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## Appeal Decisions

Hearing Held on 7 September 2021

Site Visit made on 8 September 2021

**by AJ Steen BA(Hons) DipTP MRTPI**

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

**Decision date: 21 December 2021**

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**Appeal A Ref: APP/X5210/C/20/3263558**

**Appeal B Ref: APP/X5210/C/20/3263559**

**48 Mornington Terrace, London NW1 7RT**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. Appeal A is made by JL Center Holdings LLP and appeal B is made by Undercover Architecture Ltd against an enforcement notice issued by London Borough of Camden.
- The notice was issued on 12 October 2020.
- The breach of planning control as alleged in the notice is: Without planning permission: The material change of use of the basement of the property from part of a residential dwelling (Use class C3) to an office (Class E).
- The requirement of the notice is: To cease the unauthorised office use, and remove all fixtures, fittings and equipment that facilitate the unauthorised office use.
- The period for compliance with the requirement is: one month.
- The appeals are proceeding on the grounds set out in section 174(2)(a), (b), (f) and (g) 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.

**Summary Decisions:** The appeals are dismissed and the enforcement notice is upheld with a correction and variation in the terms set out below in the Formal Decision.

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### Preliminary Matters

1. 48 Mornington Terrace is a Grade II listed building. The hearing related to these appeals and an appeal against the issue of a Listed Building Enforcement Notice (LBEN)<sup>1</sup>. That notice was withdrawn during the course of the hearing. Applications for costs were made by JL Center Holdings LLP and Undercover Architecture Ltd against the Council of the London Borough of Camden following the hearing. Those applications are the subject of a separate Decision.
2. The works identified in the LBEN included the removal of an internal wall, lowering of the floor in the basement and a rear extension at basement level. The enforcement notice subject of this appeal relates solely to the change of use of the basement and does not relate to works to the building, other than insofar as they may be referred to in the requirement to remove fixtures, fittings and equipment that facilitate the unauthorised use.
3. A revised National Planning Policy Framework was published during the course of the appeal. The Council and appellant were given the opportunity to comment and I have taken its contents into account in coming to my decision.

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<sup>1</sup> Appeal reference APP/X5210/F/20/3263561

4. The London Plan was published during the course of the appeal and replaces the previous London Plan. The Council and the appellant had the opportunity to make comments in light of the new London Plan at the hearing. I have taken the new London Plan into account in coming to my decision.
5. A Unilateral Undertaking (UU) under Section 106 of the Town and Country Planning Act 1990 (the Act) was submitted during the course of the appeal. I will return to its provisions in my main and other issues.

### **The Appeals on Ground (b)**

6. An appeal on this ground is that the matters described in the notice have not occurred. The burden of proof for this ground is on the appellant, with the relevant test of the evidence being on the balance of probability. I note that Section 176 of the Act gives Inspectors wide ranging powers to correct or vary enforcement notices to get them "in order", provided that such alterations would not result in substantial injustice to any party.
7. The date for consideration of the use of the building is the date of issue of the enforcement notice; it is the use or last use of the building on that date on which I need to base my decision. That date was 12 October 2020 and I shall refer to this as the relevant date.
8. The description of the breach of planning control alleged in the enforcement notice states that the basement of 48 Mornington Terrace had been part of a residential dwelling comprising the whole of this building. However, at the time the enforcement notice was issued, it alleges that the basement was occupied as an office separate from the dwelling above in terms of its use and as a planning unit. The main issue, therefore, is whether the office was occupied separately from the dwelling on the relevant date.
9. I understand that the use of the basement has evolved in the period since 2013. Prior to that time, it was a flat with a private entrance to the front as well as stairs providing access to the remainder of the building. The remainder of the building was, and remains, a dwellinghouse. From that date the basement was used by the owner as an office for their business, Undercover Architecture Ltd. Ownership of the property was subsequently transferred to JL Center Holdings LLP set up by a business partner of the owner, but Undercover Architecture Ltd carried on using the basement as an office. I understand that Undercover Architecture Ltd manages the building including the residential tenancy. It is possible that the use of the basement has changed during that period and that could comprise a material change of use in planning terms.
10. The case of *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207 (Burdle) confirms that an Inspector may correct or vary an enforcement notice to ensure it is directed to the correct planning unit. In that case, it was held that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes; the concept of physical and functional separation is key.
11. At the hearing I suggested that, adapting the distinctions used in Burdle to the circumstances of this case, the use of the basement must comprise either:
  - a) residential use with ancillary/incidental office within a single planning unit;
  - b) mixed residential and office use within a single planning unit;

- c) two separate uses in separate planning units for residential and office.
12. By the relevant date, I understand that the appellant employed six people within the office. These employees did not live in the property. They commuted into the office for work. That is a significant number of people working, but not living, at the property. As a result, by the relevant date the office use was not ancillary or incidental to the residential use of the dwellinghouse above.
  13. The appellant now lives in France, where they have established another office. For the most part the house was and is let on short-term lettings on a similar basis to Airbnb. This allows them flexibility to live in the house when they wish to return to London for short periods, during which they would visit or work in the business occupying the office in the basement. However, the short-term lettings of the residential part of the building mean that, for the most part, the residential occupation of the upper floors and of the office are different and unrelated uses.
  14. I understand that, due to the restrictions on travel and working in offices that arose during the coronavirus pandemic, the appellant let the house, excluding the lower ground floor, on a longer term basis during the period in which the relevant date falls. It seems clear to me that the occupation of the office was wholly separate from the residential use above on the relevant date. This suggests that, in functional terms, there were two different and unrelated residential and office uses on the relevant date.
  15. I note that the appellant may have slept within the meeting room through the glass at the end of the office when in London on an occasional basis during that period. There is a shower room and basic cooking facilities in the basement that would support staying in the basement for short visits. Whilst I think it is unlikely that this form of accommodation would ordinarily happen, during the period when most or all staff were working from home, this seems likely. However, the sleeping accommodation in this case would have been ancillary or incidental to the main office use of the basement at this time. This supports my view that in functional terms there were two separate planning units on the relevant date.
  16. Physically, the basement has a historic separate entrance to the front of the building. It is connected to the upper floors by a narrow staircase that leads up to a corridor linking the main rooms of the dwellinghouse to the rear extension. The only physical barrier between the residential use in the upper floors and the office within the basement is the staircase. Although this does not significantly impede movement between the two uses, the basement is a physically separate and distinct area. As such, there is sufficient physical separation that the basement can be used as a separate planning unit, so this would not alter my conclusions relating to the functional use of the basement.
  17. The address given on the enforcement notice implies that it relates to the whole building. However, the description of the breach of planning control alleged refers solely to the change of use of the basement. The Council and appellant have accepted that the address could be changed to solely refer to the basement for clarity. Given all the above, I will vary the notice such that the address solely relates to the basement.
  18. Taking all the above factors into account and as a matter of fact and degree, on the balance of probability at the date the notice was issued the office within

the basement was a separate use within a separate planning unit from the residential dwellinghouse in the floors above. As a result, the breach of planning control constituted by the matters stated in the enforcement notice has occurred.

19. For these reasons, I conclude that the appeal under ground (b) should fail.

### **The Appeals on Ground (a) and the Deemed Planning Application**

#### *Background and main issues*

20. I note that the appellant may be satisfied with an alternative form of development, but an appeal on ground (a) relates to the development alleged in the enforcement notice. Nevertheless, as there are both ground (a) and (f) appeals I will take account of any obvious alternatives that form part of the development alleged.

21. The main issues are:

- a) the effect of the proposal on the supply of housing; and
- b) the effect of the proposed development on highway safety with regard to the adequacy of parking provision.

#### *Reasons*

##### *Supply of housing*

22. The change of use of the basement from part of the dwellinghouse at 48 Mornington Terrace to a separate office has resulted in the loss of floorspace within the dwelling.

23. Policy H3 of the Camden Local Plan (LP) seeks to ensure housing meets the needs of existing and future households, including by resisting development that would involve a net loss of residential floorspace. A loss of floorspace can affect the number of residents who can occupy a home.

24. In this case, the property is a substantial terraced dwelling with access to the basement via a staircase from the ground floor. The loss of the basement to separate office use has reduced the size of the dwelling and altered its contribution to the housing market.

25. I note that the change of use of the basement has not resulted in a loss of any dwellings to the housing stock such that the dwelling continues to contribute to the number of dwellings within the housing market. However, that does not alter its affect relating to the loss of residential floorspace.

26. For these reasons, I conclude that there has been a net loss of residential floorspace and, consequently, this has had a modest effect on the supply of housing. As such, this is contrary to Policy H3 of the LP.

##### *Highway safety*

27. Policies T2 and DM1 of the LP seek to require all new developments to be car-free. This is achieved through the negotiation of agreements under Section 106 of the Town and Country Planning Act 1990. I understand that existing staff do not commute to the office by car, although it is possible they may in the future. In any event, the UU seeks to address this matter.

28. The UU requires that new occupants of the office would be informed of the Council's policy that they would not be entitled to a Business Parking Permit or to buy a contract to park within any car park owned, controlled or licensed by the Council. The office would not be available for use by an occupier with a Business Parking Permit. The exception would be a holder of a disabled persons badge. The UU would, therefore, comply with the requirements of Policies T2 and DM1 of the LP.
29. I note that the legal basis of the UU states that the deed is made pursuant to Section 16 of the Greater London Council (General Powers) Act 1974 along with other Acts such that the UU would be enforceable in this regard. On that basis, I conclude that the provisions in the UU relating to car free development would be necessary to make the development acceptable in planning terms, be directly related to the development and be fairly and reasonably related in scale and kind to the development. Consequently, I have taken the UU into account in coming to my decision.
30. For these reasons, I conclude that the proposed development would not affect highway safety with regard to the adequacy of parking provision.

#### Other matters

31. The office is occupied by a small architectural practice with another office in France. It contributes to the economy of the area and provides employment. As a result, the change of use complies with Policies E1 and E2 of the LP that seek to create the conditions for economic growth and support businesses, including the provision of employment premises.
32. I understand that available appropriate alternative accommodation is restricted in the local area, and this is reflected in the background to the LP policies. Closure of this office would alter the relationship between the London home of the owner of the business and their workspace. However, I note that the owner lives in France for much of the time, which limits the weight that can be given to that factor.
33. I note that a condition has been suggested that would limit the occupancy of the basement as an office to the occupier. This seeks to overcome the reasons for issuing the enforcement notice. Planning Practice Guidance (PPG)<sup>2</sup> sets out that there may be exceptional occasions where development that would not normally be permitted may be justified because of who would benefit from the permission. The condition suggested refers to Undercover Architecture Ltd, but PPG indicates that is inappropriate and any condition should refer to a person. I have assumed that this could be agreed were I to raise this with the appellant, although it wasn't raised at the hearing.
34. The use of such a personal condition would support this business, the employment it generates and the convenience of the property and business owner. If the building were sold or the basement ceased to be occupied by the person named in the condition, the use of the basement would revert to being part of the dwelling. The use would, therefore, be effectively temporary until such time as it was no longer required by the person named in the condition. There is some support from Policies E1 and E2 of the LP. However, it is not an exceptional occasion as required by the PPG. On that basis, I consider it would

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<sup>2</sup> PPG paragraph: 015 Reference ID: 21a-015-20140306

not overcome the conflict with Policy H3 of the LP. As a result, it would not be appropriate to include such a condition.

35. A condition has been suggested to limit the hours of use of the offices. This seeks to minimise noise and disturbance of staff coming and going on the living conditions of occupiers of neighbouring dwellings in the terrace. There is little evidence that the use results in material noise and disturbance, so this would be a minor benefit of limited weight.

36. I have also taken into account the potential to allow the use of the office within the basement as part of the residential use of the upper floors. I accept that would be part of the development. Use ancillary or incidental to the dwelling would form part of the residential use, so would not require planning permission. A mixed use would also result in the loss of residential floorspace to the same extent as the two separate uses, so would not overcome the harm identified. Consequently, neither of these obvious alternatives would overcome the issues raised in this case.

### Conclusion

37. The use of the basement at 48 Mornington Terrace has resulted in the loss of residential floorspace contrary to Policy H3 of the LP. However, Policies E1 and E2 of the LP support businesses and the provision of new business premises. There is limited suitable alternative accommodation in the area and the location of the office in the basement is closely linked to the ownership of the business and dwelling above. The UU addresses the potential need for on street parking and a condition could limit the hours of working in the office to protect the living conditions of neighbouring residential dwellings, but these are benefits of limited weight in the balance. I have considered whether a condition could be attached to limit the use to the current occupier, but this is not an exceptional occasion as required by the PPG. Taking all these factors into account, I conclude that the conflict with Policy H3 of the LP arising from the loss of residential floorspace leads to conflict with the development plan as a whole and this conflict is not outweighed by the other material considerations I have identified.

38. For these reasons, I conclude that on balance the development does not accord with the development plan. The appeal on ground (a) therefore fails.

### **The Appeals on Ground (f)**

39. An appeal on this ground 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 any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. In this case, the requirements seek the cessation of the office use and remove fixtures, fittings and equipment that facilitate the unauthorised use. Clearly, therefore, the purpose of the notice requirements is to remedy the breach of planning control.

40. For ground (f) to succeed it is necessary to show that the requirements are excessive to remedy the breach. A notice directed at a material change of use may require the removal of works that facilitate that use. In this case, the requirement only refers to the removal of fixtures, fittings and equipment that facilitate the unauthorised office use. Those fixtures, fittings and equipment that

would be related to the residential occupation of the building are not required to be removed. Whilst the fixtures, fittings and equipment required to be removed are not listed, it is clear to what they relate and, as such, the requirement is not ambiguous.

41.As a result, I conclude that the requirements of the notice do not exceed what is necessary in order to remedy the breach of planning control.

42.For these reasons, I conclude that the appeal under ground (f) should fail.

### **The Appeals on Ground (g)**

43.An appeal on this ground is that the period specified in the notice for compliance falls short of what should reasonably be allowed.

44.The appellant has suggested that it would take 18 months to find appropriate accommodation in a suitable location that reflect the particular circumstances of the appellant. This reflects the background to the LP policies that states premises suitable for small and medium sized enterprises, such as Undercover Architecture Ltd, are under pressure from rising land values, limited land availability and the ability for offices to change to residential use through the Town and Country Planning (General Permitted Development) (England) Order 2015.

45.However, the Council have drawn my attention to vacant office space in Camden and that staff were working from home for much of the coronavirus pandemic suggesting such offices are less necessary.

46.The period for compliance is one month. Whilst it may be possible to find alternative accommodation within that time, accommodation that meets the needs of this business is likely to be more specialised which means availability of suitable premises is restricted. As a result, I agree that the period falls short of what should reasonably be allowed, taking account of the circumstances of the case. On balance, I consider a period of 9 months would be more reasonable.

47.For these reasons, I conclude that the appeal under ground (g) should succeed and I will amend the period of compliance to 9 months.

### **Formal Decisions**

48.It is directed that the enforcement notice is corrected and varied by:

- by the deletion of "Land at: 48 Mornington Terrace ..." and the substitution of "Land at: basement of 48 Mornington Terrace ..." in section 2. The Land To Which The Notice Relates;
- by the deletion of "one month" and the substitution of "nine months" as the period for compliance.

49.Subject to the corrections and variations, the appeals are 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.

*AJ Steen*

INSPECTOR

## **APPEARANCES**

### **FOR THE APPELLANT:**

Jonathan Clay of Counsel

Heidi Copland                      DMH Stallard

Karen Tipper                      ECE Planning

Sarah Burdis                      The Heritage Advisory

Luke Chandresinghe              Director, Undercover Architecture Ltd

### **FOR THE LOCAL PLANNING AUTHORITY:**

Esther Drabkin-Reiter of Counsel

Emily Shelton-Agar              Legal Officer, London Borough of Camden

Angela Ryan                      Principal Planning Officer, London Borough of Camden

Antonia Powell                   Senior Conservation officer, London Borough of Camden

Elizabeth Beaumont              Appeals and Enforcement Manager, London Borough of Camden

### **DOCUMENTS SUBMITTED AT THE HEARING:**

Document 1: Policies H3, E1, E2, A1, T2 and DM1 of the Local Plan