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: 19 October 2021

Appeal Ref: APP/U5360/C/20/3249944
6 - 14 Northwold Road, Hackney, London N16 7HR

- 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 Eliezer Schwarcz of Pinetop Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice, numbered 2019/0215/ENF, was issued on 24 February 2020.
- The breach of planning control as alleged in the notice is:
  Without planning permission, the material change of use of the ground floor level of the Property to 14 self-contained flats (use class C3) and external alterations (namely the insertion of new windows and doors); and, the material change of use of part of the third floor level of the Property to 6 self-contained flats.
- The requirements of the notice are:
  1. Cease the use of the ground floor of the property as self-contained flats;
  2. Cease the use of the third floor of the property as self-contained flats;
  3. Remove all windows and doors inserted to the external facings of the property associated with the unauthorised change of use and restore the property to its design and appearance before the unauthorised development was carried out;
  4. Remove all internal partitions, doors, bathroom & kitchen fixtures and fittings that facilitate the use of the property as self-contained flats; 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 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (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.
- This decision supersedes that issued on 20 October 2020. That decision on the appeal was remitted for re-determination by order of the High Court.

Decision

1. The appeal is dismissed, and the enforcement notice is upheld.

Preliminary matter and background information

2. The challenge to the previous Inspector's decision dated 20 October 2020 proceeded on Ground 1: procedural unfairness that the decision was issued in advance of and without taking account of the appellant's final comments on the appeal. The decision was remitted for redetermination, and I will therefore re-determine each of the original grounds of appeal.

3. The appeal site is the subject of an extensive planning history. Of most relevance are prior notification applications approved for the change of use of 10 Northwold Road to 6 studio residential units at the third floor (LPA ref:

2015/0714); the change of use of 8 Northwold Road to 8 studio flats and associated physical works comprising the addition of doors and windows at ground floor level to the front elevation (LPA ref: 2015/3189); and, the change of use of 12-14 Northwold Road to 6 studio units at ground floor level, including changes to fenestration (LPA ref: 2015/3203).

The notice

4. Regulation 4(c)[1] provides that the notice shall specify the 'precise boundaries of the land to which it relates, whether by reference to a plan or otherwise. In this case, the notice specifies the address of the land and a plan is attached. While each self-contained flat is a separate unit of occupation and, therefore, a separate planning unit, there is nothing to prevent the Land specified in the notice from including more than one planning unit.

5. Furthermore, where a building is in a mixed use, it is acceptable for the notice to identify the extent of the whole building but only apply to the unauthorised use(s). In this case, the Land is identified as '6-14 Northwold Road', which I saw to be in mixed residential and commercial use. The allegation and the requirements are clear that the notice only relates to the residential use and the associated external alterations at ground floor level. There is therefore no requirement for 3 separate notices to have been issued to correspond with the 3 separate prior notification approvals.

6. Having regard to *Miller Mead*[2], it is clear what Land the allegation and requirements relate to. The appellant has been able to lodge an appeal against the notice on various grounds and no injustice has arisen from the issue of a single notice. I do not find the notice a nullity or flawed.

Appeal on ground (b)

7. To succeed on this ground the appellant must show on the balance of probability that the matters alleged in the notice have not in fact occurred. The appellant's evidence confirms the development has occurred and their argument actually supports their ground (c) appeal. Notwithstanding whether the development may be lawful, it is evident that the change of use and operational development alleged has occurred.

8. For this reason, the appeal on ground (b) failed.

Appeal on ground (c)

9. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control. The onus of proof is on the appellant and the relevant test is the balance of probability.

10. The appellant claims that the development benefits from planning permission granted under Article 3(1) of the GPDO[3], having regard to Class M and Class O, Part 3, Schedule 2. Any planning permission granted by Article 3(1) is subject to any relevant exception, limitation or condition specified in Schedule 2. The appellant claims that the 3 prior approvals were implemented and any deviations from the approved plans are so trifling as to amount to a breach of limitation, not development undertaken without planning permission.

[1] Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002/2682
[2] *Miller Mead v MHLG [1963] 1 A11 ER 459*
[3] Town and Country Planning (General Permitted Development) (England) Order 2015 as amended

11. The 3 prior approvals were all subject to conditions requiring that the developments be carried out in accordance with their respective approved details. From what I saw and the appellant's submissions, the development has not been carried out in accordance with the approved details, notwithstanding the inaccuracies of the proposed plans that accompanied application 2015/3189 confirmed by the appellant.

12. In *Commercial Land*[4] it was found that it is insufficient to simply consider the material differences between what has been built and what was approved. Similarities and the degree of compliance with the approved plans are also relevant. In this case, the works undertaken on site to facilitate the change of use vary from the approved plans as follows:

    - 2015/0714 – The access corridor is in a different position, which has changed the floor areas and footprints of each of the 6 self-contained flats. The communal storage room has not been provided and that space has been incorporated into the 2 adjacent self-contained flats. Entrance doors, kitchens and bathroom facilities are in different locations. Windows in the eastern elevation have been retained.
    - 2015/3189 – Some entrance doors are in different positions and the shop windows have been boarded over. Some self-contained flats are now served only by high level windows. The positioning of internal dividing walls means at least 2 self-contained flats are in different locations and the positioning of kitchens and bathrooms has reduced the amount of living space within each self-contained flat. The communal storage area is located in the basement and only accessible from the entrance stairwell to No 10.
    - 2015/3203 – The shop front windows have been boarded up and the frontage self-contained flats only have high level windows. Bathroom and kitchen positions have been relocated, which reduces the living space within each self-contained flat.

13. The deviations from the approved plans may not have changed the number or distribution of the flats throughout the relevant areas of the building, however that is where the similarities end. Having regard to the variations set out above, in paragraph 12, significant alterations would be required to make the external design of the development and the internal layout conform to the previously approved schemes. Having regard to the changes to the internal layout and external design, the development differs substantially from the approved schemes. Even if I were to find that changes to the windows occurred after the material change of use had occurred, the other substantial differences would remain. For these reasons, the development is substantially different to that granted planning permission by the GPDO under the 3 prior approvals.

14. Planning permission has not been granted for the 14 self-contained flats at ground floor level or the 6 self-contained flats at third floor level. The development is therefore development without planning permission and the notice correctly refers to s171A(1)(a) of the 1990 Act.

15. The appellant has directed me to *Garland*[5], which confirms that where the failure is to comply with a condition imposed by the GPDO, the notice should be

[4] *Commercial Land Ltd v SSTLR & Kensington and Chelsea RBC [2002] EWHC (ADMIN); [2003] JPL 358*
[5] *Garland v MHLG [1968] 20 P&CR 93*

directed to a breach of condition. However, as I have found that the development is substantially different to that granted permission by the GPDO, this is not relevant.

16. The material change of use of the ground floor to 14 self-contained flats and external alterations; and the material change of use of part of the third floor level to 6 self-contained flats is development requiring planning permission and that permission has not been granted. A breach of planning control has occurred as a matter of fact.

17. For the reasons, the appeal on ground (c) failed.

Appeal on ground (f)

18. For the appeal to succeed on this ground the appellant needs to show that the steps required to comply with the requirements of the notice are excessive and lesser steps could be taken to overcome the breach of planning control or, as the case may be, the injury to amenity.

19. The purpose of the notice is to remedy the breach of planning control and s173(5)(a) confirms that the requirements can include the alteration or removal of any building or works that facilitate the development. Requiring the use to cease and the removal of all works that facilitate that use are necessary to remedy the breach. For this reason, I find the requirements are not excessive.

20. The appellant argues that the differences between the development and the prior approval schemes are 'trifling' and the development should be allowed to be retained. It was held in *Ioannou*[6] that the power to allow an appeal under ground (f) is not a power to grant planning permission. If permission is to be granted under s174 of the 1990 Act, it may only be granted under s177(1). As the appellant has not made a ground (a) appeal there is no deemed application for planning permission under s177(5) of the 1990 Act. As such planning permission does not fall to be considered for the development or any part of it. Also, as the prior approvals have lapsed, there is no viable fallback position.

21. For these reasons, the requirements of the notice are not excessive and there are no lesser steps that could be taken to remedy the breach of planning control. The appeal on ground (f) failed.

Appeal on ground (g)

22. This ground of appeal is that the period for compliance is unreasonably short. The time for compliance specified is 6 months. The appellant has not suggested an alterative compliance period. No evidence has been provided to support the appellant's claim that tenants are in the high-risk category or that the window supplier maintains their stance on delivery and installation.

23. While all Covid 19 restrictions have been lifted, appropriate steps still need to be taken to safeguard the vulnerable. There is however no evidence before me to show that adequate safeguarding could not be achieved within the 6 months compliance period. The Council also emphasises that they have the power to vary the period of compliance, under s173A(1)(b) of the 1990 Act and that they will act reasonably with regard to the effects of Covid 19.

[6] *Ioannou v SSCLG [2014] EWCA Civ 1432*

24. The 6 month period of compliance specified in the notice is reasonable, and the appeal on ground (g) failed.

Overall conclusion

25. For the reasons given above, the appeal shall not succeed, and the enforcement notice is upheld.

M Madge

INSPECTOR