



Appeal Decision

Site Visit made on 14 September 2021

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 October 2021

Appeal Ref: APP/C5690/C/19/3234525

Land at Highfield House, 28 Sydenham Hill, London SE26 6TP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Ben Jackson of Oaksure Property Protection against an enforcement notice issued by London Borough of Lewisham.
 - The notice was issued on 25 June 2019.
 - The breach of planning control as alleged in the notice is without the benefit of planning permission the material change of use of the property to use as two large houses of multiple occupation and a self-contained flat (Sui Generis).
 - The requirements of the notice are:
 - (1) Cease the use of the property as two large houses of multiple occupation (sui generis) and a two-bedroom self-contained dwelling.
 - (2) Remove all kitchen fixtures, fittings and drainage connections that facilitate the use of the second floor of Building B as a self-contained flat.
 - (3) Remove all bathroom fixtures, fittings and drainage connections which facilitate the use of the second floor of Building B as a self-contained flat.
 - (4) Remove all internal partition walls which subdivide Building B internally to a self-contained flat.
 - (5) Remove all waste, materials, equipment and debris from the property resulting from compliance with the above requirements of this notice.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected and varied by:
 - Adding the words 'and Hill House, 28A Sydenham Hill' to the address before 'London'.
 - Deletion of the words 'two bedroom' and 'dwelling' in requirement (1) and substitution of the word 'flat'.
 - Deletion of requirements (2), (3) and (4).
 - Renumbering requirement (5) as requirement (2), deleting the word 'requirements' and substituting with the word 'requirement'.
2. Subject to the corrections and variation, the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The appellant has referred to the effect of upholding the enforcement notice on the occupiers of the building, who will become homeless, and the implications

for the future management of the building. However, appeals on legal grounds (b) and (c), and ground (f), do not allow for the consideration of the effect of the decision, including on individuals and their rights. I also appreciate that the appellant is frustrated with the Council and its handling of the case and their application for an HMO licence, but this does not have any bearing on my decision.

Matters concerning the notice

4. The enforcement notice relates to two buildings within a single plot. The building at the front of the site is Highfield House, 28 Sydenham Hill, while the newer building to the rear is Hill House, 28A Sydenham Hill. Although the notice refers only to land at Highfield House, 28 Sydenham Hill, the accompanying plan covers the whole site, and it is clear from the allegation and the requirements of the notice that it is concerned with both buildings. The notice was served on the occupiers of both buildings, and site address given on the appeal form is 28 & 28A Sydenham Hill. I can therefore correct the notice so that it refers to both buildings without causing injustice to the parties.
5. The notice refers to a 'self-contained flat' in the alleged breach of planning control but refers to a 'two bedroom self-contained dwelling' in requirement (1). It would be more consistent to refer to it as a 'flat' in requirement (1) and I can correct the notice accordingly.
6. Requirements (2), (3) and (4) of the notice refer to 'Building B', but the building is not identified in the enforcement notice. However, the appellant appears to have understood the substance of the allegation, and has not been prejudiced by the wording used in the notice. There is no need to correct the requirements in view of my decision to vary the notice in relation to the ground (f) appeal.

Background

7. Both buildings on the site have been used as a care home falling within Class C2. According to the Council, Highfield House, a locally listed Victorian villa at the front of the site, was closed as a care home in 2007, while the more modern building behind it at Hill House was closed in 2014. Following closure, the buildings were vacant and subject to trespass and vandalism. The appellant was then brought in to provide security and maintenance, through the use of live-in guardians. The Council reports that it first investigated the use in February 2018, when the managing agent advised that the buildings had been occupied by live-in guardians since April 2014.

The appeal on grounds (b)

8. To succeed on this ground the appellant would have to demonstrate, on the balance of probabilities, that the matters that led to the service of the notice have not occurred, as a matter of fact.
9. A House in Multiple Occupation (HMO) is defined in the Housing Act 2004 section 254, and is the use of a building or part of a building by persons who do not form a single household and share one or more basic amenities. The HMO is 'large' if it consists of more than six residents. A large HMO does not fall within a use class so is 'sui generis'. It has been established by case law that the distinctive characteristic of a dwellinghouse is its ability to afford to

those who use it the facilities required for day-to-day private domestic existence and this includes self-contained flats.

10. The appellant's case is that no new works have been carried out to the building to change the use or that could be classed as development, and there has been no loss of use class C2 floorspace. The layout of the building is unchanged and it has been actively marketed for use class C2. The occupiers do not have security of tenure.
11. I saw on my site visit that Hill House consists of individual lockable rooms accessed from communal corridors from a central staircase, with several bathrooms in each corridor. On the ground floor is a communal kitchen, dining room and sitting room, with a further communal kitchen and laundry on the lower ground floor. I was not able to gain access to the second floor flat in Hill House, or the interior of Highfield House. Hill House was being lived in by tenants who do not form a single household and share the communal facilities. The appellant has not disputed that a self-contained flat has been formed. It was not clear whether Highfield House was being lived in by the guardians at the time of my visit, but the appellant has not provided any evidence to contradict the Council's account in their enforcement report.
12. At the time of submitting the appeal there were 28 people benefitting from low cost temporary accommodation at No 28, and 10 people at No 28A. While I have no reason to disagree with the appellant's statement that there have been no internal changes to the layout of the buildings and that the use is temporary, that does not indicate that they have not been used as alleged by the Council. On the basis of the evidence before me, I am satisfied that it is more likely than not that the buildings were being occupied as two large HMOs and a self-contained flat. I conclude, on the balance of probability, that the matters stated in the notice have occurred, and the appeal on ground (b) appeal fails.

The ground (c) appeal

13. The ground of appeal is that the matters stated in the notice do not constitute a breach of planning control.
14. The concept of a material change of use is not defined in statute or statutory instrument and therefore it is a question of fact and degree in each case. For there to be a material change of use, there needs to be some significant difference in the character of the activities from the lawful use of the premises, which in this case is as a care home.
15. The appellant's case is that the intention was to maintain the use class as C2 as a care home. The occupation by live-in guardians was a temporary measure while planning permission was being sought, and has continued for longer than was originally anticipated. The guardians could vacate the property with 20 days' notice and the use of the property could revert to a care home. The use of the property by live-in guardians is ancillary to the use of the site as care home.
16. However, regardless of the intentions of the appellant, the current occupation by the live-in guardians has continued for a number of years and the site is no longer being used as a care home. Although the purpose of the use was to

provide security and maintenance, it cannot be said that the use is ancillary to the lawful use as a care home, as that use is not taking place.

17. The use as two HMOs and a self-contained flat has significantly different on-site and off-site effects to the use as a care home, not least through the level and nature of activities within the site, associated vehicle movements, the use of the grounds. The change of use also has implications for the area as the loss of the existing use has a significant planning consequence in terms of the availability of care home facilities. Even if no physical alterations to the site have been carried out that constitute operational development, the character of the use has changed in a way that is material.
18. I therefore conclude, on the balance of probability, that a material change of use has taken place. The material change of use is not a permitted change under the Town and Country (General Permitted Development) (England) Order 2015 as amended, and therefore planning permission is required.
19. The appellant refers to other buildings in the Borough which are being used by live-in guardians without planning permission. However, the appellant states that those buildings are classified as being in Use Class C3, C4 or Sui Generis use, and therefore they do not appear to be comparable to this site where the lawful use is as a care home.
20. On this basis, I am satisfied that the alleged breach has occurred and is a breach of planning control. The evidence submitted by the appellant falls short of discharging the burden of proof. The appeal on ground (c) therefore fails.

Appeal on Ground (f)

21. The ground of appeal is that the steps required by the notice to be taken, or the activities required by the notice 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. As the notice requires the use to cease, the purpose of the notice is to remedy the breach.
22. An enforcement notice that is directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, so the land is restored to its condition before the change of use took place. However, the appellant argues that the changes made to the property in relation to the self-contained flat were already in place during the previous use as a care home, and that therefore steps (2)-(5) are excessive. The Council has not provided any contrary evidence. Given that the property was in use as a care home, I conclude that, on the balance of probabilities, the kitchen and bathroom fixtures and fittings and drainage connections and internal partition walls were already in place prior to the change of use taking place. It is not excessive however to require that all waste, materials, equipment and debris from the property resulting from compliance with requirement (1).
23. I therefore agree that requirements (2) to (4) inclusive are exceed what is necessary to remedy the breach. To this extent the appeal on ground (f) succeeds and I shall vary the notice accordingly.

Conclusion

24. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and variations.

N Thomas

INSPECTOR