The Planning Inspectorate

Appeal Decision

Hearing Held on 25 May 2021 and 8 February 2022

Site visit made on 8 February 2022

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 February 2022

Appeal Ref: APP/U5360/C/20/3254557
49 Scrutton Street, Hackney, London EC2A 4PJ

- 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 Jacques Saade of MG London Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice was issued on 15 May 2020.
- The breach of planning control as alleged in the notice is the material change of use of the property to use as a dwelling and associated extensions and alterations.
- The requirements of the notice are (1) Cease the residential use of the property. (2) Remove all kitchen and bathroom fixtures and fittings that facilitate the unauthorised use. (3) Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and the premises.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decision

1. It is directed that the enforcement notice is corrected by the deletion of the words "and associated extensions and alterations" from the allegation and the insertion of the words "It appears to the Council that the above breach of planning control has occurred within the last four years" at the start of paragraph 4. Subject to these corrections, the appeal is allowed, and the enforcement notice is quashed.

Procedural Matter

2. The appellant submitted a late appeal on ground (c). The Council's response to this was not copied[1] to the appellant in time and this was not discovered until the opening of the Hearing in May 2021. As a result, in the interests of fairness to the appellant, the event was adjourned. At the resumption of the Hearing, the ground (c) appeal was withdrawn by the appellant and the submissions under that ground were added to the existing appeal on ground (f). The Council raised no concerns about this change and I have proceeded with the appeal on the original grounds.

[1] By the Planning Inspectorate

The Notice

3. An enforcement notice must enable every person who receives a copy to know exactly what, in the Council's view, constitutes the breach of planning control and the reasons for issuing the notice.

4. In this case the allegation is the material change of use of the property to use as a dwelling and associated extensions and alterations. The use of the phrase "associated extensions and alterations" is unclear. This is because the Council were not able to elaborate on what it meant, given that the photographs of the building appear to show no extensions and the requirements of the notice do not address this phrase. The parties agreed there would be no injustice caused if I were to direct that this expression be deleted from the allegation. I shall therefore proceed on the basis that the allegation is the material change of use of the property to use as a dwelling.

5. The reasons for issuing the notice fail to state that the breach of planning control has occurred within the last four years. It was also agreed that the notice could be corrected to remedy this without causing injustice.

Background

6. The appeal concerns an end of terrace period building situated on the corner of Scrutton Street and Phipp Street. It has a basement with three floors of accommodation above and a flat roof laid out as a terrace. There are two entrances to the building, one from the corner and one from the rear. The whole building is currently used as a single dwelling. The appeal site sits within an area that is subject to an Article 4 Direction[2] made in March 2018, which seeks to control the change of use of office accommodation to dwelling houses.

The ground (d) appeal

7. This ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The burden of proof in an appeal on this ground lies with the appellant. As such, the appellant needs to show, on the balance of probabilities, that the use of the building as a single dwelling began more than four years before the notice was issued. In addition, that the use continued such that at any time during the four year period the Council could have taken enforcement action against the use. The relevant date is the 15 May 2016.

The appellant's case

8. The former use of the building was as offices. Mr Kyson bought it in May 2012 and submitted a planning application in September 2012 to change the use of the first and second floors of the building to a three bedroom, self-contained flat. The submitted plans showed the retention of an office use on the ground floor and basement accessed from the corner entrance to the building. Prior to obtaining planning permission in January 2013[3] Mr Kyson began to strip out the building during December 2012.

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[2] Article 4 of the Town and Country Planning (General Permitted Development)(England) Order 2015 removes the permitted development right to change the use of an office (Use Class B1) to a dwelling house (Use Class C3).
[3] Reference 2012/2220

9. It was at this point that he states in his statutory declaration that he changed his mind on retaining the office space on the ground floor and in the basement for use by his architectural practice, finding that the area would be too small. Instead, as he had also just had a third child, he converted the whole building to a single dwelling. The majority of the ground floor was laid out as a kitchen and dining area and the basement provided a family room, gym, bathroom and sauna.

10. Mr Kyson and his family moved in on the 1 June 2013. At this point payment of business rates ceased and Mr Kyson began paying Council tax.[4] Various exhibits are attached to his statutory declaration including different types of utility bills and family photographs of Christmas and birthday celebrations during his time there. There is also confirmation from HM Revenue and Customs dated November 2019 that they were satisfied the appeal site was Mr Kyson's principal private residence until he sold it.

11. During his occupation, Mr Kyson submitted the finished property for a national design award, namely the Architects Journal Retrofit Awards 2015, for which it won the category of 'House over £250 000'. This was published in the Architects Journal September 2015 edition. There was also an article about the dwelling in The Times newspaper on the 27 June 2015 featuring photographs of the property and an interview with Mr Kyson sat in the kitchen.

12. The appellant bought the property as an investment in October 2015. Prior to renting it out, it was re-decorated and minor repairs and chips were remedied. This was overseen by his friend Ms Darlet. Immediately after he acquired it, he engaged estate agents to carry out the marketing.[5]

13. In November 2015 a second estate agent was appointed. Both, over the course of the next few months, advised that the market was slow. One offer was received but it fell through. Eventually a firm offer was received in March 2016 but the prospective tenants required some remedial works to be carried out to the dwelling. These were carried out in April 2016 and the tenants signed a two year tenancy agreement on the 30 April 2016.[6]

14. These tenants then moved out in January 2017 before the official end of the tenancy agreement, following a dispute with the landlord. A formal agreement to settle the dispute was finalised in September 2017. Following their departure, the appellant undertook some cosmetic works to the roof terrace, namely repairing the decking, but this resulted in a tear to the roof membrane, which then had to be fixed to maintain the integrity of the roof.[7]

15. Separate from that, a water main burst in the street in February 2017 flooding the basement of the property. Although the basement was dried out by the middle of March 2017, the insurers required an inspection and the services of a loss adjuster. The appellant submitted that the property was habitable following the flood and was anxious for it to be marketed.[8]

[4] Appellant's Statement of Case Appendix 3, Council tax and business rates information
[5] Emails dated 20 and 30 October 2015 confirming details of advertised rent and that there had been three viewings, exhibited to 2nd statutory declaration of Ms Darlet
[6] Signed two year tenancy agreement, exhibited in Ms Darlet's 1st statutory declaration
[7] Works began 1 February 2017, completed 10 February 2017, exhibits of emails by Ms Darlet
[8] Emails sent by him in April and July 2017 to the loss adjuster and the estate agent

16. Viewings took place after a final clean in July 2017 and an offer was received at the beginning of September 2017 but this did not proceed. A second offer was received on the 29 September 2017 and not long after that the appellant signed a 12 month company let tenancy agreement on the 7 October 2017 with Leston Properties Ltd, which was subsequently extended several times until the property was vacated on the 6 August 2020.[9] There were two occupiers; Mr Adderley resided there permanently and is listed in the tenancy agreement as being the permitted occupier. There are utility bills in his name exhibited by Ms Darlet. Mr Cullen resided there between 10 and 21 days every month when he was conducting business in the United Kingdom as he was the partner of Mr Adderley. Exhibits show that it was Mr Cullen who paid the rent on a regular basis.

The Council's case

17. The Council submit that the appellant and Mr Kyson concealed the residential use of the whole property. This only came to the attention of the local planning authority when the appellant submitted an application for a lawful development certificate for the existing use.[10] A site visit on the 18 November 2019 revealed that the basement was being used as two bedrooms and was fitted with a bathroom and sauna. The ground floor had been fitted out as a kitchen and was also being used as a dining area. The 2013 approved plans showed that the kitchen should have been placed on part of the first floor but this area was being used as an office/spare room.

Assessment

18. The evidence which supports a residential use includes dated photographs, utility bills, Council tax bills and a letter from HM Revenue and Customs. I accept it was a short period between the 2013 planning permission and the first Council tax payment at the beginning of June. In addition, the domestic electrical certificate was not signed off until the 3 June 2013.

19. However, the appellant's photograph of the basement after it was stripped out is dated the 8 December 2012. It seems reasonable to me that refurbishment of the internal spaces of this size of a building could be done within six months, especially as, no doubt Mr Kyson, who has his own architectural practice, was, in all likelihood, project managing it. It appears no extensions were added to the building, which take additional time, and, other than the removal of the original pitched roof to form a roof terrace, most of the works were internal, which are not subject to the vagaries of the weather.

20. It can be the case with projects such as this that people move into a property before it is completely finished and decorated. There is no definition of a dwelling in the 1990 Act but in *Gravesham*[11] it was accepted that the distinctive characteristic of a dwelling was the ability to afford to those who used it the facilities required for day to day private domestic existence. Certainly, in one of the later photographs it appears that the shower screen had yet to be installed.

[9] Copies of all agreements exhibited by Ms Darlet
[10] Reference: 2019/3292, refused 4 November 2019
[11] Gravesham BC v SSE and O'Brien [1983] JPL 306

21. In any event, it has also been held in the Courts that in assessing when the change of use of premises to residential use occurs, the physical state of the premises is very important but it is not decisive. The actual, intended, or attempted use is also important but again, it is not decisive, as these matters have to be looked at in the round. This is because a change of use to residential use can take place before the premises are used in the ordinary and accepted sense of the word. In some cases, operations are undertaken to convert premises for residential use and they are then put on the market as being available for rent. Nobody is using these premises in the ordinary connotation of the term because they are empty. Nevertheless, there has plainly, on those facts, been a change of use.

22. Drawing these thoughts together, there is no evidence from the Council to show that it was not Mr Kyson's intention to occupy the property when he did. As to what facilities had been provided at that point, The Building Inspector's Final Certificate dated the 3 June 2013 confirms that the work in the initial notice was complete. Whilst the details of those *initial works* are not known, in all likelihood Mr Kyson would not have started paying full Council tax if he was not residing in the property. I therefore find that there was a residential use of the whole property by Mr Kyson and his family from June 2013 until he sold it in October 2015.

23. The Council submit that there are *Swale*[12] type breaks in the evidence. Lord Mance held in *Welwyn Hatfield*[13] that "too much stress [has] been placed on the need for "actual use"…it is more appropriate to look at the matter in the round and to ask what use the building has or, of what use it is". Thus, it is incorrect to regard the commencement of residential use as automatically giving rise to the change of use or conversely to conclude that there had not been a change of use because the building was not actively occupied as a dwelling house.

24. However, it may be difficult for an appellant to show that a change of use occurred only through physical works, "actual use" remains a factor and must be more than squatting or camping out. It is necessary to look at the evidence in the round with regard to the former use of the building, the physical state of the building at the relevant date, the actual use of the building at that date, the intended use and the whole chronology. Intended use should be considered objectively and with regard to evidence of, for example, any active marketing of the dwelling for sale or let.

25. In this case after the property was purchased by the appellant in October 2015, he immediately sought to market it to find tenants. At this point if the Council had made an internal inspection, they would have seen that the basement and ground floor were not laid out or furnished as an office. Instead, there was a large, fitted kitchen on the ground floor and a sauna in the basement.

26. Even on the basis that some offices these days have unconventional layouts to facilitate innovative thinking, team working and hot desking, it would seem unlikely that any reasoned viewer would consider, that the ground floor and basement were laid out for an office use. The appellant was also paying

[12] Swale BC v FSS & Lee [2005] EWCA Civ 1568 [2006] JPL 886
[13] Welwyn Hatfield BC v SSCLG & Beesley [2011] UKSC 15

Council tax at this point[14] and the property was being actively marketed as a single dwelling. I find, as a matter of fact and degree, that it would have been open to the Council to take enforcement action at this point in time. Similarly, following the departure of the first tenants in January 2017 after the rent dispute, if the Council had visited the property, they would have seen the same residential layout and the lack of any office layout.

27. Before the appellant's longer term tenants moved in during October 2017, some minor roof works were carried out that took about a week and the water ingress problem took longer to remedy. However, the appellant confirmed that the property was capable of being occupied at this point and he had not used the property for any other purpose. He chose not to market it at a lower rent and instead waited until it was in a pristine condition as it would not have appealed to his usual type of tenant. Nevertheless, the kitchen and living accommodation on the ground and upper floors remained intact and the emails show that the appellant was anxious to rent it out again as soon as possible.

28. At the time the notice was issued I find, as a matter of fact and degree, that the property had been occupied by Mr Adderley and Mr Cullen for approximately 2 years and 8 months. Documents show bills in Mr Adderley's name and rent being regularly wired from America by Mr Cullen. The Council appeared to be of the view that because a company let tenancy agreement was entered into on the 7 October 2017, that this meant the property was used as short term lets.[15] This was not the case as stated in Mr Cullen's statutory declaration and as he explained at the Hearing. In addition, the company let tenancy agreement specified a permitted occupier.

29. During this time Council tax was also being paid. The Council said that the Council tax department is completely separate from the local planning authority "and would not have had any reason to suspect a planning violation at the property". This, however, does not excuse the Council's lack of knowledge about the material change of use as it is understood that Councils are expected to work collaboratively. In many authorities planning enforcement staff have arrangements in place with building control and other departments whereby certain events, such as work starting on a listed building or a change from payment of business rates to Council tax, triggers an alert or email to planning enforcement staff.

30. Indeed, I find the Council's arguments regarding concealment by both Mr Kyson and the appellant are not made out. In the first instance, for such a case to be made the Council needs to demonstrate that there was positive deception. It is unclear to me how Mr Kyson's actions in entering a national competition and permitting photographs of his property to be published in the national press amounts to concealment. In addition, he was openly paying his Council tax dues. With regard to the appellant's actions, it is difficult to sustain an argument on concealment when he advertised his property for rent on more than one occasion. In addition, he also paid his Council tax dues.

31. Mr Kyson may have changed his mind about the use of the property and omitted to regularise the situation. However, looking at all his actions in the round, this does not clear the high bar necessary to reach the conclusion that

[14] Council tax bill 16 October 2015-31 March 2016 exhibited with Ms Darlet's 1st statutory declaration
[15] Appendix C Council's Statement of Case in response to ground (c) appeal

there has been positive deception. Adding some obscured glazing to the kitchen windows also does not amount to positive deception as many buildings in the area in both residential and office use situated on the back edge of the pavement have similar treatments, in the interests of privacy.

32. The Council also refer to the submission of the application for a lawful development certificate in 2019 to support their assertion that the appellant had the intention of obtaining immunity from enforcement action. It is not known whether the appellant carried out a Land Registry search before he bought the property or why he did not seek to regularise the planning status of the building before 2019. Be that as it may, advertising it for rent by engaging, as he did, a high profile company such as Savills and paying Council tax dues also does not clear the high bar necessary to conclude that there has been positive deception by the appellant.

Conclusion

33. It is therefore considered, in the absence of any significant information to the contrary, and as a matter of facts and degree, that a residential use of the whole property began in June 2013. Furthermore, at any point four years after June 2013 the Council could have taken enforcement action against the residential use and there were no intervening uses which interrupted the accrual of a lawful use.

34. Having regard to the totality of the evidence and its overall consistency, I find, on the balance of probabilities, that the appellant's evidence is sufficiently precise and unambiguous to support the single residential use of the appeal property. Furthermore, for the reasons given, the concealment case is not made out.

35. The appeal on ground (d) therefore succeeds.

Overall Conclusion

36. On the balance of probabilities, the appeal on ground (d) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control. The enforcement notice will be corrected and quashed. In these circumstances, the appeals on grounds (f) and (g) do not need to be considered.

D Fleming

INSPECTOR

APPEARANCES on 25 May 2021

FOR THE APPELLANT:

Ms J Donovan	Agent, Rolfe Judd Planning
Ms C Hereward	Solicitor, Hereward Solicitors
Ms E Darlet	Appellant's friend
Mr S Kyson	Former owner of the appeal site

FOR THE LOCAL PLANNING AUTHORITY:

Mr P O'Connor	Planning Enforcement Team Leader
Ms M Clark	Senior Planning Enforcement Officer
Ms A Rokad	Of Counsel
Ms C Stephenson	Senior Lawyer

APPEARANCES on 8 February 2022

FOR THE APPELLANT:

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Mr A Greaves	Of Counsel
Ms C Hereward	Solicitor, Hereward Solicitors
Ms E Darlet	Appellant's friend
Mr J Cullen	Former tenant of the appeal site

FOR THE LOCAL PLANNING AUTHORITY:

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