



Appeal Decision

Site visit made on 8 December 2021

by Felicity Thompson BA(Hons), MCD, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 February 2022

Appeal Ref: APP/T5150/C/20/3255771

24 St. Michaels Avenue, Wembley HA9 6RX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
 - The appeal is made by Mr S Fahmy against an enforcement notice issued by the Council of the London Borough of Brent.
 - The notice was issued on 4 June 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises from one dwellinghouse to a House in Multiple Occupation (HMO) on the land to the front of the premises, and two separate residential uses on the land to the rear of the premises, AND without planning permission, the erection of an L shaped building on the land to the rear of the premises shown outlined cross-hatched in black on Plan A attached to the notice.
 - The requirements of the notice are to:
 - STEP 1 Cease the use of the land to the front of the premises as a House in Multiple Occupation (HMO) and its occupation by more than ONE household.
 - STEP 2 Remove all internal partitions, items, materials and debris associated with the unauthorised change of use from the land to the front of the premises, including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets.
 - STEP 3 Restore the internal configuration to the original layout before the unauthorised change of use took place at the land to the front of the premises. For the avoidance of doubt, this should include a kitchen, dining room and lounge on the ground floor, bedrooms on the upper floors, a bathroom on the first floor, and a WC on the ground floor.
 - STEP 4 Cease the residential uses on the land to the rear of the premises.
 - STEP 5 Remove all kitchens and cooking facilities on the land to the rear of the premises and remove all associated debris and materials, arising from this removal from the land to the rear of the premises, from the premises.
 - STEP 6 Remove all bathrooms and bathroom facilities on the land to the rear of the premises and remove all associated debris and materials, arising from this removal from the land to the rear of the premises, from the premises.
 - STEP 7 Demolish the L-shaped building on the land to the rear of the premises as shown outlined cross-hatched in black on the attached Plan A and remove all items, debris and materials associated with the unauthorised development from the land/premises.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended.
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Formal Decision

1. It is directed that the enforcement notice is corrected and varied by:
 - 1) The addition of (*use class C4*) after (*HMO*) in the allegation set out in Schedule 2 of the notice – the alleged breach of planning control.

- 2) Deleting the words *L-shaped building* from the allegation and Step 7 of the requirements and replacing them with *extension to the existing outbuilding (former garage)*.
 - 3) Deleting the words *cross-hatched in black* from the allegation and Step 7 of the requirements and replacing them with *in red*.
 - 4) Substituting Plan A attached to the issued enforcement notice with the one attached to this decision.
 - 5) Deleting Steps 1, 2 and 3 from Schedule 4 of the notice and renumbering accordingly.
2. The appeal on ground (c) is allowed insofar as it relates to the C4 HMO. Otherwise, subject to the above corrections and variations the appeal is dismissed insofar as it relates to the two separate residential uses and the extension of the outbuilding, and the enforcement notice is upheld.

Preliminary Matters

3. The appellant's argument about the type of HMO the notice is targeted at and whether an L-shaped building has been erected or an existing outbuilding has been extended, are more pertinent to an appeal on ground (b). Such submissions were made in the appellant's statement upon which the Council had the opportunity to comment, I have therefore addressed them as though that ground was pleaded.
4. I note a third-party representation however, planning merits are not relevant to the grounds of appeal in this case, which rests on the facts of the case and the interpretation of any relevant planning law.

The Enforcement Notice

5. The appellant submits that the notice is so defective that it must be quashed. The reasons for this submission are related to what they consider to be ambiguities in both the allegation and requirements.
6. The lawful use of the appeal site (premises) is as a three-bedroom semi-detached dwellinghouse with an outbuilding (former garage) to the rear.
7. At my visit I observed that the house, which is located at the front of the premises, is in use as an HMO with two bedrooms and a shared kitchen on the ground floor and two bedrooms, a small office and shared bathroom on the first floor. To the rear of the premises is an L-shaped building which is in use as two units of *separate* [my emphasis] residential accommodation. It is clear from the use of the word *separate* that there is no suggestion that they form part of the overall lawful residential use of the premises. Step 4 requires those residential *uses* to cease.
8. In respect of the operational development, the allegation is simply the erection of an L-shaped building. Whether that building is an entirely new structure or an extension to an existing structure, become important considerations for other grounds of appeal, but those considerations are academic for present purposes.
9. In respect of the requirements, Steps 2 and 3 contradict one another. However, I could have exercised my wide powers of correction to delete Step 2

since Step 3 was sufficient alone. This would have caused no injustice since it would neither have enlarged or reduced the scope of the requirements.

10. Whilst the appellant considers Steps 5 and 6 are not reasonable or necessary, they are neither ambiguous nor excessive, particularly bearing in mind the requirements of the notice as varied.
11. Section 173(2) of the 1990 Act says that a notice complies with section 173(1)(a) *if it enables any person on whom a copy of it is served to know what those matters are*, being the matters alleged to constitute the breach. The test being whether an enforcement notice tells the recipient *fairly what he has done wrong and what he must do to remedy it*.
12. Having visited the site, I am satisfied that the notice describes the breaches with reasonable accuracy. It is also evident that the appellant understood the allegations and the requirements of the notice.

The 'hidden' appeal on ground (b)

13. An appeal on ground (b) is a claim that the matters stated in the enforcement notice (which may give rise to the alleged breach of planning control) have not occurred as a matter of fact. The burden of proof is on the appellant and the relevant test is the 'balance of probabilities.'

The HMO

14. The Council do not state in their allegation whether they consider the use as an HMO to fall within Class C4 of the UCO¹ (use of a dwellinghouse by not more than six residents as a house in multiple occupation) or a large (sui generis) HMO. However, it is evident from their submissions that they consider the use to be as a sui generis HMO which the appellant disputes. They seek to demonstrate that the use is as a C4 HMO and, under their appeal on ground (c), that such a use constitutes permitted development.
15. There is evidently a relatively complex and detailed planning history to the site. The appellant states that the HMO was first occupied by six people when the use began in 2016 but now it is only occupied by five.
16. The first HMO license was issued on 20 October 2016 for a three household, six-person, five-bedroom HMO with the most recent license being issued on 18 February 2019 for occupation by not more than five persons.
17. I acknowledge that the Council's licensing team, in 2017, raised various matters concerning non-compliance with the terms of the license, including overcrowding. However, there is little evidence regarding precise numbers beyond a letter from the Council, dated 24 December 2018 which refers to six occupants. Use by this number would fall within the definition of a C4 HMO. In any event, it seems likely that the issue of overcrowding was resolved, indeed there is no evidence to indicate that it wasn't, between 2018 and the issuing of the most recent license in 2019.
18. In the appellant's response to a Planning Contravention Notice (PCN) in April 2020, they stated that there are five occupants of the HMO with five names given. It was also stated that there are two bedrooms on the ground and two

¹ The Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO).

on the first floor with three bed spaces on the ground and two on the first floor. This is consistent with my site observations.

19. Consequently, it seems to me, based on the evidence before me and the balance of probabilities that the dwellinghouse was in use as a C4 HMO prior to and at the time the notice was issued.

The L-shaped building

20. There is no dispute between the parties that there was a pre-existing outbuilding (former garage) to the rear of the premises. The dispute is in respect of whether the alterations and extension of that building have resulted in a *new building*. The appellant considers it has not. The Council in support of their case referred to *Oates v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2229, where the Court of Appeal upheld the finding of the lower Court that it was possible to conclude that there was a *new building* even where parts of the *old building* remained.
21. It is evident from photographs provided by both main parties that the external alterations to the outbuilding have included the garage door being blocked up, an existing side door has been replaced, two windows have been installed, rainwater goods and drainage have been provided and an extension has been erected adjoining the rear. However, the original outbuilding structure, in terms of overall form, is retained and is clearly discernible.
22. Accordingly, I conclude that, as a matter of fact and degree, the L-shaped building is not an entirely new building but consists of the alteration and extension of an existing outbuilding. The allegation is inaccurate in this respect.

Conclusion on ground (b)

23. Whilst the above findings will lead to success of the appeal under ground (b) that does not mean, necessarily, that the notice must be quashed. It is open to me to correct any defect, error or misdescription in the enforcement notice. The powers of correction are wide, limited only by the proviso that no injustice shall be caused to the appellant and/or the Council.
24. The allegation can therefore be corrected as set out in my formal decision since such corrections do not enlarge the scope of the breaches or requirements. Consequently, there would be no injustice to either party. I shall correct the notice accordingly under the available powers of section 176(1)(a) of the Act.

The appeal on ground (c)

25. In this appeal, the onus is upon the appellant to show that, on the balance of probabilities, the matters alleged in the notice do not constitute a breach of planning control. The appropriate time period for the consideration of a ground (c) appeal is at the time when the notice was issued and when the appeal is determined.
26. By virtue of s.55(1) of the 1990 Act the meaning of 'development' includes the carrying out of building, engineering, mining, or other operations in, on, over or under land and the making of any material change in the use of any buildings or other land. Section 57(1) provides that planning permission is required for development.

27. There is no dispute that the use as an C4 HMO constitutes a material change of use, the appellant's case on this ground is that such a use constitutes permitted development and therefore, the change to a C4 HMO did not amount to a breach of planning control.
28. Schedule 2 Part 3 Class L of The Town and Country Planning (General Permitted Development) Order 1995 (as amended) (the GPDO) permits the change of use of a building from a use falling within Class C3(dwellinghouses) of the Schedule to the UCO, to a use falling within Class C4(houses in multiple occupation) of that Schedule.
29. I have found based upon the evidence before me and the balance of probabilities, that the use of the dwellinghouse was as an C4 HMO at the time the notice was issued. Since there is no suggestion that all the alleged uses took place as a single act of development, the use constitutes permitted development by virtue of Schedule 2 Part 3 Class L of the GPDO and does not constitute a breach of planning control. The appeal on ground (c) therefore succeeds to this limited extent and the requirements are varied to reflect this finding.
30. The appellant has not sought to demonstrate that the use of the existing outbuilding and extension to it does not constitute a breach of planning control. Whilst in respect of the extension, the appellant makes some reference to Schedule 2 Part 1 Class E of the GPDO, the erection and use of the extension as separate residential accommodation is not an incidental use and would not constitute permitted development by virtue of Class E.
31. The appellant has failed to demonstrate that the extension of the outbuilding and the use of the outbuilding and extension, for separate residential purposes does not constitute a breach of planning control. These developments are not development that is permitted by any development order and there is no record of planning permission having been granted for them. The appeal on ground (c) therefore fails in these respects.

The appeal on ground (f)

32. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to achieve the purpose of the notice. The purposes of an enforcement notice are set out in s173 of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). In this case the requirements are, in summary, to cease the HMO and separate residential uses and to remove all internal fixtures and fittings which facilitate such uses. I therefore find the purpose is to remedy the breach of planning control.
33. Given the partial success under the ground (b) appeal, the allegation is corrected as set out in my decision. The requirements should flow logically from the allegation, accordingly, subject to the corrected allegation, the requirements are varied, in particular to delete the requirements relating to the C4 HMO.
34. The appellant's remaining case on this ground is that the requirement to demolish the outbuilding (former garage) is excessive on the basis that that building was an existing building.

35. It is an established principle that where an enforcement notice alleges a material change of use it can require the removal of works which were carried out to facilitate the use. This principle has been considered by the courts on numerous occasions including the comprehensive evaluation by the Court of Appeal in *Kestrel Hydro v Secretary of State for Communities and Local Government* [2015] EWHC 1654 (Admin).
36. There is no doubt that the internal alterations to the outbuilding and the construction of the extension constitute works carried out to facilitate the material change of use for separate residential purposes. Consequently, it is not excessive to require all internal fixtures and fittings (kitchens, bathrooms etc) to be removed and for the extension to the outbuilding to be demolished, no lesser steps would remedy the breach of planning control.
37. The question remains, however, as to whether this principle can extend to the removal of a lawful building, being the existing outbuilding, as part of an enforcement notice alleging a material change of use.
38. The courts have expressed reservations that an enforcement notice directed against a use of the land could properly require removal of a building that enjoys an immunity from enforcement by virtue of section 171B(1).
39. Furthermore, it is open to me to form the view as to what steps would be the least onerous to prevent the resumption of the unauthorised use and to consider whether there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption.
40. On balance, since the outbuilding was an existing lawful building and since to remedy the breach of planning control it is sufficient to require the use for separate residential purposes to cease and the kitchen and bathroom facilities to be removed, I find that the requirement to demolish the outbuilding (former garage) is excessive. I will therefore vary the notice accordingly prior to upholding it. The appeal on ground (f) succeeds to this limited extent.

Conclusion

41. For the reasons given above I conclude that the appeal should succeed on ground (c) insofar as it relates to the C4 HMO. Otherwise, I shall uphold the notice with corrections and variations.

Felicity Thompson

INSPECTOR