



Appeal Decision

Site visit made on 6 January 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 February 2022

Appeal Ref: APP/Y5420/C/20/3249992

The land and building(s) known as 1 Tenby Close, London N15 4TB

- 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 Oumer Salahi against an enforcement notice issued by the Council of the London Borough of Haringey.
- The enforcement notice was issued on 20 February 2020.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use from a single family dwellinghouse to a mixed use comprising a small House in Multiple Occupation (HMO) and 1 self-contained flat at the rear of the ground floor level.
- The requirements of the notice are:
 1. Cease the use of the property other than as a single family dwellinghouse.
 2. Remove from the property all but one of the kitchens (a kitchen includes cooking appliances, sinks, kitchen worktops and cupboards).
 3. Remove from the property all but one supply of electricity, gas and water.
 4. Remove from the property all but one of the doorbells.
 5. Remove from the property any internal dividing doorways and partitions facilitating the unauthorised use of the property.
 6. Remove from the land all debris arising from compliance with the above steps.
- The period for compliance with the requirements is: Six (6) months.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (d) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with corrections in the terms set out below in the Formal Decision.

The Notice

1. The Council considers that there is one planning unit on the appeal site and that the uses on it form a single mixed-use, as described in the allegation.
2. It appears to me that, considered in the round, the appellant's cases on ground (c) and ground (d) indicate that what has occurred is 2 separate uses (ie an HMO and separate self-contained flat) rather than a mixed use and so the appellant's case includes a 'hidden' ground (b) appeal in this regard. The appellant has agreed this is the case and the Council acknowledges that the uses the appellant refers to in their appeal form are not the same as the breach of planning control stated on the notice.
3. In this case, ground (b) (ie that 'the matters stated in the notice have not occurred') has not been pleaded. But nevertheless, I have a duty to ensure that the law is applied correctly to the facts I find.
4. In support of its view that there is a functional relationship between the HMO and the self-contained flat, the Council states that the mixed use falls within one register of title for which there is one mortgage against the whole

property, that the mixed use falls within and is controlled by one HMO licence and that the mixed use falls within one Council Tax band. As such, the Council considers both the owner-appellant sees the mixed use as one functional unit and so do other third parties. But on a fact and degree basis, I am not satisfied that any of the above are decisive factors to indicate that there is a functional land use relationship between the two uses in this case.

5. In support of its view that there is a physical connection between the HMO and the self-contained flat, the Council states that the garden seems to be attached to the house as a whole, not just the flat nor the HMO, and that the garden appears to be available to use for the HMO occupiers and the flat occupier. But many buildings contain separate planning units with shared use of outside space, it does not necessarily mean the units in the building are in a single mixed use or that the units are a single planning unit.
6. I have had regard to the case of *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207. 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. Each area that has a different primary use ought to be considered as a separate planning unit.
7. At my site visit, I saw that there is a side access to the rear of the appeal building, with an entrance door in the flank elevation, providing access to the separate, self-contained studio flat, ie this flat has its own independent access. This is consistent with what is said in the appellant's statement and I have no reason to believe this arrangement has changed since the enforcement notice was issued. This flat is referred to by the appellant as 'Studio D'.
8. I have a duty to get the notice in order, if I can, using my powers of correction under section 176(1) of the 1990 Act. So I have sought the views of the Council and the appellant on:
 - (i) whether the allegation should be corrected to "the material change of use from a single family dwellinghouse to a small HMO and 1 self-contained flat at the rear of the ground floor level";
 - (ii) whether correcting the allegation in this way may cause injustice to the Council or the appellant;
 - (iii) if the allegation is corrected in this way, what consequential corrections should be made to the rest of the notice, particularly its requirements; and
 - (iv) whether those consequential corrections may cause injustice to the Council or the appellant.
9. The appellant has expressed concern that changing the allegation on the notice would 'prejudice' the appellant's interests because they might have approached the appeal differently, in terms of what arguments they presented, if the allegation had been more clearly expressed from the beginning. But I do not accept this argument as the appellant has approached the case as though the rear ground floor self-contained flat and the small HMO are separate planning units. So in my judgment, the correction set out in (i) above would not cause injustice to the appellant.

10. Based on the above, the appeal site contains 2 separate planning units, in separate uses, ie the single self-contained flat at the rear of the ground floor, with its independent access, and, an HMO unit containing 3 bedrooms in the remainder of the building, accessed from the front of the building. So the allegation in the notice is not correct.
11. In light of the above, I shall correct the notice to remove the reference to a "mixed use" from the allegation. However, correcting the allegation in this way results in the need for consequential corrections to the requirements of the notice. The Council considers that requirements 2-6 may be deleted and that requirement 1 could read: "Cease use of the HMO other than as a single family dwellinghouse".
12. If I uphold the notice, I am satisfied that its requirements may be corrected to reflect the suggestion by the Council to get the notice in order so far as my observations regarding the number of planning units is concerned. But the actual wording would require some amendment since it is the use of the building as an HMO that should cease and a notice cannot require that a lawful use is actively carried out. As this would be less onerous than the requirements as originally drafted on the notice, I am satisfied there would be no injustice to the appellant or the Council as a result.
13. In the appellant's evidence it is suggested that the previous use of the planning unit now used as an HMO was not one of a single family dwellinghouse but that it contained one or more self-contained flats. This is a matter appropriately addressed here. The Council states that it appears that the appellant is arguing that previous uses they refer to (ie flats where the HMO is) would have been lawful and thus they should be permitted to revert to those under section 57(4) of the 1990 Act.
14. The breach of planning control alleged in the notice indicates that the lawful use is a single family dwellinghouse. However, the Council has since taken the view that the HMO and 2 flats may have been a possible 'fallback' position. This indicates that I cannot be certain that the reference to "from a single family dwellinghouse" in the breach of planning control stated in the notice is correct.
15. Section 57(4) provides that where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of Part III of the Act) it could lawfully have been used if that development had not been carried out. But section 57(4) does not provide for resumption of a past lawful use when there has been one or more intervening unlawful uses between that and the current unlawful use.
16. Given the above uncertainty about the lawful use (and as the previous use need not be recited in the notice), to get the notice in order I shall correct the notice to remove the reference to "from a single family dwellinghouse" from the allegation, due to section 57(4). I shall proceed with the appeal on this basis.

Reasons

The ground (c) appeal

17. An appeal on ground (c) is that the matters stated in the notice do not constitute a breach of planning control. In a ground (c) appeal the onus is on

the appellant to make out their case to the standard of the balance of probabilities. If there is no evidence to contradict the appellant's version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted.

18. The appellant acknowledges that the creation of a separate flat at the rear (ie Studio D) was an act of development for which planning permission was required and not obtained and that this part of the allegation does constitute a breach of planning control. So ground (c) is pleaded by the appellant only in respect of the small HMO occupying the rest of the appeal building.
19. The appellant states that the use of the main part of the house as an HMO did not require express planning consent when the HMO was brought into use in 2008. As no planning permission is said to exist for the HMO, the appellant's case on ground (c) indicates that the appellant considers that, at that time, the HMO use fell under the same use class as a dwellinghouse (ie C3) and so, in their view, the HMO use did not constitute a material change of use from a dwellinghouse.
20. But section 55(3)(a) of the 1990 Act states that, for the avoidance of doubt, it is hereby declared that for the purposes of this section the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used. So when the separate flat at the rear was created there was a material change of use of the entire building, not just the part where the separate flat has been created, even if the remainder of the building remained a dwellinghouse for use class purposes.
21. Even if this were not the case, for the use to fall into the dwellinghouse use class, it would have to have constituted people living together as a family, or not more than 6 residents living together as a single household. This is to comply with the definition of a dwellinghouse that existed at that time¹. There is no evidence this is how the main part of the house (ie excluding Studio D) has been used, taking into account what the appellant describes in a statutory declaration as 'room lets' to 'individual people'.
22. Based on the information provided, the tenants had separate tenancy agreements, ie they were not living together as a family or as a single household, they may just have shared at least one facility which in this case appears to have included a kitchen, meaning the use was an HMO use and not a dwellinghouse use.
23. In light of the above, I am not satisfied on the balance of probability that the matters stated in the notice do not constitute a breach of planning control. Accordingly, the ground (c) appeal fails.

The ground (d) appeal

24. An appeal on ground (d) is that it was too late for the Council to take enforcement action due to the time limits set out in section 171B of the 1990 Act, ie that the breach of planning control alleged is 'immune'. In a ground (d) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

¹ The Town and Country Planning (Use Classes) Order 1987, Schedule, Part C, Class C3

25. Notwithstanding what is stated in paragraph 4.1 of the notice, the time limit for Studio D, ie the self-contained flat at the rear ground floor level, is 4 years, known as the 4 year rule. This is as set out in section 171(2) of the 1990 Act. The time limit for the small HMO is 10 years, as set out in section 171B(3) of the 1990 Act, known as the 10 year rule.
26. In response to my observation that the building contains 2 planning units rather than one, the Council has said that if the notice is corrected as set out in (i) above, it would only continue to contest the small HMO and that the small HMO is not immune as it commenced in/around 2019.
27. The Council accepts that, if the rear ground floor flat is its own planning unit, it is immune on the basis of the 4 year rule. Considering the evidence provided, I have no reason to disagree with the Council's position in this regard. I am satisfied the rear ground floor flat is its own planning unit (for the reasons set out above) and so it is immune and the ground (d) appeal succeeds in respect of the rear ground floor flat, ie Studio D.
28. Based on the information provided, the HMO use identified in the notice came about in 2019 when, according to the appellant, kitchen appliances/facilities were removed from the ground floor and first floor lettings. These are referred to by the appellant as Studios A, B and C. The appellant states that before the above changes were made 'it' was used as a self-contained flat. Although it is ambiguous what 'it' is in this context. The appellant's Exhibit 20A identifies that Studio A is a "dwelling-house". The appellant's Exhibit 19 identifies that Studio C is a "dwelling-house or flat". On their appeal form dated 30 March 2020, the appellant has stated that they can show consistent use of the property as 4 self-contained flats since 2009.
29. The above contradicts the appellant's argument that the building has been continuously let as an HMO and a separate studio flat since 2008. It also contradicts statutory declarations provided by former tenants (and others) who, during the same time period, declare that the house has been used as shared accommodation.
30. In their statement the appellant states that they did not fully understand the terms they were using, or the implications of the statements they were making, in their initial grounds of appeal, ie those on their appeal form.
31. But in a lawful development certificate (LDC) application, dated 20 May 2019, Ref HGY/2019/1852, the appellant declared that on 5 January 2008 the ground floor of the appeal building was converted into 2 studio flats. These are referred to as Studio A and Studio D. It is explicit on the LDC application form that the LDC application was made on the basis that Studio A and Studio D existed and had been in existence as dwellinghouses for more than 4 years. Names and dates of tenants occupying Studio A and Studio D are stated, going back to 12 February 2015 and 2 January 2015 respectively.
32. Documents entitled 'Form of Oath/Affidavit' in the names of 3 former tenants, submitted with the LDC application, declare that Studio A was a self-contained flat with a kitchen. These documents contradict the appellant's case that what was removed in 2019 was 'just' cooking facilities such as microwaves and toasters, rather than 'full' kitchens.

33. Having inspected each of the rooms in the appeal building, I do not accept the appellant's assertion that it is clear from an internal inspection that the rooms could never have had 'proper' kitchen facilities. This is because it depends on precisely how the rooms are laid out, for example, what size bed is used and how much other furniture there is.
34. The appellant states that the Council should be in a position to clarify what kitchen facilities were in place in each of the rooms. But this does not reflect the fact that the onus is on the appellant, and not the Council, to make out the appellant's case. The ground (d) appeal therefore fails in respect of the small HMO.

The ground (g) appeal

35. An appeal on ground (g) is that the period specified in the notice falls short of what should reasonably be allowed.
36. The notice was issued prior to the Covid-19 pandemic. The appellant states that due to the pandemic they have been unable to leave their property which, taking into account social distancing, is going to make it difficult to get the work required by the notice completed. My attention has also been drawn to longer notice periods landlords have been required to give renters as a result of the pandemic, as well as enforced lockdown.
37. The Council states that if I am minded to extend the compliance period due to Covid-19, it is of the view that 9 months instead of the 12 months sought by the appellant would be enough time for compliance. But restrictions as a result of Covid-19 have been relaxed and notice periods have reverted to pre-pandemic levels. Moreover, with the requirements of the notice corrected in the manner suggested by the Council, no physical works to the property are required by the notice.
38. I appreciate that the appellant would like to give the tenants as long as possible to find alternative accommodation. But no specific evidence has been provided to indicate that more than 6 months would be required for tenants to look for alternative accommodation.
39. Taking all of the above points into account, I am satisfied that 6 months is a reasonable period to comply with the remaining single (corrected) requirement of the notice. Should this prove not to be the case, it is entirely a matter within the discretion of the Council to draw on its powers under section 173A(1)(b) of the 1990 Act, without prejudicing its right to take further action.
40. I conclude the period for compliance stated in the notice does not fall short of what should reasonably be allowed and so the appeal on ground (g) fails.

Conclusion

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

Formal Decision

42. It is directed that the enforcement notice is corrected by:

- the deletion of the words "from a single family dwellinghouse" and "a mixed use comprising" from the allegation in paragraph 3 of the notice, such that the breach of planning control alleged in the notice reads:

"Without planning permission, the material change of use to a small House in Multiple Occupation (HMO) and 1 self-contained flat at the rear of the ground floor level.";
- the deletion of requirement 1 in paragraph 5 of the notice and its substitution with: "Cease the use of any part of the property as an HMO."; and
- the deletion of requirements 2-6 in paragraph 5 of the notice.

43. Subject to these corrections, the appeal is dismissed and the enforcement notice is upheld.

L Perkins

INSPECTOR