See Council statement appendix 14

⁷ See Council statement appendix 15

⁸ See Council statement appendix 11

The appeal on ground (f)

28. With regard to the alleged unauthorised use of the outbuilding, the objectives of the notice are to discontinue the use of the land and to restore the land to its condition before the breach took place. It follows that the purpose of the notice is to remedy the breach. As with the aforementioned appeal, it is the appellant's case that the requirement to remove all associated fixtures and fittings would be excessive.
29. The notice is to remedy the breach of planning control. For the same reasons as given above, this can only be achieved by ceasing the use of the outbuilding as a self-contained flat and removing fixtures and fittings that facilitate this use, as required in the notice. To require that does not, therefore, exceed what is necessary and the appeal on this ground must fail. I do not therefore concur with the view that Steps 2 and 3 should be deleted. In arriving at this conclusion I have had regard to Articles 5 and 8 of the Human Rights Act as set out above.

Conclusion

30. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Formal Decisions

Appeal A

31. The appeal is dismissed and the enforcement notice is upheld.

Appeal B

32. The appeal is dismissed and the enforcement notice is upheld.

Roy Merrett

INSPECTOR