

Appeal Decision

Site visit made on 23 March 2022

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 4 April 2022

Appeal A - Appeal ref: APP/N5090/C/21/3283910 35 Dartmouth Road, London NW4 3HY

- The appeal is made by Trentpeak Ltd under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the London Borough of Barnet Council.
- The notice was issued on 14 September 2021; reference No. ENF/0804/21.
- The breach of planning control was: Without planning permission, the material change of use to two self-contained flats.
- The requirements of the notice are:
 1. Cease the use of the property as self-contained flats.
 2. Permanently remove from the property all but one kitchen including kitchen units, sinks, cookers and food preparation areas.
 3. Permanently remove from the property the partition walls and doors behind the main front door at ground level that divides the ground floor from the upper floor.
- The period for compliance with the requirements is 6 months.
- The appeal was made on ground (c) as set out in the amended Act.

Summary of decision: The enforcement notice is upheld

Appeal B - Appeal ref: APP/N5090/X/21/3283448 35 Dartmouth Road, London NW4 3HY

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal by the London Borough of Barnet Council to grant a certificate of lawful use or development.
- The appeal was made by Trentpeak Ltd.
- The application, reference 21/2576/191 was registered on 10 May 2021. It was refused by a notice dated 5 July 2021.
- The development for which a certificate of lawful use or development was sought was for the use as 2 no. self-contained flats of the property at 35 Dartmouth Road, London NW4 3HY.
- The application was made under section 191(1)(a) of the Act for a certificate of lawfulness for the use as 2 self-contained flats.

Summary of decision: A certificate of lawfulness is not issued.

Appeal property

1. No. 35 Dartmouth Road is a 2 storey house in a residential road of similar houses. A former single family home, it has been divided into 2 separate self-contained flats.

The enforcement notice appeal on ground (c)

2. An appeal on ground (c) asserts there has not been a breach of planning control. The Appellants, Trentpeak Ltd, said the property had been in use as 2 self-contained flats since about 2007.
3. S.55 (3) of the Town and Country Planning Acts states: *For the avoidance of doubt it is hereby declared that for the purposes of this section—(a) 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.* That is clearly the situation here. Planning permission was required for the change of use of No. 35 Dartmouth Road from a single dwelling to 2 self-contained flats.
4. On the Appellants' evidence, their case is effectively a ground (d) appeal. I deal with the implied ground (d) appeal below. The appeal on ground (c) fails.

The implied ground (d) appeal

5. S.171B of the Act at (2) says: *Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.*
6. That unlawful use has to be shown to have started more than 4 years before the enforcement notice was issued. It has to have continued without interruption during that period for immunity from enforcement action to be acquired. The case of *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226; [2002] JPL 1278 is authority for that position.
7. A substantial amount of evidence was produced by the Appellants purporting to show that No. 35 had been occupied as 2 self-contained flats for many years. Aside from the difficulty of addressing the need to show a continuity of occupation over a 4 year period, it would have to be shown that the breach of planning control was ongoing at the time the enforcement notice was issued. In fact, on the Appellants' evidence, the building was returned to a single residential use for a period when the benefits of the concessions in Schedule 2, Part 1, Class A.1 of the General Permitted Development Order were successfully sought for the construction of a rear dormer extension to the building.
8. The freeholder had written to the Council pursuant to the preceding enforcement case (ENF/00825/17) on 17 September 2017 to say that the house had been reverted to one dwelling, occupied by herself. A Council site visit made on 11 October 2017 showed the second kitchen and dividing doors had been removed. Occupation as a single dwelling was confirmed.
9. After a gap of some 8 months while building work was undertaken, the house reverted once more to use as 2 self-contained flats. The application for a certificate for lawful use of No. 35 Dartmouth Road as 2 self-contained flats was made in May 2021.

10. Section 191 of the 1990 Act provides for anyone to apply to the local planning authority for a lawful development certificate certifying the lawfulness, for planning purposes, of an existing use of land. No such application was made regarding the claim that the use of No. 35 as 2 flats became lawful prior to September 2017. Even if lawfulness had been established, that would have been lost when No. 35 reverted to use as a single dwellinghouse. Lawful use rights are lost by the formation of a new planning unit; or by being superseded by a further change of use, (*Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461). An appeal on ground (d) would have failed.

Lawful development certificate appeal

11. It follows that the lawful development certificate application for the lawful use as 2 no. self-contained flats of the property at 35 Dartmouth Road, London NW4 3HY must also fail. That is because the enforcement notice appeal and this application appeal deal with the same issues. I concluded above that the lawfulness of the use of No. 35 as 2 flats had not, on the balance of probabilities, been established.

FORMAL DECISIONS

Appeal A - the enforcement notice appeal ref: APP/N5090/C/21/3283910

12. The appeal fails. The enforcement notice is upheld.

Appeal B - the lawful development certificate application appeal ref: APP/N5090/X/21/3283448

13. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful development for the use as 2 no. self-contained flats of the property at 35 Dartmouth Road, London NW4 3HY was well founded and that the appeal should fail. I exercise the powers transferred to me in section 195(3) of the 1990 Act as amended.

John Whalley

INSPECTOR