The Planning Inspectorate

Appeal Decisions

Site visit made on 24 April 2023

by Alexander Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 May 2023

Appeal A Ref: APP/N5090/C/22/3301974
Land at 213 Regents Park Road, London N3 3LD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Denis Shmilli against an enforcement notice issued by London Borough of Barnet.
- The notice was issued on 19 May 2022.
- The breach of planning control as alleged in the notice is the sub-division of an existing ground floor retail unit into front and rear units and the material change of use of the rear unit (as shown edged red on the attached plan) so created to use as a dwellinghouse.
- The requirements of the notice are to:
    1. Cease the use of the ground floor rear unit as a self-contained residential flat
    2. Restore the land to the state in which it was prior to the breach. These works should be in accordance with drawing reference, 257; drawing no P01 of application reference, 21/6338/RCU and must include the removal of all aspects pertaining to self-contained residential use. For instance the works must include the removal of the kitchen/bathroom/partition wall etc; unless such things were there before.
    3. Permanently remove from the property all constituent materials resulting from the works in 1 and 2 above.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (d) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Appeal B Ref: APP/N5090/W/22/3301973
213 Regents Park Road, Finchley, London N3 3LD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr & Mrs Shmilli against the decision of London Borough of Barnet.
- The application Ref 21/6338/RCU, dated 2 December 2021, was refused by notice dated 4 April 2022.
- The development proposed is the change of use of the rear of the ground floor as a new residential unit.

Decision – Appeal A

1. The appeal is allowed and the enforcement notice is quashed.

Decision – Appeal B

2. The appeal is dismissed.

Appeal A – The ground (d) appeal

3. In pursuing this appeal on ground (d), the onus is on the appellant to demonstrate on the balance of probabilities that at the time the Enforcement Notice (the Notice) was served on 19 May 2022, it was too late to take enforcement action against the alleged breach of planning control. The relevant test of the evidence is 'on the balance of probability' (i.e. that it is more probable than not). If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.

4. The appellant contends the flat was completed in December 2017, which is corroborated by the statutory declarations of the appellant; Selman Doko, the builder who helped with the conversion works on the flat; and, Martin Shmilli, the son of the appellant. Exhibit DS2 attached to the appellant's statutory declaration includes photographs of the interior of the flat, dated 11 December 2017, which show the bathroom and kitchen installed and the flat decorated, appearing to be substantially completed.

5. The Council question the provenance of these photographs. However, in the absence of any evidence to indicate that they have in some way been edited, I have accepted them as true.

6. The Council argues the appellant has provided inconsistent start dates for when the change of use occurred. In the appeal, the appellant claims it was December 2017. However, on the planning application form for the change of use[1], it states the works to the flat started 1 July 2020 and the change of use was completed 1 March 2021. The appellant argues that the application form was completed online and these dates were 'guessed' simply in order to enable the form to be submitted. These dates do not correlate with any of the supporting evidence submitted by the appellant, including the statutory declarations and photographic evidence. Furthermore, they are not consistent with the Google Streetview image, dated April 2018, which clearly shows the front door and kitchen window of the flat in situ. Consequently, I consider that it is reasonably likely that the dates on the application form were not accurate and therefore I attribute them very little weight.

7. Given the above, I am satisfied that it has been sufficiently demonstrated that, on the balance of probabilities, the flat was completed in in December 2017.

8. The crux of the matter is now whether the flat has been occupied for a continuous period of four years prior to the date of the service of the Notice. In the High Court judgment of *Swale*[2] it was confirmed that there is a difference between an established dwellinghouse where an occupier does not have to be continuously or even regularly present for the dwelling to remain in use as such, and where there is no established use. The use must be 'affirmatively established' over the four year period. In this context, it is necessary to consider whether there was any period during the four years when the flat was not physically occupied, even though available for such, and the Council could

[1] Council ref: 21/6338/RCU
[2] Swale BC v FSS & Lee [2005] EWCA Civ 1568; [2006] JPL 886

not have taken enforcement action against the use. It is also important to consider whether any periods of non-occupation were de minimis.

9. The appellant has provided a timeline highlighting when the flat was occupied and by whom, spanning the period of occupation from December 2017 onwards. Over this period, the flat has been occupied by numerous tenants, including the appellant, for various tenancy periods. There is no indication of gaps in occupation since December 2017 that would be regarded as anything other than de minimis. The statutory declarations corroborate the timeline, confirming there have been various occupiers of the flat including the appellant on a number of occasions.

10. I note there were changes in the tenancy of the flat during the Covid-19 pandemic. However, the appellant's explanation that these changes took place when lockdown rules were eased is a sufficiently reasonable explanation.

11. There is a lack of evidence such as council tax bills, utility bills or tenancy agreements, which often help support such cases. However, given the informal nature of the tenancy of the flat, I acknowledge such evidence may not exist.

12. I have had regard to the Certificate of Completion, dated 14 July 2017. The works pertaining to this certificate were to the upper floor flat. There is no mention on the certificate of any works to the appeal property. However, the appellant does not claim that it does, only that the works to the appeal flat took place following the works to the upper floor flat.

13. Overall, I consider the appellant's evidence is adequately precise and free of significant ambiguities to demonstrate that on the balance of probabilities the flat has been occupied for a continuous period of four years prior to the service of the Notice. The appeal on ground (d) therefore succeeds and the Notice will be quashed.

14. As the Notice will be quashed, there is no alleged breach against which the deemed planning application and ground (a) can be assessed. Accordingly, I am unable to proceed to determine whether planning permission should be granted in this case, with regard to the appeal made under s174.

Conclusion on Appeal A

15. For the reasons given above I conclude that the appeal succeeds on ground (d). Accordingly, the enforcement notice is quashed. In these circumstances the appeal under ground (a) set out in section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Appeal B

Preliminary Matter

16. The appellant has submitted an amended plan which would remove the internal wall between the bedroom and the kitchen/living room to create a studio flat and remove the external canopy. At the time of my site visit, the canopy had already been removed. I note the Council's objection to the consideration of the amended plan as part of the appeal. However, given the minor nature of the works involved, particularly as the canopy has already been removed, I am

satisfied that parties would not be prejudiced by my consideration of the amendments.

Main Issues

17. The main issues are whether the development provides adequate living conditions for existing and future occupants, with regard to outdoor private amenity space, internal floor space, outlook, daylight and privacy.

Reasons

18. The appeal property comprises a single-storey flat consisting of a kitchen/living room, bedroom, small utility room and a bathroom. The overall floorspace of the flat is approximately 39.5 sqm. This falls far short of the minimum requirements for a 1 bed 2 person unit set out in Table 3.1 of the London Plan, which states it should be a minimum of 50sqm. Whilst the bedroom is of a good size, the kitchen/living area is particularly small.

19. The flat does not benefit from any outdoor private space. I note that the area to the front of the flat is used exclusively for the enjoyment of the occupants of the flat. However, it is open to clear views from the service road, which provides access to numerous properties, enabling passers-by to have full views of this area. I acknowledge that landscaping could enhance the privacy of this area; however, I am not satisfied that it could sufficiently do so without having significantly harmful effects on other living conditions, such as outlook from the garden and the kitchen/living room window. Given these concerns, the imposition of a condition requiring such landscaping would not be appropriate.

20. The only external source of natural light serving the bedroom is a single roof light. There are also high-level windows between the bedroom and kitchen/living room to provide additional daylight. Based on my observations during my site visit, the bedroom was adequately served by daylight.

21. However, the only outlook from the bedroom is provided via the roof light, which is limited to that of the open sky. Moreover, the kitchen/living room is served by a single window. Consequently, the flat only has a single aspect with a single window. The appellant suggests that it is possibly a double aspect due to the side window in the utility room. However, this window is obscure glazed and provides no outlook. As such, I do not consider it to be an additional aspect. This restricted outlook would have an unacceptable detrimental effect on the well-being of its occupants.

22. Although the kitchen/living room window is set back from the service road, it is clearly open to views into it from the road by passers-by and occupants/visitors of the upper floor flat when traversing the adjacent external staircase. As a result, there would be an unacceptable degree of overlooking. Privacy screening and landscaping could be installed to prevent overlooking. However, as with the outdoor amenity space issue, this could have a detrimental effect on the outlook from the window.

23. Overall, the limited floor space, outdoor private amenity space, privacy and outlook represents an oppressively confined form of residential accommodation.

24. Whilst the creation of a studio flat through the removal of the internal wall would result in the flat complying with the internal floor space requirements for

a studio, it would still have insufficient outdoor private amenity space, privacy and outlook, as I have set out above.

25. I find therefore that the development provides inadequate living conditions for existing and future occupants with regard to outdoor private amenity space, internal floor space, outlook and privacy. As such, it is contrary to Policy D6 of the London Plan, Policy CS5 of the London Borough of Barnet's Local Plan Core Strategy 2012 and Policies DM01 and DM02 of the London Borough of Barnet's Local Plan Development Management Policies 2012, which, amongst other things, seek to ensure development provides adequate living conditions. It would also fail to accord with the London Borough of Barnet's Sustainable Design and Construction Supplementary Planning Document 2016 and the London Borough of Barnet's Residential Design Guidance Supplementary Planning Document 2016, which provide guidance on providing adequate living conditions.

Other Matters

26. The flat utilises an under-used brownfield site. Furthermore, I acknowledge that the flat has provided residential accommodation for many occupants and contributes to the supply of housing in the area. However, individually or cumulatively, these matters do not outweigh the harm I have identified.

27. I have also had regard to my finding on Appeal A, in that the flat was immune from enforcement action at the time the Notice was served. Be that as it may, that does not mean that I am bound to grant planning permission for it. In this instance, the development fails to accord with the development plan and the fact it was immune from enforcement action at the time the Notice was served does not outweigh this harm.

Conclusion on Appeal B

28. For the above reasons, having considered the development plan as a whole and all material considerations, the appeal is dismissed.

Alexander Walker

INSPECTOR