



Appeal Decisions

Site visit made on 14 March 2022

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 May 2022

Appeal A Ref: APP/T5150/C/21/3271512

49 Selsdon Road, London NW2 7NG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Balucci Properties LTD against an enforcement notice issued by London Borough of Brent.
 - The notice was issued on 3 March 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises to a House in Multiple Occupation (HMO) and flats ("the unauthorised change of use") AND without planning permission, the erection of a single storey rear extension to the premises ("the unauthorised development") AND without planning permission, the erection of a dormer roof extension to the rear of the premises ("the unauthorised development").
 - The requirements of the notice are to:
 - STEP 1 Cease the use of the premises as a House in Multiple Occupation (HMO).
 - STEP 2 Cease the use of the premises as flats.
 - STEP 3 Remove all internal partitions, items, materials and debris associated with the unauthorised change of use, including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets.
 - STEP 4 Demolish the unauthorised rear extension and remove all items and debris arising from that demolition, and remove all materials associated with the unauthorised use and development from the premises.
 - STEP 5 Demolish the unauthorised dormer roof extension and remove all items and debris arising from that demolition, and remove all materials associated with the unauthorised use and development from the premises.
 - STEP 6 Restore the internal configuration to the original layout before the unauthorised change of use took place. For the avoidance of doubt, this should include a kitchen/dining room, a separate lounge on the ground floor, 2 bedrooms on the first floor, a bathroom on the first floor, and a WC on the ground floor.
 - STEP 7 Restore the land to its condition before the breach took place.
 - The period for compliance with the requirements is: 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/T5150/C/21/3271516

49 Selsdon Road, London NW2 7NG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Balucci Properties LTD against an enforcement notice issued by the Council of the London Borough of Brent.
 - The notice was issued on 3 March 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a dwelling in the rear garden of the premises.
 - The requirements of the notice are to:
 - STEP 1 Demolish the unauthorised dwelling in the rear garden of the premises.
 - STEP 2 Remove all items and debris arising from that demolition and remove all materials associated with the unauthorised development from 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)(b), (c) and (f) of the Town and Country Planning Act 1990 as amended.
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Decisions:

Appeal A Decision: APP/T5150/C/21/3271512

1. It is directed that the enforcement notice is varied by: the deletion of the following " ,including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets" in STEP 3 of SCHEDULE 4 of the enforcement notice.
2. Subject to the variation above, the appeal is dismissed and the enforcement notice is upheld.

Appeal B Decision: APP/T5150/C/21/3271516

3. The appeal is dismissed and the enforcement notice is upheld.

Preliminary Matters

4. The appellant states that the property is in use as a House in Multiple Occupation (HMO) for 5 individuals and the outbuilding is utilised as a storage room. The appellant has confirmed it would like me to consider these matters under ground (b) and the Council has been given the opportunity to comment on this through the appeal and so I shall consider it accordingly.

Ground (b)

5. An appeal under ground (b) is made on the basis that the matters stated in the notice as constituting the breach of planning control have not occurred, as a matter of fact.

Main dwelling: Appeal A

6. The main thrust of the appellant's case under this ground with respect to the main dwelling, is that it is used as a 5 person house in multiple occupation (HMO). The Town and Country Planning (Use Classes) Order (UCO) 1987 (as amended) sets out that for the purposes of Class C4 a "house in multiple occupation" does not include a converted block of flats to which section 257 of the Housing Act 2004 applies but otherwise has the same meaning as in section 254 of the Housing Act 2004.
7. It is not disputed that the accommodation is occupied by persons who do not form a single household as their only or main residence, that their occupation of the living accommodation constitutes the only use of that accommodation and rents are payable in respect of the living accommodation. What is in dispute is whether or not the building includes self-contained units which would not meet the definition of an HMO for the purposes of the UCO.
8. The appellant applied for an HMO licence, which was approved on 25 February 2019. Although each of the units is registered as a flat with effect from 15 September 2018, registration cannot of itself be determinative since the banding is intended for Council Tax purposes and not planning purposes.
9. It is established in *Gravesham*¹ that premises can be properly regarded as being used as a dwellinghouse where they are a single, self-contained unit of occupation which contains the normal facilities for cooking, eating, washing and sleeping associated with use as a dwellinghouse.

¹ Gravesham BC v SoSE and Another QBD 8 November 1982 (1984) 47 P. & C.R. 142

10. The appellant accepts that the bedrooms are equipped to allow for a degree of independent living but asserts that the rooms do not have any fixed cooking facilities and have only limited space for food preparation, which means that occupiers need to resort to using the communal kitchen facilities on the ground floor of the property. However, I see no reason why portable facilities, such as a microwave or a hob plate, which can clearly enable food to be heated sufficiently to prepare meals, could not comprise normal facilities for cooking.
11. Each of the units is provided with a kitchen area, including a sink, fridge and cupboard space and ensuite bathroom. Photographs, dated 20 August 2020, show a microwave and plug-in hob in the top floor unit, room 5, and a microwave in room 4. While the units do not contain fixed cooking facilities, I saw that they are each provided with cooker switches, which suggests they have been designed to allow cooking to take place.
12. Although rooms 1 and 3 are provided with kitchen facilities, the rooms are modest, with limited space for food preparation. The photographs provided by the Council do not appear to show cooking facilities in these rooms and I saw no evidence of cooking facilities in them during my site visit. I therefore consider it likely, on the balance of probabilities, that the occupants of these rooms use the shared kitchen.
13. There was a microwave in rooms 2 and 4 at the time of my visit. Room 2 appeared relatively spacious, with room for a table and chairs and a sofa. Although it is adjacent to the communal kitchen, given its size, the provision of a microwave, and in the absence of evidence to the contrary, I consider it likely, on the balance of probabilities, that it has been used as a self-contained dwelling.
14. Room 4 is modest in size and much of the space was utilised storing clothing and other household items, which limited manoeuvrability within the room. A microwave was stacked above a storage system, with a kettle above, leaving very little space, if any for food preparation. This is consistent with the photographs provided by the Council. Given the very limited space for food preparation within the room, I consider it highly likely that the occupant uses the communal kitchen to cook and prepare food.
15. Room 5 is located on the top floor and is a reasonable size, with a kitchen area, double bed and space for a table and sofa. There were significant grease stains on the cupboard above the cooker switch, which indicate that the area has been used to cook food for some considerable time. Although there were no cooking facilities in the room at the time of my visit, the question under ground (b) is whether the breach had occurred by the date of issue of the enforcement notice. Given the generous size of the room, the fact that occupants would need to walk up and down two flights of stairs to use the kitchen, the photographic evidence provided by the Council and from my inspection, I consider it likely, on the balance of probabilities, that the top floor has been used as a self-contained dwelling.
16. The Council has provided me with a copy of an application for housing or council tax benefit. The form states that the tenancy started on 18 September 2018, describes the accommodation as 'Flat in a house' and confirms that the occupant does not share any rooms with other tenants. This points towards at least one of the occupants of the building using their room as a self-contained dwelling.

17. The appellant has drawn my attention to appeal reference APP/T5150/C/18/3206971, which concerned an alleged material change of use to a HMO incorporating self-contained flats, and shared accommodation. While I note, in that case, the Inspector found the premises to be an HMO, I do not believe he was suggesting, as a matter of principle, that part of a dwelling could never comprise a self-contained flat or that portable facilities could never constitute cooking facilities for the purposes of applying *Gravesham*.
18. Indeed, the Inspector explains that, in that case, there was only limited space for food preparation, meaning that occupiers would need to resort to the communal kitchen facilities. With respect to rooms 2 and 5, I have found that is not the case. As set out above, the evidence in this appeal points towards the premises having been used as flats and an HMO and I must draw my conclusions based upon the facts of the case before me.
19. The burden of proof in a ground (b) appeal is firmly on the appellant. The appellant has not demonstrated, on the balance of probabilities, that the alleged breach has not occurred. Consequently, the appeal under ground (b) must fail.

Outbuilding: Appeal B

20. The main thrust of the appellant's case under ground (b) with respect to the outbuilding, is that when it was constructed it complied with Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended), which permits buildings etc incidental to the enjoyment of a dwellinghouse and, following a change in circumstances, is now used as a storage room by the landlord and tenants.
21. Although there were no cooking facilities in the outbuilding at the time of my visit, there was a sink, cupboard units and cooker switch above the units. Photographs taken by the Council on 29 November 2018, show what appear to be kitchen units and a fridge within the outbuilding. Although the outbuilding does not appear to be occupied at this time, with building equipment still evident in one of the photographs provided, this points towards the building being constructed as a dwellinghouse and not an incidental building.
22. The Council advise that during a visit on 20 August 2020, the enforcement officer witnessed that the outbuilding was occupied by a family consisting of three people and has provided photographs which show the outbuilding contained a fridge, two microwaves and what appears to be a plug-in hob, with pots and pans.
23. While the building may currently be used for storage, an appeal under ground (b) is made on the basis that the alleged breach has occurred. Even if the outbuilding did not contain kitchen facilities at the time the notice was issued, section 174(2)(b) of the Act is worded in the past tense, so the question is whether the breach had occurred by the date of issue of the enforcement notice. Since the evidence points towards the building having been constructed and used as a self-contained dwelling, the appeal under ground (b) must fail.

Ground (c)

24. An appeal under ground (c) is made on the basis that those matters (the matters stated in the notice, if they occurred) do not constitute a breach of planning control. It is for the appellant to make their case on the balance of

probabilities. As set out in Planning Practice Guidance (PPG), the appellant's evidence should not be rejected simply because it is not corroborated. If a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted.

Main dwelling: Appeal A

25. The main thrust of the appellant's argument under ground (c) in relation to the main building is that its use as a C4 HMO is permitted by Schedule 2, Part 3, Class L of the GPDO and the single storey rear extension and rear dormer, when erected, complied with the provisions of the Schedule 2, Part 1, Class A and B of the GPDO respectively.
26. With respect to the use of the building, the alleged breach is the material change of use of the premises to a House in Multiple Occupation (HMO) and flats. Section 55(3)(a) sets out that 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 it which is so used. Consequently, the change of use to an HMO and flats is development for which planning permission is required.
27. Article 3(5) of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(GPDO) sets out that permission granted by Schedule 2 does not apply if (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful; (b) in the case of permission granted in connection with an existing use, that use is unlawful.
28. It is not disputed that the rear extension and dormer meet the limitations set out in Schedule 2, Part 1, Class A and B, what is in dispute is whether the premises actually benefited from permitted development rights at the time of their construction and if it did, whether the works which have been carried out were constructed to facilitate the unauthorised change of use.
29. The appellant confirms that the construction of the single storey rear extension, rear dormer extension and outbuilding were carried out at the same time. As held in *RSBS Developments Ltd v SSHCLG & Brent LBC* [2020] EWHC 3077 (Admin), even where prior approval has been granted Article 3(5)(a) may be engaged where unlawful works have been carried out. The same principle applies where in the case of permission granted in connection with an existing use, that use is unlawful².
30. As set out above, I have found that the appellant has erected a dwelling in the rear garden. The subdivision of the premises to form separate planning units constituted a material change of use and was unlawful. Consequently, Article 3(5)(b) is engaged and the premises did not benefit from permitted development rights.
31. Furthermore, the appellant states that all works were completed by January 2019 and a completion certificate issued on 16 April 2019. Photographs taken by the Council on 29 November 2018, show the hallway laid out as it was during my visit, rather than the kitchen/dining/living room as proposed under

² Article 3(5)(b) of the GPDO

application 18/3311. I therefore consider it highly likely that the works were carried out to facilitate the breach and were therefore not permitted development.

Outbuilding: Appeal B

32. The main thrust of the appellant's argument under ground (c) in relation to the outbuilding, is that at the time of its construction, it complied with Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development)(England Order 2015. Class E permits buildings etc incidental to the enjoyment of a dwellinghouse. However, as set out above, I have found that the outbuilding which has been erected has been used as a dwelling.
33. Moreover, Class E does not allow buildings when their height would exceed 2.5m in the case of a building within 2 metres of the boundary of the curtilage. The Technical Guidance advises that, if any part of the building... is within 2 metres of the boundary of the curtilage of the house, then the height limit for the total development is restricted to 2.5 metres if it is to be permitted development.
34. Measurements of the outbuilding were taken and agreed by the parties during my visit. The outbuilding is located on a raised platform which measures around 0.17m above ground level and the outbuilding itself measures approximately 2.62m at its highest point, above the raised platform. Consequently, it exceeds 2.5 metres in height and so is not permitted development.
35. Thus, for the reasons given above, the appeals under ground (c) must fail.

Ground (f)

36. An appeal under ground (f) is made on the basis 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. The Council confirms that the purpose of the notice(s) is to remedy the breach of planning control.
37. With regards to the outbuilding, the appellant suggests that residents of the main dwelling may wish to use the outbuilding toilet and shower facilities as a backup. The appellant also advises they are willing to remove the showering and toilet facilities from the outbuilding. However, the notice requires that the building is demolished. Since the breach of planning control alleged is the erection of a dwelling, simply removing the showering and toilet facilities would fail to remedy the breach.
38. Although the GPDO grants permitted development for the erection of buildings which are incidental to the enjoyment of the dwellinghouse, the outbuilding which has been erected exceeds the limitations of the GPDO. Furthermore, its use as storage by the landlord and tenants of the property for storage is not incidental to the enjoyment of the dwellinghouse. I can see no obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal. Consequently, the appeal under ground (f) must fail.

39. While the appellant has not appealed under ground (f) with respect to the main building, I have a duty to check whether any steps are excessive for the purposes of the enforcement notice.
40. Section 173(4) of the Act sets out the purposes of an enforcement notice are (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place.
41. In the event the appellant complies with the notice, the property would once again benefit from permitted development rights. However, as set out above, the rear extension and dormer were erected to facilitate the unauthorised use and did not, therefore benefit from planning permission afforded by the GPDO. Since the appellant has not appealed under ground (a), it is not open to me to substitute lesser steps which would leave unauthorised structures in place.
42. Step 3 requires the removal of all kitchens, en-suite bathrooms/shower rooms and toilets. However, this is inconsistent with Step 6, which requires restoration to the original layout before the unauthorised change of use took place, which includes a kitchen/dining room, a bathroom on the first floor and a WC on the ground floor, amongst other things.
43. Deleting the words 'including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets' would address this inconsistency. I consider such an amendment can be made without causing injustice to either party, since it would lessen the scope of the requirements, while still ensuring the land is restored to its condition before the breach took place.

Appeal A Conclusion

44. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the enforcement notice prior to upholding it. The appeal on ground (f) succeeds to that extent.

Appeal B Conclusion

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

M Savage

INSPECTOR