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## Appeal Decision

Site visit made on 26 October 2021

**by Roy Curnow MA BSc(Hons) MRTPI**

**An Inspector appointed by the Secretary of State**

**Decision date: 01 December 2021**

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### **Appeal Ref: APP/D1780/C/20/3257370 60 Waterloo Road, Southampton SO15 3BE**

- 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 Joanne Charles of MYA Property Ltd against an enforcement notice issued by Southampton City Council ('the Notice').
  - The enforcement notice, numbered 19/00250/ENCOU, was issued on 17 July 2020.
  - The breach of planning control as alleged in the notice is Without planning permission, change of use of the Land from 12 self-contained flats to use as 13 self-contained flats, office and overnight emergency residential accommodation.
  - The requirements of the notice are: 1. Cease the use of Room 15 in the basement for residential accommodation; 2. Cease the use of Flat 13 on the ground floor as a self-contained flat; 3. Remove the kitchenettes and appliances from Flat 13 and Room 15; and 4. Restore the use of Flat 13 to use as a communal room in accordance with the lawful use of the land certified pursuant to application 13/01965/ELDC.
  - The period for compliance with the requirements is Nine months.
  - The appeal is proceeding on the grounds set out in section 174(2)(a) and (d) of the Town and Country Planning Act 1990 as amended.
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### **Decision**

1. It is directed that the enforcement notice is varied by the deletion of the words "Restore the use of Flat 13 to use as a communal room in accordance with the lawful use of the land certified pursuant to application 13/01965/ELDC" in section 5 of the enforcement notice, 'What you are required to do'.

Subject to the variation, 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.

### **The Notice**

2. Amongst the requirements, set out in section 5 of the Notice, that numbered 4 requires that the communal use of the room presently used as Flat 13 is restored. Under the terms of S173(4), Notice can only remedy the alleged breach of planning control or injury to amenity. To my mind, requirement 4 of the Notice goes beyond the remit allowed by S173(4). I wrote to the parties asking their views on this.
3. The Council stated that the loss of the communal room adversely affected the living conditions of the occupants of the flats and that this part of the Notice sought to remedy the injury to amenity, under S173(4)(4)(b). It states that the requirement is necessary to ensure that the room is restored to 'enable use

by the other occupiers of flats', and that case law<sup>1</sup> established the principle that a Notice can require the restoration of the land to its previous condition. Lastly, it sets out that the Appellant did not appeal under ground (f).

4. The Appellant's response did not address the point I raised, but repeated the assertion that the property has always been 13 flats.
5. I understand and agree with the points that the Council has made about the effects on the living conditions of occupants of the building as a whole that has resulted from the creation of Flat 13. However, there is a clear distinction between the Council's requirement to restore the use of the room, rather than restore the land to its previous condition, along the lines of the *Kestrel Hydro* judgement. The Notice cannot be used to force the former to happen. The Notice did not require the restoration of the land to its previous condition, and to add that as a requirement at this stage would cause injustice to the Appellant.
6. Although the Appellant does not make an appeal under Ground (f), I am required to ensure that the Notice accords with the statutory provisions of the Act. Restoring the use of the communal room goes beyond the terms of S173(4) and I will vary the Notice by removing its fourth requirement.

#### **Ground (d)**

7. An appeal made under this ground is that, at the date the Notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters alleged therein.
8. S171B of the 1990 Act sets out the time periods after which breaches of planning control gain immunity from enforcement action. The relevant time period here is that set out in S171B(2), four years. Given that the Notice was issued on 17 July 2020, the 'relevant date' is, therefore, on or before 17 July 2016.
9. The onus lies with the Appellant to demonstrate its case on the balance of probability. Evidence put forward need not be corroborated, but where this is not the case it should be precise and unambiguous<sup>2</sup>.
10. The evidence shows that the Council issued a certificate of lawfulness for the existing use of the property as 12 flats on 23 April 2014. The Council has submitted a copy of the layout plan for the property, on which that certificate was based, ('the certificate plan'). It is safe to say that, on the balance of probabilities, the layout shown on this plan was what was in the property at the time the certificate was issued.
11. Therefore, for the case to be made, it would need to be demonstrated on the balance of probability that: the development alleged in the Notice commenced between the date that the certificate was issued and the relevant date; that it was undertaken continuously for four years; and, if these were the case, that the use was not lost between the relevant date and the date that the notice was issued.
12. The alleged breach of planning control in the Notice related to parts of the Ground Floor and Basement of 60 Waterloo Road (No 60). At my site visit, it

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<sup>1</sup> *Kestrel Hydro v SSCLG & Spelthorne BC* [2015] 1654 (Admin), [2016] EWCA Civ 784

<sup>2</sup> See *Gabbittas v SSE & Newham LBC* [1985] JPL 630

was agreed that there was no need to visit the property's first floor, as this was laid out as per the certificate plan. I was told at the site visit that the flats on each floor of the property are now numbered differently; however, this does not affect my decision.

13. On the ground floor, what is marked as a 'communal room and access to garden' on the certificate plan was Flat 13 at the time of my visit. In addition, its form had changed, as it was accessed by a corridor not shown on the certificate plan. To form this flat, numbered 13, the room has been sub-divided to create an en-suite shower and wc.
14. At basement level, I saw: that two rooms were used for Flat 14; what had been a bedroom was being used as an office, which I was told was used by the charity running the building; a room being used as Flat 15; and a bathroom that served Flats 14 and 15.
15. The evidence shows that the Appellant company bought the property from a company trading as Loizou Properties on 24 April 2014, at which time the vendor confirmed that there were 13 self-contained studio flats in the property. In this respect, the Appellant has submitted an email from Mr Loizou, dated 11 August 2020, in which it is said, amongst other things, that when his business arrangement with a partner ended, there were 13 self-contained studio flats in the property.
16. The Appellant company has submitted an undated and unaddressed 'To whom it may concern...' letter written by its Mr Yeganegy. In this, he says that as he was interested in the property he visited it a few years before it was eventually purchased and can confirm that there were 13 self-contained flats in it.
17. The Council does not supply any contradictory evidence of the use of the site. It did not, it appears, visit the site between the processing of the certificate application and 1 August 2019, the latter visit was part of its enforcement investigation. Its case, on this ground, is based on its view that the Appellant has failed to adequately demonstrate that the use had occurred.
18. There is nothing in the letter from Mr Loizou to demonstrate how the 13 flats he refers to were set out and when this occurred; nor does he say when his business partnership ceased. Lastly, he does not say whether, how or when the flats were actually used.
19. Similarly, Mr Yeganegy's letter does not set out when his pre-purchase visit occurred, how the property was laid out and whether the flats were actually in use.
20. For the above reasons, I find that both these submissions, marked Documents 1 and 2 in the Appellant's statement, lack the necessary precision and are ambiguous.
21. Other documents submitted by the Appellant relate to correspondence with the Council, after it had started its enforcement investigations. As this is after the relevant date, this does not take the Ground (d) arguments forward.
22. I understand that the Appellant does not run the flats and therefore does not have any control over the manner in which the property is run. Therefore, it cannot necessarily provide tenancy agreements that might have assisted in proving the ground (d) case. However, there is no evidence to show that it

even asked the building's lessee, 'Two Saints' to provide these for the period that it has been operating from No 60. Two Saints did not provide any evidence in support of the Appellant's claim.

23. Using the principles set out in *Gabbitas*, even though little evidence has been put forward by the Council to contradict the claim that the property has been put to the alleged use for a period in excess of four years, I find that the Appellant's evidence is imprecise and ambiguous. As such, my finding on the ground (d) is that it has not been demonstrated on the balance of probability that the property has been used continuously for a period of four years as 13 self-contained flats, office and overnight emergency residential accommodation.

### **Ground (a)**

24. The main issues in this ground of appeal are the effects of the development on:

- The living conditions of the occupants of Flats 13 and 15 having particular regard to the size of the units, privacy and outlook;
- The living conditions of the occupants of all occupants of 60 Waterloo Road, having particular regard to the loss of a communal room, access to the garden space and washing facilities there; and
- The integrity of European Sites of Nature Importance (ESNI).

#### *Living Conditions - Occupants of Flats 13 and 15*

25. Flat 13 is very small; the evidence shows that it is well under the minimum size for single bed units in the Technical housing standards – nationally described space standard (March 2015) ('the Standards'). The flat was not in use when I visited. I saw that what might be termed its 'living area', that is to say excluding the bathroom, which had a very small kitchen facility that left very little room for a bed and any other furniture. The flat has a window that looks out onto the rear garden area. As this provides space for all residents of No 60 to relax in, and in which an outbuilding houses their washing facilities, it would be well-used. The result being that a number of people would pass close to the flat's window daily.
26. Given its size, when a bed and other necessary furniture were added the room would be very cramped. However, it is light and has a good outlook. Furthermore, despite the proximity of users of the garden, it would provide sufficient privacy for its occupants. In this regard, I saw that other flats on the ground floor had a similar relationship. However, its size is such that it provides a poor standard of accommodation for its occupants.
27. Flat 15, too, is below the minimum size for single bed units in the Standards. It was not in use when I visited, due to a water leak. It, too, has a small kitchen facility. It is served by two high level windows that, due to the room being mostly below ground level, are at ground level externally. Shared bathroom and toilet facilities are available across the corridor.
28. It is clear that the room is of insufficient size for a flat. Furthermore, its windows offer precious little in terms of outlook, due to their height in the wall and the fact that they are very close to a high boundary fence. They let very little light into the flat, which was dark and oppressive. As the windows are at

such a low level outside, people passing by cannot look in. Therefore, the flat offers a good level of privacy to its occupants.

29. The flats offer very poor living conditions for their occupants. Thus, their creation is contrary to the overall aim of Policy H7 of the City of Southampton Local Plan Review 2<sup>nd</sup> Revision, 2015 ('LP') which requires, amongst other things, the highest standards of quality and design for residential development. As the flats would unacceptably affect the health of their occupants, the development is contrary to the terms of LP Policy SDP 1.
30. Policy CS13 from the Local Development Framework Core Strategy Development Plan Document ('CS') sets out 12 fundamental principles relating to design. The eleventh of these is that development should "make higher densities work". The increase in density here would not work, for the reasons set out, above; thus, the development is also contrary to this policy. The development also runs contrary to the aims of the Residential Design Guide, 2006, to provide good design, including access to natural light and outlook in section 2.2.

#### *Living Conditions – All Residents of No 60*

31. The evidence shows that, at the time that the certificate was issued, what is now Flat 13 was used for communal purposes for the residents of No 60. At that time, it provided a communal laundry facility. The laundry facility has been relocated to an outbuilding in the rear garden, so that particular facility has not been lost to the occupants of No 60.
32. Notwithstanding this, the evidence before me shows that the flats at No 60 are not large. The loss of the inside communal space now used for Flat 13 would have an adverse effect on the living conditions of all occupants of No 60.
33. Therefore, although I agree with the Council in its position here, I have explained that the Notice cannot insist on the room being used for that purpose.
34. The loss of the communal facility does not, however, adversely affect the ability of the property's occupants from accessing the rear garden area. For most occupants, if not all, the easiest way to access the garden is to go down the stairs to the basement level and use the door there. This internal link would be more attractive than the alternative, more circuitous routes out the front door and either through what is now Flat 13 or around the front and side of the property.
35. Thus, the loss of the communal room has an adverse effect on the living conditions of the occupants of the flats at No 60. This, again, is contrary to the terms of LP Policy SDP1(i), the overall aim of LP Policy H7 and the terms of CS Policy CS 13 that I refer to, above.

#### *Integrity of ESNIs*

36. The Council states that the development would have an effect on the Solent and Southampton Water Special Protection Area (SPA) and the Solent Maritime Special Area of Conservation (SAC). Although I have not been given a map showing their locations, as the Appellant does not counter this I take it to be the case. These are wildlife habitats of international importance; their

importance, and the level of protection to be afforded to them, is set out in section 15 of the National Planning Policy Framework ('the Framework').

37. The Council has submitted a copy of CS Policy CS22 that, amongst other things, aims to protect habitats. The Notice refers to the 'Solent Disturbance Mitigation Project' (SDMP) which the Council's statement tells me is a scheme to mitigate the effects of developments on ESNIs. In the case of one-bedroom units, I am told that a financial contribution of £356 for each unit is required to mitigate the effects of their creation. I do not have a copy of the SDMP but, again, as this is not challenged by the Appellant, I take it to be the case.
38. The evidence shows that no financial contribution has been made, or agreed to be made, through a planning obligation or some similar method. From the limited evidence before me I can only find that the development would have an adverse effect on the integrity of European Sites of Nature Importance contrary to the terms of Policy CS22 and section 15 of the Framework.

### **Human Rights Act<sup>3</sup> (HRA) and Public Sector Equality Duty<sup>4</sup> (PSED)**

39. Although no case has been made in this respect, I have been told of the work with homeless and vulnerable people that is undertaken by the building's lessee, 'Two Saints'. No-one was occupying the flats at the time of my visit; however, it has been occupied and might well be again before compliance with the Notice. The consequence of the Notice is that if they are occupied, their occupants would have to cease living in the two flats that have been formed.
40. Article 8 of the HRA sets out the right to respect for an individual's home. Dismissing the appeal will interfere with this right for occupiers of Flats 13 and 15 and will engage the operation of Article 8. However, this interference is in accordance with the law and is necessary for the reasons given. Thus, the requirements of the Notice and the period for compliance, (which is not challenged), are proportionate. I am not aware of an alternative approach that would achieve the purpose of the Notice in a manner that interferes less with the rights of occupants of the flats, and I cannot see one.
41. I need also to pay due regard to the matter under S149 of The Equality Act 2010, taking into account its three aims. Here, the Council's action does not amount to discrimination, harassment or victimisation. It is not clear to what degree the occupants of the flats share a 'protected characteristic'; however, the Notice is not aimed at anyone on this basis. It is legitimately aimed at flats that provide poor living conditions to their occupants and cause harm to protected habitats. Lastly, it does not affect any individuals' participation in public life. For these reasons, the Notice accords with the HRA and the PSED in the Equality Act 2010.

### **Conclusion**

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

*Roy Curnow*

Inspector

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<sup>3</sup> The Human Rights Act 1998

<sup>4</sup> Contained in The Equality Act 2010