



Appeal Decision

Site visit made on 14 September 2023

by D Hartley BA(Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22ND SEPTEMBER 2023

Appeal Ref: APP/M2270/C/22/3305147

Land at 72 Camden Road, Royal Tunbridge Wells, Kent TN1 2QP

- 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 Peter Jeremy Bowring of Epic Capital UK Limited against an enforcement notice issued by Tunbridge Wells Borough Council.
 - The enforcement notice was issued on 28 July 2022.
 - The breach of planning control as alleged in the notice is without planning permission the material change of use of the front part of the ground floor and entire basement to a self-contained flat.
 - The requirements of the notice are 1. Permanently cease the residential use of the shop/office shown in the shaded yellow area on the attached Plan A; 2. Permanently remove all domestic items, fixtures and fittings, personal belongings and furniture brought into the areas shaded yellow on the attached Plan A for the purposes of, and in connection with the residential use. Permanently dismantle and remove all kitchen facilities, including any fridge, (apart from that within the alcove marked "Kitchenette" on the attached Plan A) freezer, sink (apart from that within the alcove marked "Kitchenette" on the attached Plan A), oven/cooker, hob, domestic washing machine and dishwasher located within the areas shaded yellow on the attached Plan A, and 3. Permanently dismantle and remove any shower or bath within the areas shaded yellow on the attached Plan A.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended (the Act). 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.
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Decision

1. It is directed that the enforcement notice be corrected by deleting all of the words in paragraph 4.1 and replacing them with '*It appears to the Council that the above breach of planning control has occurred within the last four years (section 171B(2))*'. Subject to this correction, the appeal is dismissed and 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 Matter

2. A pre-arranged accompanied site visit was scheduled to take place on 14 September 2023. While representatives from the local planning authority (LPA) were in attendance, neither the appellant nor a representative turned up to enable access inside the building. On the site visit, and, at my request, the LPA contacted the appellant by telephone to find out why a representative had

- not attended the site visit. In response, the LPA comment that the appellant stated that there was a *'refusal to attend the site visit and that judicial review proceedings would be pursued'*. This is a matter that is also separately addressed in an application for costs submitted by the LPA and associated correspondence sent to the Planning Inspectorate on 14 September 2023.
3. Given the above, it was necessary for me to abort the accompanied site visit on 14 September 2023. While I was able to see the appeal property from the main road, it was not possible to see inside the building owing to the presence of blinds on the front windows which were in a down position. Even if the blinds had been up, I would not have been able to see in the basement. Notwithstanding the appellant's comment about refusing to attend the site visit and pursuing judicial review proceedings, I nevertheless afforded him an opportunity to attend a further accompanied site visit to take place on 25 September 2023. This was communicated in the form of a letter sent to him on 19 September 2023.
 4. The appellant responded on 19 September 2023 that *'we are disappointed that the initial site visit could not be completed, despite our client, Epic Capital (UK) Limited, having notified the estate agency responsible for this property, Lettings Homes PropTech, copied some time ago. Would it make sense for you to reach out to them direct?' and 'Kath from the agent, copied, will endeavour to obtain access but obviously can't guarantee that the tenants will cooperate; given the implications for the destruction of their home. We should highlight that our client has no control over whether the tenants actually do grant access'*.
 5. In response to the above, a letter was sent to the appellant on the same day requesting that he seek assurances from all concerned, particularly the letting agent and tenant, that access would be permitted inside the building on 25 September 2023. The letter asked for such assurances to be communicated to the Planning Inspectorate by no later than 20 September 2023. The letter made it clear that in the absence of certainty, and a clear response from the appellant about this matter, it would be necessary for me to determine the appeal on the evidence that is before me. No such response was received from the appellant by the given deadline, despite a further letter chasing a response on 21 September 2023.
 6. Despite not responding in accordance with the deadline regarding the 25 September 2023 accompanied site visit, the appellant responded on 22 September 2023 stating that *'neither we nor the agency can reasonably be requested to provide this kind of "guaranteed" consensual access into the building next Monday at 12.30 pm as requested'* and that *'Lettings Homes, has notified the tenant about the requested site visit. Despite her efforts so far to obtain cooperation, she has not yet received a response from the tenant'*. In this case, it was clearly incumbent on the appellant to have liaised with the tenant a long time ago and particularly when the Planning Inspectorate provided details of the accompanied site visit taking place on 14 September 2023.
 7. Given the absence of any reasonable certainty about being permitted access inside the building, I have determined this appeal on the written evidence that is before me as well as the site visit that took place on 14 September 2023, i.e., what I could see from public land. However, and, on reflection, given my

subsequent reasoning and conclusions on the ground (a) appeal below, I do not consider that the absence of a second accompanied site visit has materially impacted on my conclusion in respect of the deemed planning application. In other words, and given the evidence that is now before me, a further accompanied site visit would not have led me to reach a different conclusion in respect of the ground (a) appeal and the deemed planning application.

Applications for costs

8. An application for costs was made by Mr Peter Bowring of Epic Capital UK Limited against Tunbridge Wells Borough Council. An application for costs was made by Tunbridge Wells Borough Council against Mr Peter Bowring of Epic Capital UK Limited. These applications are the subject of separate Decisions.

The Enforcement Notice

9. Concern is raised by the appellant that the drawing attached to the notice shows a lightwell. I was not able to see a lightwell on my site visit, i.e., within land that is visible from the public domain and indeed the appellant has indicated that no such lightwell exists. However, the purpose of the drawing attached to the notice is simply to delineate, in 'shaded yellow' colour, the space relating to the breach of planning control. Its purpose is to also define what is required under section 5 of the enforcement notice. In this respect, it does not matter that the plan is not quite accurate in terms of showing a lightwell, or indeed any other matter, and, in this regard, it is not necessary for me to consider correcting the notice.
10. The appellant has questioned what 'scheme' I am considering. For the avoidance of doubt, and given the comments made by the appellant, I have determined the ground (a) appeal based on the alleged breach of planning control (i.e., material change of use only) as outlined in section 3 of the enforcement notice (i.e., that which had taken place when the enforcement notice was issued) and the floor space/use shown in a 'shaded yellow' colour on the attached 'Plan A'. I am satisfied that the enforcement notice is clear and certain in these respects.
11. Paragraph 4.1 of the notice states '*it appears to the Council that the above breach of planning control has occurred within the last ten years (section 171B(3))*'. However, the allegation relates to a material change of use of part of the ground floor and entire basement to a self-contained flat. Flats are dwellinghouses for the purposes of the Act. As the allegation relates to change of use to a single dwellinghouse, the enforcement notice should have said '*it appears to the Council that the above breach of planning control has occurred within the last four years (section 171B(2))*'. Indeed, section 171(B)(2) states '*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*'.
12. I am satisfied that I can correct the enforcement notice, as above, without injustice being caused to the main parties. This is because, as detailed below, the appellant's appeal under ground (d) is not made based on immunity arising from the passage of time. Furthermore, and, in any event, the evidence before me (as detailed below) demonstrates, on the balance of probability, that the alleged breach of planning control did not occur more than four years ago. I

shall therefore correct the notice at paragraph 4.1 by deleting all of the words and replacing them with *'it appears to the Council that the above breach of planning control has occurred within the last four years (section 171B(2))'*.

Reasons

Ground (b) appeal

13. The appeal made on ground (b) is on the basis that the matters comprising the alleged breach of planning control have not occurred. The appellant's claim under ground (b) is that the breach of planning control is permitted development. This is not a ground (b) matter.
14. The appellant does not provide any objective or compelling evidence to demonstrate that when the enforcement notice was issued, the breach of planning control had not occurred, i.e., that the front part of the ground floor and the basement was in use as a self-contained flat. The appellant does not provide any persuasive evidence to demonstrate that the material change of use of the building did not occur. Therefore, I conclude that the ground (b) appeal fails.

Ground (c) appeal

15. The appeal made on ground (c) is that the matters alleged do not constitute a breach of planning control. The claim made by the appellant is that the breach of planning control is permitted development and does not require planning permission as Class MA of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) permits the conversion of uses that fall within use Class E to residential. It specifically states that the following is permitted development: *'development consisting of a change of use of a building and any land within its curtilage from a use falling within Class E (commercial, business and service) of Schedule 2 to the Use Classes Order to a use falling within Class C3 (dwellinghouses) of Schedule 1 to that Order'*.
16. The evidence is that the front part of the ground floor of the building and its basement was approved as office space¹ (originally use Class A2 but now use Class E). However, paragraph M.A.2 (2) (Conditions) states that development is permitted under Class MA subject to the condition that *'(2) Before beginning development under Class MA, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required'*. The evidence before me is that an application for a determination as to whether the prior approval of the local planning authority would be required for the breach of planning control did not take place before the beginning of the development.
17. Given the above, the breach of planning control is not therefore permitted development and hence planning permission is required. It is clear from the evidence before me that the local planning authority made this clear to the appellant prior to the appeal being lodged. For the above reasons, I conclude that the ground (c) appeal fails.

¹ Approved as part of planning permission 20/00543/FULL dated April 2020

Ground (d) appeal

18. An appeal made on ground (d) is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. In an appeal against an enforcement notice on ground (d), the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is on the balance of probability.
19. The appellant's claim on ground (d) is as per that made on ground (c), i.e., that the breach of planning control is permitted development. This is not a relevant matter when considering an appeal made on ground (d). A ground (d) appeal can only succeed, in this case, if it is too late, by virtue of Section 171B(2) of the Act to take enforcement action. In this case, the appellant does not make a case or provide any compelling evidence to demonstrate that the self-contained flat has been used for four or more years. Furthermore, and, in any event, the Council's evidence in the form of Google Streetview imagery dated October 2020 includes a frontage advertisement that reads 'Hot Desks', that the flat has been entered on the list liable for Council tax since 18 December 2021, and the appellant declared on 2 October 2019 (part 5 of the planning application form for 19/02870/FULL for the conversion of the basement/front ground floor to a flat) that the development had not yet commenced.
20. In the absence of any compelling contrary evidence, the above casts sufficient doubt, on the balance of probability, of any claim that the self-contained flat has been used for four or more years.
21. For the above reasons, I conclude that the ground (d) appeal fails.

Ground (e) appeal

22. The appeal made on ground (e) is that copies of the enforcement notice were not properly served on everyone with an interest in the land as required by section 172 of the Act.
23. The claim made is that notice was not served on everyone with an interest in the land, namely EPIC Capital UK Limited who have an address in Blackpool. However, there is nothing before me to indicate that a copy of the enforcement notice was not served on EPIC Capital UK Limited. The address in Blackpool is listed, along with others, as part of the enforcement notice. The local planning authority (LPA) provide proof of postage at appendix 6 of their statement of case and this includes Epic Capital UK Limited and the owner.
24. Even if it were the case that Epic Capital UK Limited did not for some reason receive a copy of the enforcement notice, perhaps because it did not refer to '72 D', such a company is clearly aware of the appeal as it is the appellant in terms of this enforcement appeal. Therefore, it could not be argued that any injustice has been caused to Epic Capital UK Ltd arising out of any alleged claim that a copy of the enforcement notice had not been properly served upon them. Despite claims from the appellant to the contrary, there was no requirement for the Council to serve copies of the enforcement notice on the other three lawful flats in the building (i.e., 72A, 72B and 72C).
25. In addition, I have reviewed the LPA's land registry details, which are not disputed by the appellant, and am satisfied that the LPA did appropriately serve

a copy of the enforcement notice on all those that had a material interest in the land. The LPA's evidence did indicate that Hampshire Trust Bank PLC and Blake Morgan LLP did have a material interest in the land and hence it was appropriate that a copy of the enforcement notice was served upon them. If that position has changed, then no injustice has been caused to such parties.

26. The appellant makes the claim that the LPA has breached the Data Protection Act and the appellant's right to privacy. This is not a matter that is directly relevant to a ground (e) appeal. There are separate legal channels to pursue in respect of such matters, should that be necessary and justified.
27. For the above reasons, I therefore conclude that the ground (e) appeal fails.

Ground (a) appeal and the deemed planning application

Background and Main Issues

28. Prior to the LPA issuing the enforcement notice, an appeal was made under section 78 of the Act in respect of the 'creation of 1 x 2-bedroom flat'². The proposal was not identical to that being considered as part of this appeal, but nonetheless the proposed flat did include residential use of the same front part of the ground floor and the entire basement as a proposed flat. The Inspector's decision (i.e., dismissed appeal), dated 16 February 2021, is a material consideration of significant weight in terms of determining this ground (a) appeal and the deemed planning application. Some of the conclusions reached by the Inspector in that appeal are pertinent to the consideration of this appeal.
29. The appeal is made under ground (a) which is that planning permission ought to be granted in respect of the breach of planning control alleged in the notice. I have considered the reasons for issuing the enforcement notice and the main issues are the effect of the unauthorised development on i) the living conditions of existing and future occupiers in respect of daylight, sunlight and outlook and ii) the character and appearance of the area.

Living conditions

30. As explained in my procedural matter paragraph above, the appellant was not able to confirm that I would be given access to the inside of the building as part of an accompanied site visit. However, the evidence before me indicates that the main windows to the self-contained flat are those within the frontage of the building onto the main road. I could see from my site visit that these are currently fitted with blinds. To ensure acceptable privacy for occupiers of the flat, I find that it would be necessary to have blinds in a closed position for most of the time and/or have in place opaque glass. Consequently, and, in the absence of any evidence that there are other windows that would provide acceptable outlook, I find that the development has had a materially harmful impact on the living conditions of occupiers of the self-contained flat.
31. Furthermore, and, for these reasons, the evidence does not persuade me that the self-contained flat has acceptable levels of natural daylight and sunlight penetration. Therefore, the evidence is that there would likely be an over reliance on artificial light sources. I reach this view even if it were possible to confine and reasonably control areas within the basement as non-habitable

² Appeal Ref APP/M2270/W/19/3243971

room space, such as a utility. Even if this did take place, and was enforceable, it would not overcome the identified harm that has been caused to habitable room areas, particularly at ground floor level.

32. I am not certain whether it would be possible to provide a lightwell to the basement based on the appellant's land ownership. In any event, the breach of planning control relates to the development that was in place when the notice was issued and there is no evidence that there was a lightwell. Even if I could impose a condition relating to a lightwell, or any other window, I have no certainty that such development could take place within the appellant's control or what specific impacts this might have on surrounding properties/land, occupiers of the building or the character and appearance of the area. In addition, I do not have appropriate detailed plans showing any such proposal.
33. For the above reasons, I conclude that the evidence indicates that the self-contained flat has a very oppressive feel and material harm has been caused to the occupiers of it in terms of outlook and light. In this regard, the development does not accord with the amenity requirements of policy EN1 of the adopted Tunbridge Wells Borough Local Plan 2006 (LP) and paragraph 130(f) of the National Planning Policy Framework 2023 (the Framework). In reaching this view, I have considered the appellant's references to No. 116 Camden Road. The appellant does not provide me with sufficient detail to show that the internal living environments are the same, and, in any event, I have determined this appeal on its individual planning merits.

Character and appearance

34. The appeal building is located within an established shopping area and is surrounded by other retail and commercial uses. While my site visit was only a snapshot in time, I was able to appreciate that the area/buildings had a vibrant and active character given the mix of mainly retail and commercial properties within the locality. In my judgement, such attributes add positively and distinctively to the character of the area.
35. As the self-contained flat is being used for residential purposes, it would be necessary to afford occupants more privacy than would be the case if this part of the building were used for its permitted Class E use. It is likely that for prolonged periods of time, curtains or blinds would be needed for the frontage windows. Indeed, this was the case when I visited the site, and they were in a down position.
36. While it would be possible, as an alternative, to include opaque glass to the windows, this would equally have a harmful character impact in terms of departing from what would likely be a more 'active' frontage associated with the permitted Class E use. Therefore, while the use of opaque glass (i.e., controlled by means of the imposition of a planning condition) need not, subject to careful detailing, be unduly harmful in design terms, I find that the loss of an active frontage arising from this, or the inevitable use of curtains or blinds for privacy purposes, would do so.
37. It is noteworthy that in considering a similar appeal for the building, as detailed above, the Inspector also concluded that *'the conversion of an established shop unit into a residential flat would be harmful to the setting as an active gateway to the town centre'*. In terms of the breach of planning control, I was able to see as part of my site visit that the property now had a noticeably 'inactive'

frontage in relative terms. There is a reasonable expectation that occupiers of the self-contained flat would always need privacy. The need for privacy for existing and future occupiers of the self-contained flat from those that pass close to the property in this busy street, is such that I cannot conclude that the development would be capable of having an acceptable impact on the character and appearance of the area.

38. I therefore conclude that significant harm has been caused to the character and appearance of the area. For the reasons outlined, planning conditions would not suitably mitigate such harm. Consequently, the development does not accord with the design, character and appearance requirements of policies CR5 and EN1 of the LP, Core Policy 4 of the Council's Core Strategy DPD 2010, and paragraph 130 of the Framework. In reaching this conclusion, I acknowledge that some commercial properties are vacant, but that is not sufficient to justify development which causes harm to the overall character and appearance of the area. Furthermore, I note the appellant's comment about No. 116 Camden Road, but I have no reason to depart from the reasoning of the previous Inspector about this development.

Other considerations

39. There is no dispute between the parties that the LPA cannot demonstrate a five-year supply of deliverable housing sites. The LPA states that the current supply figure is 4.66 years. In this context, paragraph 11d of the Framework is engaged and the relevant development plan policies are deemed to be out of date.
40. The self-contained flat has a positive impact on the supply of housing in the context of the undersupply position. However, the contribution from one residential unit, while positive, is not significant in quantitative terms. There are some economic benefits associated with use of the self-contained flat in terms of supporting facilities, amenities and services in the area and of course the appellant's business. The development also relates to previously developed land. However, these benefits carry limited weight in the context of one self-contained flat.

Ground (a) planning balance and conclusion

41. On balance, I find that the identified adverse impacts of the breach of planning control, namely the harm to living conditions and the character and appearance of the area, significantly and demonstrably outweigh the benefits of the development when assessed against the Framework taken as a whole. Therefore, and taking into account all other matters raised, I conclude that the ground (a) appeal should fail. Even if I had found that the proposal was acceptable in terms of the living conditions of occupiers of the unauthorised self-contained flat, I would still have reached the same conclusion as above given the significant harm that has been caused to the character and appearance of the area.
42. In reaching the above conclusion, I have not afforded any material weight to policy CR5 of the LP. Accordance or otherwise with this policy is not a determinative matter. Given that paragraph 11(d) is engaged, I have found very specific conflict with the Framework, and other development plan policies, in terms of character and appearance issues and living conditions matters. These are determinative considerations in the overall planning balance. Hence,

I find that the breach of planning control does not deliver a sustainable form of development. Therefore, the ground (a) appeal fails.

Ground (f) appeal

43. The appeal made under ground (f) is 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 or to remedy any injury to amenity which has been caused by any such a breach.
44. The purpose of the notice is to remedy the breach of planning control by ceasing residential use of the front part of the ground floor of the building and the basement. The steps required by the notice to remove domestic items, fixtures and fittings, personal belongings and furniture from the areas shown yellow on the attached plan is not excessive. Indeed, there is no persuasive evidence before me to indicate that any such domestic items, fixtures and fittings, personal belongings and furniture did not facilitate the material change of use of the land to a self-contained flat.
45. As regards, the removal of kitchen facilities and domestic appliances, the steps are not excessive in so far that they permit the retention of kitchen facilities as marked 'kitchenette' in the alcove on the attached Plan A and specified domestic appliances also within the alcove marked 'kitchenette' on the attached Plan A), thereby ensuring that the enforcement notice does not seek to remove a kitchen facility (with appliances) which the evidence indicates was permitted as part of the commercial use of the premises in association with planning permission 20/00543/FULL. The appellant does not provide any specific and objective evidence to demonstrate that the removal of said appliances and facilities were not provided as part and parcel of the unauthorised material change of use.
46. The appellant makes the claim that the enforcement notice is excessive as it seeks to revert the basement to its previous use which was '*derelict*'. The enforcement notice does not seek to do this. It seeks to remove the breach of planning control and associated domestic items and facilities that facilitated such a use.
47. On the evidence that is before me, I therefore conclude that the steps required by the notice do not exceed what is necessary to remedy the breach of planning control. Therefore, the ground (f) appeal fails.

Ground (g) appeal

48. The appeal made on ground (g) is that the period specified in the notice in accordance with s173(9) falls short of what should reasonably be allowed.
49. The appellant claims that an assured shorthold tenancy agreement is in place and alleges that eviction proceedings are taking a minimum of two years where contested. Furthermore, the appellant claims that it would take more than six months to run a tender process and then execute the works required by the enforcement notice. I have not been provided with a copy of any tenancy agreement. In any event, there is no reasonable evidence to indicate that the tenant would refuse to vacate the self-contained flat and hence that a court hearing would be a certain outcome. It is noteworthy, in any event, that the LPA has made reference to section 173A(1)(b) of the Act which states that it

may 'waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173 (9)'.

50. Given the above, I find that a six-month compliance period is reasonable. Furthermore, there is no credible evidence before me to indicate that such a period is not reasonable in terms of securing a contractor and undertaking the necessary works to ensure compliance with the enforcement notice. Indeed, the requirements in the enforcement notice do not entail very significant works to the building.
51. The appellant also seeks more time as it is claimed that a new commercial mortgage may be needed for the property. Even if a new commercial mortgage were to be needed, I have little information about timescales relating to such a matter. In any event, I do not find that this would reasonably justify extending the compliance period from six months.
52. I acknowledge that the requirement to cease using the land as a self-contained flat would result in the loss of a home. However, I find that upholding the enforcement notice, including a compliance period of six months, is a legitimate and proportionate response to addressing the breach of planning control in the public interest. This outweighs the loss of a home on the site taking into account rights under Article 8 of the European Convention on Human Rights, as incorporated into the Human Rights Act 1998, which provides that everyone has a right to respect private and family life, their home and correspondence.
53. I find, on the evidence before me, that a period of six months to comply with the requirements of the notice is reasonable. Therefore, I conclude that the ground (g) appeal fails.

Conclusion

54. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the corrected enforcement notice and refuse to grant planning permission on the deemed application.

D Hartley

INSPECTOR