



Appeal Decision

Site visit made on 22 February 2022

by Roy Curnow MA BSc(Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 07 October 2022

Appeal Ref: APP/N5660/C/20/3253308 97 Broxholm Road, London SE27 0BJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act .
 - The appeal is made by Mr Adnan Chaudhury against an enforcement notice issued by the Council of the London Borough of Lambeth ('the Notice').
 - The enforcement notice, numbered EN/15/00753/3COU, was issued on 7 April 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the premises from a single (C3) dwellinghouse to a large (sui generis) House in Multiple Occupation (HMO) comprising of 7 bedrooms (2 en suite) with 2 shared kitchens, 1 shared lounge and 3 shared bathrooms, along with 2 self-contained studio flats ('the unauthorised HMO and 2 flats').
 - The requirements of the notice are: a) Cease the use of the unauthorised HMO and 2 flats; and b) Remove all internal doors, partitions, kitchen units, appliances, bathrooms electrical water and gas services including boilers and meters, that facilitate the unauthorised HMO and 2 flats; and c) Remove all associated waste and debris resulting from compliance with the above steps, from the premises.
 - The period for compliance with the requirements is 9 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended ('the Act').
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Decision

1. It is directed that the enforcement notice is varied by removing the text "; and" and the whole of paragraphs b) and c) from section 5 of the Notice, 'What You Are required To Do'. Subject to the variation, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Procedural Matters

2. The Notice referred to policies from the Lambeth Local Plan 2015, which was the development plan at the time that the Notice was issued. Since the Notice was issued, that plan has been replaced by the Lambeth Local Plan 2020–2035, adopted September 2021 ('2021 LP'). The Council submitted a copy of the 2021 LP and its policies on which it now relies, with comments on these, and the Appellant then responded to the Council's submission. The planning merits of the case are assessed against the 2021 LP policies.

Application for Costs

3. An application for costs was made by the Council of the London Borough of Lambeth against Mr Adnan Chaudhury. This application is the subject of a separate Decision.

Reasons

Ground (d)

4. This ground of appeal is that at the date the Notice was issued, no enforcement action could be taken in respect of the breach of planning control alleged in the Notice. In this respect, the Appellant has made it clear that his case only relates to the lower ground floor studio flat. This is a legal ground of appeal where the onus lies with the Appellant to make his case on the balance of probability.
5. In the case of the creation of a dwellinghouse, the time limit after which no enforcement action might be taken is set out in section 171B(2) of the Act. This is four years beginning with the date of the breach. Therefore, the Appellant has to demonstrate that the use of the flat commenced on or before 7 April 2016 and that this was continuous for a period of four years and not lost thereafter at the date that the Notice was issued.
6. There is no dispute between the parties that the flat is a dwellinghouse, as it has the facilities that are required for day-to-day living.
7. The primary piece of evidence that the Appellant has submitted in support of his case is an Affidavit. In this he confirms ownership of the property and that the basement studio flat was continuously used as a self-contained unit between 2011 and 2017. Following refurbishment in 2017-2018, he says that this continued and he had no intention to cease the use. An affidavit of this kind carries substantial weight in my deliberations.
8. Whilst he states that there was "no gap of occupancy" during the period from 2011-2017, he goes on to say that there were periods of vacancy during this time. These related to tenants leaving and new tenants being sought.
9. There was a further break in 2017-2018, during which renovations were carried out, described in the Appellant's statement of case as "extensive refurbishment works". The Appellant states that he had no intention to cease the use of the flat during this period.
10. There is little detail in the Affidavit to show continuous use. It acknowledges that there were breaks, but does not provide any detail of their duration. It does not demonstrate, on the balance of probability, that they were not so significant as to break the continuous nature of the use that is claimed. The Affidavit lacks precision in this regard.
11. In these circumstances, supporting and corroborative evidence is required to prove the case. Nothing has been provided in terms of such things as tenancy agreements, statements from the letting agents, statements from tenants or utility bills that might provide the level of proof required.
12. Copies of HMO licences dating from 2015 and 2020 have been submitted and these support the contention that the flat was in existence at those times. However, they are 'snapshots' and do not show proof of the continuous use of

the flat. Similarly, although the Council's investigations date from 2015 this does not demonstrate that the use was undertaken continuously for the required period. There is some evidence of the use of the flat in August 2017, in the Officer's site visit notes, but this is limited to a tenant being present at the time of the visit but leaving later that day.

13. I understand that the Appellant was not a planning professional when he made the comment in 2018 about "making the building safe and habitable as a single dwelling". I similarly understand the actions of his then agent when an application for a certificate of lawfulness was made for a dormer extension to the property, in 2017. The application form for this indicated the property was a dwellinghouse. The Appellant concedes that these appeared "misleading", but I do not find them to be deliberate acts of concealment.
14. However, the comments of his subsequent agent in an email dated 12 May 2020¹ are not explained. In this email he states that he discussed those comments with the Appellant and says that the Appellant provided him with "a timeline of the facts regarding this case". In this he says that the property was being used as a HMO from 2011 until 2017, when this ceased and the use "reverted back to C3 use class (single family dwelling)". Subsequently, he says "the use class of the property reverted back to C4 (house in multiple occupation)". There is no reference to the lower ground floor flat in this timeline. As this part of the Council's evidence is not commented on, nor challenged, in the Appellant's final comments, it casts further doubt on the claim made in the Appellant's Ground (d) appeal.
15. The Council has brought forward evidence from Council Tax and Electoral Role records for the property. As neither provides evidence of actual use of the property, I give them little weight.

Conclusion on Ground (d)

16. For the above reasons the evidence does not prove, on the balance of probability, that no enforcement action could be taken against the use of the lower ground floor as a flat at the time that the Notice was issued. Therefore, the appeal under Ground (d) fails

Ground (a)

Reasons

17. A ground (a) appeal is made on the basis that planning permission should be granted for the breach of planning control referred to in the Notice. There are two cases here: one in respect of the development carried out; the other in respect of a proposed alternative scheme.

Main Issues

The Development Carried Out

18. The Main Issues in the Ground (a) appeal are the effect of the development on:
 - The living conditions of the occupants of the property having particular regard to the size of the units, noise generation and the provision of waste, recycling and cycle facilities;

¹ Appendix 9 to the Council's statement of case

- On-street parking; and
- The delivery of affordable housing.

Living Conditions

19. Drawing A3/03 Revision A, entitled 'Existing Layout Plans', (I refer to this as 'the Drawing'), shows the property to have 3 bedrooms and a bathroom at second floor level. There is no kitchen on this floor, the nearest one is on the first floor, where there is also a self-contained flat and a further communal bathroom. There are a further 3 bedrooms and a bathroom on the upper ground floor.
20. The self-contained flat that is the subject of the Ground (d) appeal is on the lower ground floor, together with a bedroom and a communal kitchen, the latter gives onto a communal living room. There is a further communal space beyond this, in the form of a conservatory, though access to this entails leaving the building and going down a flight of external steps, which also give access to the communal garden. There are two rooms at Basement level. One was used as a gym and the other as a store when I visited.
21. Given my finding in the Ground (d) case, my assessment of the development that has been carried out has to include the lower ground floor studio flat. The Council reports it has a floor area of approximately 18sqm. This has not been challenged by the Appellant, and I saw that it was small. It is well under the minimum 37sqm floor area set out in the Government's 'Technical housing standards – nationally described space standard', March 2015 ('the THS'). This, allied to its single aspect and its position below ground level at the front of the dwelling, thus requiring undue reliance on artificial light, make it substandard and unsuitable for residential use.
22. The Council suggests that the first-floor flat has a floor area of 33sqm. Again, this is not challenged by the Appellant, so I take it to be the case. Whilst it enjoys good levels of natural light, it is below the 37sqm floor area threshold in the THS. This is a minimum figure and, as such, a flat that does not achieve the threshold is, by definition, sub-standard.
23. I have not been provided with floor area standards for bedrooms in a HMO. The Council suggests that their sizes range from 8sqm to 18sqm, though this differs slightly from what is shown on the Drawing. My impression was that, save for the rooms marked B5 and B7 on the Drawing, the bedrooms were small and offered cramped accommodation to their occupants. This points to an over-intensive use of the property.
24. The sub-standard nature of the accommodation is further evidenced by the fact that the occupants of most of the bedrooms have to move between floors to access kitchen and other amenity space, save for bathrooms.
25. The Council tells me that the property has a very poor accessibility rating, its PTAL rating being 1b. The Appellant does not dispute this rating, so I take it to be the case. Although he states that there are other properties in the area that have been sub-divided into flats, this does not provide adequate justification for departing from the Council's policy aim to secure accessible development set out in 2021 LP Policy H9.
26. The Appellant's statement that noise attenuation can be achieved through the Building Regulations might be read as accepting that there is presently a noise

problem for the occupants of the flats and bedrooms. However, the Council has provided insufficient evidence to demonstrate that the appeal should be dismissed for this reason.

27. Amongst other things, Policy H1 of the 2021 LP supports development proposals that provide a mix of housing. Its supporting text refers to 'Lambeth's Design Code SPD' in this regard. I have not been provided with a copy of this document, nor has the Council provided adequate justification for its assertion that the mix in the property is inappropriate. Thus, I cannot conclude that this is the case.
28. My finding on this main issue is that the development that has been carried out fails to provide adequate living conditions for all of its occupants by reason of the size of the two flats and most of the HMO bedrooms. This development is, therefore, contrary to the terms of 2021 LP Policies H5 and H6, London Plan Policy D6 that, amongst other things, require dwellings to be of an adequate size. It is also contrary to the terms of the THS for this reason. From the evidence before me, I also find that the site lies in a location with poor accessibility, contrary to 2021 LP Policy H9

Waste and Recycling Facilities

29. On this issue, the aims of Policies H6 and Q12 of the 2021 LP are much the same; there should be appropriate provision of waste and recycling facilities, and this should be provided in a manner that does not cause harm to the character and appearance of the area.
30. As with many other properties on Broxholm Road, waste bins and recycling facilities are stored to the front of the property and, I am told, have been for many years. The success of the manner in which bins are stored along the road, and by extension their effect on the street scene, varies. I saw well-positioned and screened facilities that had no adverse effect on the character and appearance of the area, and I am of the view that a similar outcome could be achieved on the appeal site.
31. As suggested by the Appellant, this is a matter that might be controlled through the use of a suitably worded condition, and I note that the Council proposed the use of such a condition had the appeal been allowed. Therefore, I do not refuse permission for reasons of a lack of formal waste and recycling facilities. This would achieve the aims for waste and recycling facilities set out in 2021 LP Policies H6 and Q12.

Vehicle and Cycle Parking Provision

32. Initially, the Council's position in its statement of case was that no parking survey had been undertaken to indicate how the use had impacted on vehicle parking stress in the area. Of the 2021 LP policies that the Council has brought to my attention, there is reference to parking in Policies H6 'Residential Conversions' and H9 'Hostels and Housing in Multiple Occupation'. Both refer to standards in 2021 LP Policy T3.
33. As I was not given a copy of Policy T3, I cannot be sure that such a survey was required and do not find against the scheme on this basis. I find similarly with regards to the provision of cycle spaces; however, I do note that submitted plans show how cycle parking might be provided.

Affordable Housing

34. At the time that the Notice was issued, amongst the terms of Policy H2 of the 2015 Lambeth Local Plan, where a proposal resulted in the creation of less than 10 new residential units a financial contribution to the provision of off-site affordable housing would be sought. This requirement has changed in the 2021 LP, its Policy H2 has no requirement for a financial contribution or the provision of affordable dwellings.
35. The Council suggested that, as the unauthorised conversion was substantially completed and occupied prior to the adoption of the 2021 LP, the works should be assessed against the terms of the 2015 Plan. Whether or not it is fair on those that followed due process at the time Policy H2 was in force is immaterial; there is no basis for taking that position. It is a well-established position that development proposals are assessed against the terms of the development plan in force at the time of the decision. Therefore, I do not find against the development for this reason.
36. The Appellant has referred to the prospect of using the property as a HMO, utilising permitted development rights. It seems that this would be an option but would be a matter for him and the Council. Here, I am assessing the development that has been undertaken.

Other Matters

37. Following the adoption of the 2021 LP, the property is no longer located in an area that is identified as being under housing stress "where all dwellings suitable for occupation by families are protected". 2021 LP Policy H6 refers to the protection of dwellings suitable for family occupation that have less than 130sqm. However, as the evidence shows that the building as originally constructed was greater than 130sqm its terms do not apply to the scheme before me. Therefore, there would be no loss of a family-sized dwelling, in planning policy terms.

Alternative scheme

38. In the deemed planning application made by the Appellant, he proposes an alternative scheme.
39. The principle of submitting an alternative scheme in this way is set out in s177 of the Act. However, the deemed application has to relate to the development that is set out as the breach of planning control in the Notice.
40. This is not the case in the alternative scheme. It proposes the mixed use of the property as a 6-bedroom HMO, set over the upper ground, first and second floors, and a single three-bedroom flat over the lower ground and basement floors. It is a materially different proposition from the breach set out in the Notice and does not represent the whole or part of the matters in it. As such, I cannot take this proposal into account or comment on it. This does not, however, preclude the Appellant from applying to the Council for the development shown in the drawings.

Ground (f)

41. An appeal under Ground (f) is that 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. In this case, it is clear that the purpose of the Notice was to remedy the breach of planning control.

42. The Appellant requests that the requirements of the Notice be amended to clarify that the property can be used as a HMO under Use Class C4 or as a dwellinghouse under Use Class C3. The statutory requirements of a Notice are set out in s173 of the Act. Whilst it is necessary for the Notice to set out what the alleged breach of planning control is, there is no requirement to set out how land can lawfully be used. The lawfulness of future uses of the property is a matter between the Appellant and the Council and it would neither be appropriate nor necessary for me to vary the Notice in this regard.
43. Secondly, the Appellant states that requirement b) is excessive. He accepts that the kitchen in the first floor flat would have to be removed, and, given my decision on the ground (d) case, this must by extension include that in the lower ground floor flat. However, he states that the terms are unclear in respect of which doors should be removed and that none were installed to facilitate the use. He makes an argument similar to the latter point in respect of the shared kitchens and en-suites in certain rooms. He says that requirement c) is entirely unnecessary, as it neither relates to the alleged breach of planning control, nor to any remedy to amenity.
44. The Council's response is succinctly set out in its Final Comments. It states that "the requirements of the notice clearly seek to remedy the breach referred to in paragraph 3 of the notice by simply requiring removal of those works that facilitate the breach as per 173(4)(a) of the Act. In light of this, the requirements of the notice cannot be considered to be excessive and should be upheld in their entirety".
45. I find that there is ambiguity in requirement b) of the Notice, as, for example, There is no explanation as to why "all" doors, partitions, appliances, electrical, water and gas services need to be removed. Given this, and notwithstanding the Appellant agreeing that the kitchen in the first floor flat might be removed, in this case I find that merely complying with requirement a) would remedy the breach of planning control as the use that led to the issuing of the Notice would cease. Therefore, I will vary the terms of the Notice by omitting requirements b) and c). To this limited extent the Ground (f) appeal succeeds.

Ground (g)

46. There is no statutory requirement for the Council to provide notice of its intention to take enforcement action. However, I can see how the issuing of the Notice shortly before the onset of the Covid-19 pandemic might have taken the Appellant by surprise. Notwithstanding this, I note that the Council gave 56 days before the Notice came into effect rather than the required minimum of 28 days.
47. There would be no doubt in my mind that whilst the country was subject to lockdown, compliance with the terms of the Notice would be very difficult. However, this is no longer the case and does not provide justification to extend the period for compliance.

48. The Appellant has made the point that the implications of the Notice are a gross infringement of the Human Rights of the property's occupants. The Notice would certainly interfere with their rights regarding their private life and home, under Articles 1 and 8 of the European Convention on Human Rights as incorporated by the Human Rights Act 1998.
49. However, the decision to issue a Notice was a lawful one, based on a legitimate concern regarding a development that was contrary to the Council's adopted policies. As such, I find that the use of the Council's statutory powers in this regard was justified, proportionate and reasonable.
50. In the light of the above, I find that the 9 months that the Council has allowed for compliance is reasonable and that the request for 18 months to comply made by the Appellant should be refused. The Ground (g) case fails.

Conclusion

51. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended

Roy Curnow

Inspector