



Appeal Decision

Hearing Held on 15 June 2021

Site visit made on 16 June 2021

by N Thomas MA MRTPI

An Inspector appointed by the Secretary of State

Decision date: 14 September 2021

Appeal Ref: APP/U5360/C/20/3266048 138 Albion Road, Hackney, London N16 9PA

- 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 Mrs Hadassah Iwanier of Clissold Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The enforcement notice, numbered 2020/0028/ENF, was issued on 26 November 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the property to four self-contained flats and without planning permission, operational development consisting of the excavation of a front basement lightwell, erection of associated railings and erection of a mansard roof extension.
 - The requirements of the notice are:
 1. Cease the use of the first, second and third floor areas as more than one self-contained flat.
 2. Cease the residential use of the basement and ground floor areas.
 3. Remove all internal partitions, doors, bathroom & kitchen fixtures and fittings that facilitate the use of the first, second and third floor areas of the property as more than one self-contained flat.
 4. Remove all internal partitions, doors, bathroom & kitchen fixtures and fittings that facilitate the residential use of the basement and ground floor areas of the property.
 5. Backfill the front lightwell.
 6. Remove all fencing surrounding, and staircase within; the front lightwell'.
 7. 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 six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. The appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

2. Drawings¹ have been provided as part of the appellant's evidence which are stated to be a survey of the layout of the building as at 20.11.2020. These

¹ Unnumbered but labelled as current lower ground, current ground floor, current first floor, current second floor, current loft.

indicate that the ground floor contains a one bedroom flat. However, I saw on my site visit that the ground floor flat has two bedrooms, as noted by the enforcement officer visiting the property on 3 October 2019. There are also variations from the survey drawings, notably in relation to the size of the lightwell and the access arrangements to the lower ground floor flat. I have dealt with the appeal on the basis of my observations on site.

3. The Council has confirmed that it has sought to underenforce through not requiring the removal of the mansard roof extension in the requirements of the notice.
4. A revised version of the National Planning Policy Framework (NPPF) was published on 20 July 2021. I have invited the main parties to comment on the implications for the case and I have taken account of their response in my determination of the appeal.
5. Since the enforcement notice was issued, the London Plan 2021 (LP) has been adopted and the Council has provided the relevant policies with the appeal questionnaire.
6. The parties agreed at the hearing in relation to the ground (a) appeal that the lack of waste and cycling facilities and nest boxes are matters that could be secured through a planning condition if I were to allow the appeal. I have not therefore dealt with them as main issues.
7. Although the appellant indicated prior to the hearing that they would be seeking an award of costs against the Council, at the event the appellant confirmed that a costs application was not being made.

Background

8. The site is a terraced property that was previously used as a shop on the ground floor, with ancillary storage in the basement. Prior to the development, the first and second floors comprised a four bedroom dwelling and the building had a flat roof.
9. Prior approval² was granted on 30 August 2017 to change the use of the ground floor and basement from a shop to a use falling within Class C3, as two flats. The approved floor plans indicate that each flat would have a bedroom on the ground floor with separate internal staircases to a kitchen/dining/living room on the lower ground floor.
10. The decision notice includes condition 1 which requires that the development is undertaken in accordance with the conditions set out in Part 3 Class M of Schedule 2 of the GPDO 2015³. Condition M.2(3) states that the development must be completed within a period of 3 years starting with the prior approval date. Condition M.2(1) states that the provisions of paragraph W (prior approval) apply. Paragraph W(12)(a) states that where prior approval is required, the development must be carried out in accordance with the details approved by the local planning authority.

² Ref 2017/2952

³ Town and Country Planning (General Permitted Development) (England) Order 2015

11. Planning permission⁴ was granted on 8 February 2018 to convert the upper floors to a studio flat and a three bedroom flat, with a roof extension, alterations to the shop front and the creation of a lightwell at basement level. Condition 2 requires that the development shall only be carried out and completed strictly in accordance with the submitted plans and any subsequent approval of details.
12. However, the development that has been carried out differs from the prior approval and the planning permission. The building has been converted into four flats, one on each floor with the top floor flat having a bedroom within the loft space. In addition, the lower ground floor flat is accessed via an external lightwell that is in a different arrangement to the permitted drawings and includes an external staircase. The approved first floor studio flat has been laid out as a two bedroom flat. There are also other variations in particular with regard to the location of internal walls and the mansard roof does not reflect the approved drawings and is finished in slates rather than zinc cladding.

The ground (c) appeal

13. The ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control. In appeals such as this on legal grounds, the burden of proof lies with the appellant and the standard of proof is the balance of probabilities.
14. The appellant argues that the planning permission and prior approval were fully implemented before the further internal works were carried out to create the development that led to the notice being served. The further internal alterations did not result in any external changes or alter the number of flats and therefore did not require planning permission as they are not development and fall within s55(2) of the 1990 Act.
15. The appellant has provided a Community Infrastructure Levy (CIL) liability notice issued by Hackney Council. However, the Council explained that the CIL team would not normally visit a property to check that the works had commenced or been completed. Furthermore, the reason for issuing the notice is stated to be that the development is deemed to have commenced and a surcharge has been imposed, due to the failure to submit a commencement notice. It does not therefore indicate that the permission was commenced or fully implemented, only that the CIL payment was required as planning permission had been granted.
16. The appellant states that by March 2019 the new mansard roof had been completed, the lightwell had been formed, and alterations to the shopfront had been completed but no windows had been fitted to the ground floor front elevation in the former shopfront. These works are said to be shown on the extract from Google Street View (GSV). However, in that image the forecourt of the building is screened by hoardings so it is not clear that the lightwell was completed at this time, although the mansard roof and new openings at ground floor level are visible.
17. A statutory declaration (SD) is provided by Ms Maya Diamant, an Interior Designer advising on the development. This provides an explanation as to why the internal arrangements were altered from the approved drawings. It is

⁴ Ref 2017/4876

stated that the units on the lower ground and ground floors were to be completed in accordance with the approved plans, and that this is what happened, and that she arranged for the builders to quote for the new layout. The SD refers to email correspondence between Mr Iwanier representing Clissold Ltd, the architect Ovidiu Radu and Andrew Solomon's reply dated 24 January 2019. There is a further email of 10 December 2020 from Andrew Solomon confirming that all the staircases as per the original contract were installed and paid for. She states that the March 2019 GSV image does not disprove that the internal works were completed at that stage, and the only reason the doors and windows were not installed in the front elevation at ground floor was to allow easy access for kitchen units and other items to be brought into the building. The hoardings were retained for security.

18. Andrew Solomon has also provided a SD. He is a business development manager with responsibility for negotiating the contract with Clissold Ltd to carry out the development. He states that the contract was to complete the works under the two permissions, and exhibit AS02 to the SD indicates the plans. However, the drawings differ from the approved layouts, in particular the first floor flat is shown as being a one bedroom flat rather than a studio, and the internal layout for the lower ground and ground floor flats is different. The contract was dated 22 October 2018, and towards the end of January 2019 he was advised that on completion of the ground floor and basement some changes would be required. He advised them that this part of the contract would be completed in late February 2019, but this is not corroborated by the GSV image of March 2019 which indicates that the works were not complete at that time. He received the revised drawings on 14 February 2019 and quoted for the additional works on 5 March 2019, based on an amended plan exhibit AS03. The alterations were carried out and completed in May/June 2019, with the external staircase being installed to the basement in September/October 2019.
19. I have no reason to doubt that the internal staircases were installed and paid for, but these are only one element of the schemes, and only relate to the prior approval. I am also satisfied that a material operation was begun in relation to the planning permission through the works to commence the mansard roof, even though the work was not in accordance with the approval. There is no clear evidence that the upper floors were ever laid out in accordance with the approved drawings. The claim that the developments were completed prior to further alterations being undertaken is contradicted by the GSV image. Furthermore, the evidence in relation to the drawings that were used in the initial contract for the works is contradictory. The evidence is not precise and unambiguous and does not demonstrate, on the balance of probabilities, that the permissions had been fully implemented prior to the layouts being altered.
20. I therefore conclude, on the balance of probabilities, that although the works were commenced, they were not completed in accordance with the approved drawings. I cannot therefore conclude that the further alterations that have been carried out do not constitute a breach of planning control. The appeal on ground (c) therefore fails.

The ground (a) appeal and the deemed application

21. Having regard to the reasons for issuing the notice, the main issues are:

- Whether the development provides satisfactory living conditions for occupiers with regard to internal space;
- Whether the development makes adequate provision for affordable housing and climate change mitigation measures; and
- The effect of the loss of the retail unit.

Living conditions

22. The development has resulted in the creation of 3 no. 2 bedroom flats and 1 no. 3 bedroom flat. Hackney Local Plan 2020 (HLP) Policy LP17 requires that internal space standards in the London Plan are met and LP Policy D6 sets out the minimum space standards. The parties agreed that the first floor flat, as a two bedroom three person flat of approximately 47 square metres, falls below the 61 square metres minimum internal floor area. I saw on my site visit that the ground floor flat has two double bedrooms (4 person) and at approximately 55 square metres is below the 70 square metres standard.
23. Although the bedrooms are relatively generous in size, I observed that both flats have only a small kitchen/living/dining area, which results in a cramped living area for the occupiers with insufficient space for relaxation, socialising and dining. As a result, the development fails to provide satisfactory living conditions for occupiers with regard to internal space, and is in conflict with LP Policy D6 and HLP Policy LP17 insofar as they seek to ensure that development provides adequately sized rooms with comfortable and functional layouts.

Affordable housing and climate change mitigation measures

24. HLP Policy H13 requires that in new development of between 1 and 9 units, affordable housing is either provided on-site or through a payment in lieu for up to the equivalent of 50% of the housing delivered, and states that the provision will be subject to viability and site context. No provision for affordable housing has been made on-site and no justification has been provided in terms of viability or site context. I note that a House in Multiple Occupation (HMO) licence has been issued for the second floor flat, but that does not indicate that the dwelling falls within the definition of affordable housing. Affordable housing is therefore required for the equivalent of 50% of the development, either on site or as a payment for off-site provision.
25. The appellant refers to paragraph 64 of the NPPF which states that the provision of affordable housing should not be sought for residential developments that are not major developments. However, I note that the justification to the policy refers to the reliance on small sites to deliver housing in the Borough and that the requirement is subject to viability considerations. While the NPPF is a material consideration, I do not find that it indicates that HLP Policy H13 is out of date in this case.
26. HLP Policy LP55 requires that development involving the re-use of existing buildings should achieve the maximum feasible reductions in carbon emissions. The S106 Planning Contributions Supplementary Planning Document July 2020 (S106 SPD) sets out that the reduction should be evidenced by an energy statement. Where no energy statement is submitted, minor residential development that cannot achieve zero carbon target has the option of making a predefined payment to the Carbon Offset Fund. In this case, no energy

statement has been submitted and no contribution to the Carbon Offset Fund is secured through a planning obligation.

27. The appellant states that provision is not required for the upper floor units as they already have planning permission. Although the planning permission has been begun, if implemented it would not overcome the need for the rest of the development to make the necessary provision. It does not therefore overcome the conflict with the relevant policies.
28. The development therefore fails to make adequate provision for affordable housing and climate change mitigation measures. It is therefore in conflict with HLP Policies H13 and LP55, as well as the guidance in the S106 SPD, insofar as they seek to ensure the provision of affordable housing and the mitigation of the climate change impacts of development.

Loss of retail unit

29. The appeal site is a corner plot within a terrace of similar properties. To one side the terrace is characterised by ground floor retail uses centred around the junction of Albion Road with Clissold Road. To the other side of the appeal site the terrace continues but is predominantly residential. The site is on a bend in the road so that it appears as part of the residential terrace rather than the adjacent parade of shops and other commercial uses.
30. HLP Policy LP36 seeks to safeguard individual shops outside of designated town and local centres. Development involving the loss of A1 retail will be permitted if certain criteria are met. There must be alternative shopping facilities within a reasonable walking distance, the retail character of the parade should not be undermined, the proposed use should be a Class A or community use (now Class E), and a shop front and active frontage should be retained. If one of the criteria is not met, then marketing evidence of at least one year must be provided demonstrating that there is no realistic prospect of the unit being used for A1 retail.
31. The development has resulted in the loss of the shop front, it is not in a Class A or a community use, and the property has not been marketed. However, the prior approval development would also have resulted in the loss of the Class A retail use, and Class M paragraph M.2(1)(d) required the local planning authority to consider the impact of the change of use on adequate provision of services of the sort that may be provided by a building falling within Class A1, where there is a reasonable prospect of the building being used to provide such services.
32. The effect on the supply of retail units has therefore already been considered by the Council, and presumably found to be acceptable. While the prior approval is not the development that has been carried out, the Council has not argued that there has been a change in circumstance since the prior approval was granted which indicates that a different decision should be reached. Moreover, the site is in close proximity to a range of retail uses, and due to its location, the retail character of the parade is not undermined. The planning permission included the replacement of the shop window to the front with a solid wall with two smaller windows, so that the loss of the shop front and active frontage had already been considered acceptable by the Council. There is therefore no need to provide marketing evidence as argued by the Council.

33. For the reasons set out above I conclude that the loss of the retail unit is not harmful and the development is not in conflict with Policy LP36 of the HLP.

Conclusion in relation to the ground (a) appeal

34. The appellant has suggested that the development could be required to be car free, and submits that it is not harmful to the character and appearance of the area, while cycle parking and refuse storage could be required by condition. However, these are factors that have limited weight in favour of the development. I note that permission has been granted for a similar development at 136 Albion Road, but this predates the current Local Plan policies.
35. Although I have found in favour of the appellant with regard to the loss of the retail use, this does not outweigh the harm caused by the unsatisfactory living conditions, the lack of affordable housing and climate change mitigation. The ground (a) appeal should not succeed.

The appeal on ground (f)

36. The ground of appeal is that the steps required by the notice to be taken, or the activities required to cease, exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any injury to amenity which has been caused by the breach. The appellant argues that the requirements should be amended to reflect planning permission reference 2017/4876 which can still be implemented. Requirement 1 should be amended to require compliance with the permission, and requirements 3, 5 and 6 should be deleted.
37. However, I cannot grant planning permission through ground (f) for a different development by deleting some of the requirements. Case law has established that where there is a relevant planning permission that is capable of implementation in accordance with its conditions, it can be appropriate for an enforcement notice to require compliance with the terms of the permission, including the conditions, in order to remedy the breach of planning control. I could therefore vary the notice to include an alternative requirement to comply with the conditions and limitations of the planning permission. I have already established in relation to the ground (c) appeal that the development permitted by 2017/4876 was begun and I have seen no evidence to indicate that it is not capable of being implemented.
38. However, I am mindful that the notice underenforces in relation to the mansard roof extension. Compliance with the conditions and limitations of the planning permission could not be achieved without amending the mansard roof to comply with the approved drawings, which would therefore make the requirements of the notice more onerous for the appellant. This would cause injustice to the appellant and therefore I cannot use my power under s176(1)(a) to vary the terms of the notice. The appeal on ground (f) therefore fails.

Conclusion

39. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

N Thomas

INSPECTOR

APPEARANCES

FOR THE APPELLANT

Alvin Ormonde	Agent
Mr W Iwanier	Solicitor

FOR THE COUNCIL

Nick Kirk BA Regional and Town Planning	Senior Planning Enforcement Officer
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INTERESTED PERSONS

Maurizio Martorana

DOCUMENTS SUBMITTED AT THE HEARING

Document 1 – List of suggested conditions from the Council