The Planning Inspectorate

Appeal Decision

Site visit made on 11 October 2023

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 30th October 2023

Appeal Ref: APP/N5090/C/23/3314400
Land at 58 Hendon Way, London NW2 2NR

- 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 1990 Act as amended).
- The appeal is made by Ms Fareeha Amir against an enforcement notice issued by London Borough of Barnet.
- The notice, numbered ENF/1019/21, was issued on 30 November 2022.
- The breach of planning control as alleged in the notice is, without planning permission, change of use of the property to a House in Multiple Occupation (Use Class C4).
- The requirement of the notice is to: Cease the use of the property as a House in Multiple Occupation.
- The period for compliance with the requirement is: 4 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b) and (e) 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.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld in the terms set out below in the Formal Decision.

Preliminary Matters

1. The appeal was originally made on grounds (b) and (e). Following this the appellant added ground (a).

2. The alleged breach of planning control as stated in the enforcement notice (the notice) is without planning permission, change of use of the property to a House in Multiple Occupation (Use Class C4) (HMO). In appealing on ground (b) the appellant contends that those matters have not occurred. However, they also advance the case that they were unaware that the property is located within an area covered by an Article 4 Direction[1] and that planning permission is required for the change of use.

3. As such, I consider that there is a hidden ground of appeal on ground (c), namely, that those matters stated in the notice (if they occurred) do not constitute a breach of planning control. This has a degree of overlap with the appeal on ground (b). The Council reference a hidden ground (c) in its statement and the appellant had the opportunity to respond on this matter at final comments stage. I am therefore satisfied that no injustice would be caused by me taking the approach that the appeal is also proceeding on ground (c), and I have dealt with grounds (b) and (c) together.

[1] A Direction made under Article 4 of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GDPO) dated 29 May 2016. The Article 4 Direction removed permitted development rights relating to the material change of use of a dwelling (Class C3) into an HMO (Class C4) meaning that express planning permission must be granted on application for such development.

4. The potential implications of the appeal in relation to the rights conveyed under Article 8, and Article 1 of the First Protocol, of the European Convention on Human Rights, as incorporated into UK law by the Human Rights Act 1998, and the Public Sector Equality Duty contained in section 149 of the Equality Act 2010, are not directly addressed by the parties and appeals on ground (f) and/or (g) have not been pleaded. Consequently, the parties were invited to comment on this matter. Neither party responded to the invitation. I deal with this matter as part of the appeal on ground (a).

The appeal on ground (e)

5. The appeal on ground (e) is that copies of the notice were not served as required by section 172 of the 1990 Act as amended. On this ground of appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

6. Section 172(3)(b) of the 1990 Act as amended states that, The service of the notice shall take place – not less than twenty-eight days before the date specified in it as the date on which it is to take effect. The notice is dated 30 November 2022, and it states at paragraph 7 that it takes effect on 11 January 2023, unless an appeal is made beforehand.

7. The appellant submits that they received the notice on 22 December 2022, less than the required 28 days before it is stated to take effect. On this basis, the appellant contends that the service of the notice does not meet the requirements of section 172 of the 1990 Act as amended, which they state, goes 'to the very foundation of fair trial.'

8. The Council contends that it served the notice in line with the requirements of sections 172 and 329 of the 1990 Act as amended. The submitted supporting evidence confirms the names of the appellant and any persons/companies identified as having an interest in the land, along with their known or last known addresses[2]. Also provided are a signed certificate of service with images, stating that true copies of the notice were delivered or sent to these addresses on 1 December 2022.

9. The appellant does not explain why or how they only received the notice on the 22 December 2022 and no substantiating evidence has been provided in this regard, although I note that the address of the appellant given in the appeal form is different to that to which the notice was served.

10. The limited nature and ambiguity of the appellant's evidence means that there is nothing before me which demonstrates that the notice was not served as required by section 172 of the 1990 Act as amended. Additionally, even if I accept that it was not served as required, which I do not, mindful of section 176(5) of the 1990 Act as amended, given that the appellant received a correct copy of the notice and was able to submit a valid appeal prior to the notice taking effect, I am not persuaded that they have been substantially prejudiced in this respect.

11. For these reasons I conclude that, on the balance of probabilities, copies of the notice were served as required by section 172 of the 1990 Act as amended. Accordingly, the appeal on ground (e) fails.

[2] Taken from the appellant's HMO Licensing application.

The appeals on grounds (b) and (c)

12. The appeal on ground (b) is that those matters stated in the notice have not occurred. The appeal on ground (c) is that those matters stated in the notice (if they occurred) do not constitute a breach of planning control. On both of these grounds of appeal, the onus is on the appellant to make out their case to the standard of the balance of probabilities.

13. The matters stated in the notice are 'without planning permission, change of use of the property to a House in Multiple Occupation (Use Class C4)'. The submitted evidence indicates that the Council commenced an investigation into an alleged breach of planning control at No 58 Hendon Way (No 58) in August 2021 and issued a Planning Contravention Notice (PCN) in September 2021 which clearly stated the alleged breach at paragraph 3. The appellant replied to the PCN in November 2021[3].

14. Following this, an application for planning permission dated 24 November 2021 was received by the Council on 29 November 2021 for 'Change of use from a single dwelling House (C3) to HMO (C4) (retrospective)[4] which was later 'returned'. The notice, dated 30 November 2022, was then served on 1 December 2022. Another application for planning permission dated 16 December 2022 was received by the Council on 20 December 2022 for 'Change of use from a single dwelling House (C3) to HMO (C4) for 5 people (Retrospective Application)[5]'. The Council states that this application was 'Invalid On Receipt' and is currently 'Pending Consideration.'

15. The Council submits that, prior to the alleged breach, the house was in use as a single dwellinghouse (Use Class C3). The appellant has not challenged this and there is nothing before me that contradicts the Council's submission or makes it less than probable. The appellant's responses to the PCN confirm that a change of use of the property to a five bedroom HMO commenced on 14 May 2020. This date is reiterated in the application dated 24 November 2021. However, in the application dated 16 December 2022, the date that the property's use as an HMO started is stated as 24 October 2021. My site visit confirmed the current use of the property as an HMO, where I observed five separate bedrooms, one shared living room, two shared toilet/bathrooms, a shared kitchen and a shared garden/private amenity space.

16. In the above respects and notwithstanding the slight difference in dates of when the use commenced, on the balance of probabilities, by the date of the issue of the notice the change of use of the appeal property to an HMO (Use Class C4) had occurred as a matter of fact.

17. Under the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended, the change of use of a dwellinghouse (Use Class C3) to an HMO (Use Class C4) is permitted development[6]. However, on the 29 May 2016, the Council introduced an Article 4 Direction across the Borough which removed this permitted development right, following which any such change required planning permission.

[3] Via email dated 18 November 2021.
[4] Application Ref: 21/6247/FUL.
[5] Application Ref: 22/6042/RCU.
[6] Schedule 2, Part 3, Class L(b).

18. I note the appellant's comments that they were granted an HMO License for the property for five years[7], and that they were unaware planning permission was required for the change to an HMO. I also acknowledge their submission of planning applications, which they refute were 'retrospective'.

19. However, HMO licensing law and planning law are different, and having an HMO license does not mean that planning permission is not required. By the appellant's own admission in the PCN and subsequent planning applications, by the date of the issue of the notice, the change of the use of the appeal property from a single dwellinghouse to an HMO had occurred. Moreover, despite their unawareness, by virtue of the Article 4 Direction, this change required planning permission, and although planning applications had been submitted, no permission had been granted by the Council.

20. The above further confirms that the matters stated in the notice have occurred as a matter of fact and that they do constitute a breach of planning control.

21. In considering these grounds of appeal I note the Council's reference to Estoppel and the appellant's response regarding the Council's invitation to them to submit an application for planning permission, only to then issue an enforcement notice.

22. The Council's invitation to the appellant to submit an application for planning permission, may have potentially led the appellant to believe that the development was acceptable in planning terms and that no further enforcement action would be taken. However, I am mindful that at the date of the issue of the notice, the investigation into the alleged breach of planning control had been ongoing for over a year, with no clear sign of resolution. Whilst the Council invited the submission of another application without a deadline for doing so, the appellant was aware that the matters of the alleged breach could be escalated through further enforcement action.

23. Moreover, settled case law[8] confirms the general principle that public authorities cannot be estopped from performing their statutory duties. Any representation by a Council as to how it will or will not exercise its powers under section 172 of the 1990 Act as amended will not give rise to a binding estoppel.

24. I therefore conclude that, on the balance of probabilities, the matters stated in the notice have occurred and that they do constitute a breach of planning control. Accordingly, the appeals on grounds (b) and (c) fail.

The appeal on ground (a) and the deemed planning application

25. The appeal on ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. In this instance, permission is sought for the change of use of the property to a House in Multiple Occupation (Use Class C4).

Main Issues

26. Having regard to the Council's reasons for issuing the notice, the main issues are: (i) The effect of the development on the supply of family housing in the area, and whether the need for an HMO in this location has been

[7] Issue date 5 May 2020, Expiry date 4 May 2025. Taken from HMO Licence application in Council's statement.
[8] *R v E Sussex CC ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8.

demonstrated; (ii) The effect of the development on the character and amenities of the area; and (iii) Whether the development is in an accessible location with regard to public transport.

Reasons

Effect on the supply of family homes and whether the need for an HMO has been demonstrated

27. The Supporting Case for Boroughwide Article 4 (2015) acknowledges that HMO are an important source of low cost, private sector housing for those on low incomes, students, and those seeking temporary accommodation. However, it also recognises that HMO and their concentration can be associated with, amongst other things, the loss of single family dwellinghouses.

28. In this regard, Policy DM08 of Barnet's Local Plan, Development Management Policies, 2012 (BLP DMP) seeks to ensure a variety of sizes of new homes to meet housing need; and DM09 of the BLP DMP sets out that proposals for new HMO will be encouraged provided that, amongst other things, they meet an identified need.

29. From the evidence before me and my observations on site, the appeal property is located within a predominantly residential area, mostly comprising moderately sized semi-detached, two-storey dwellings, the majority of which appear to be in use as single family homes. The development and No 58's change of use to an HMO results in the loss of a single family dwellinghouse, for which the Council state there is a known demand, although no substantive evidence on this matter has been provided. The appellant has not challenged the Council's assertion and, crucially, has not provided any compelling evidence which demonstrates an identified need for an HMO in this area.

30. Accordingly, I conclude that the development has a harmful effect on the supply of family homes in the area, and that the need for an HMO in this location has not been demonstrated. This conflicts with Policy CS NPPF of Barnet's Local Plan, Core Strategy, 2012 (BLP CS) concerning the presumption in favour of sustainable development. It would also not comply with Policies DM08 and DM09 of the BLP DMP referred to above.

Character and amenities of the area

31. Policy DM09 of the BLP DMP also requires new HMO to demonstrate that they will not have a harmful impact on the character and amenities of the surrounding area.

32. The use of No 58 as an HMO is in keeping with the residential nature of the area. However, the occupation of the building by five independent households with its consequent effects, such as an increased amount of refuse, is an intensive use of this property, which is not in keeping with the general characteristics of single family dwellinghouses that are prevalent in the neighbourhood.

33. Compared with the building's occupation as a single family dwellinghouse, its use as an HMO is likely to give rise to a wider variation in movement patterns of the occupants. Furthermore, it is likely that there could be a greater number of visitors associated with the unrelated identities of the occupants. The pattern of occupation could potentially generate a larger number of comings and goings

to and from the property, resulting in greater noise and disturbance to neighbouring residents, thereby diminishing their living conditions.

34. Accordingly, I conclude that the development has a harmful effect on the character and amenities of the area. This does not comply with Policies CS NPPF and CS5 of the BLP CS and Policies DM01 and DM09 of the BLP DMP in so far as they seek to protect Barnet's character and amenity. It would also conflict with the Council's Residential Design Guidance Supplementary Planning Document, 2016.

Accessible location

35. Policy DM09 of the BLP DMP also requires new HMO to be easily accessible by public transport, cycling and walking. The appeal property is located in an area with a Public Transport Accessibility Level rating of 3. This indicates only an 'average' accessibility to the public transport network.

36. On this basis, I conclude that the development is not in an easily accessible location with regard to public transport, and thus conflicts with Policy DM09 of the BLP DMP referred to above.

Other considerations

37. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the development fails to accord with up-to-date policies in the development plan in the above respects. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that the determination should be made otherwise than in accordance with the development plan.

38. Upholding the notice would interfere with the existing tenants' rights conveyed under Article 8, and Article 1 of the First Protocol referred to above. Article 8 is the right to respect for private and family life, home and correspondence and Article 1 of the First Protocol is the right to the peaceful enjoyment of possessions including property. These are qualified rights, whereby interference may be justified in the public interest, but the concept of proportionality is crucial.

39. In this case, the interference with the existing tenants' rights under Article 8 and Article 1 of the First Protocol arises from an enforcement notice issued to the appellant under section 171 of the 1990 Act as amended. The interference with the tenants' rights in this regard is therefore lawful.

40. Achieving development for which there is a demonstrable need, which responds to and complements the character and amenities of its context and is easily accessible by public transport are legitimate and well-established planning policy aims. The cumulative harm which arises as a consequence of the development to the supply of family homes, the established character and amenities of the locale and its average accessibility by public transport, is substantial.

41. Against this harm, is that upholding the notice would result in the existing tenants having to find alternative accommodation. No evidence has been put

before me which demonstrates that there is an overriding need for any of the tenants to remain in the HMO. Moreover, it is reasonable to conclude that the tenants would be aware that they would need to move out at the end of the tenancy. As such, this carries moderate weight.

42. Balancing all these factors, I consider that the interference with the existing tenants' rights under Article 8 and Article 1 of the First Protocol would be proportionate and necessary. In reaching that conclusion, I am satisfied that the protection of the public interest cannot be achieved by means that are less interfering of their rights.

43. I have had regard to my responsibilities under the Public Sector Equality Duty contained in section 149 of the Equality Act 2010. However, neither party has claimed that any of the existing tenants shares a protected characteristic. I have therefore not considered this matter further.

44. I am also mindful of the rights of the appellant and other parties under Article 6 of the European Convention on Human Rights, as incorporated into UK law by the Human Rights Act 1998. Article 6(1) provides that in the determination of their civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

45. The appellant has exercised their right of appeal following the issue of an enforcement notice at the property. As the Inspector appointed by the Secretary of State to determine the appeal, I have done so having regard to the Franks Principles[9], the rules of natural justice, human rights and equality and the Planning Inspectorate's Code of Conduct.

46. I note the appellant's comments concerning alleged procedural unfairness and unreasonableness by the Council. However, these matters are not within the remit of my considerations in relation to an appeal under section 174 of the 1990 Act as amended.

Planning balance and conclusion on the appeal on ground (a)

47. I have found that the HMO has a harmful effect on the supply of family homes in this locale and the need for it has not been demonstrated; that it is harmful to the character and amenities of the area; and that it is not located in an easily accessible location, with regard to public transport.

48. The appellant highlights that HMO are not illegal and their use is encouraged by the London Plan, although no policies have been referenced or submitted in this regard. I note the BLP DMP's support for new HMO in the Borough, but this is subject to certain requirements which I have found the development before me does not meet. Moreover, meeting the demonstrated housing needs of an area, ensuring that sites are suitable for their proposed use, and promoting sustainable transport are fundamental aims of the planning system.

49. I have had regard to the material consideration of the implications of the requirements of the notice in relation to the rights of the existing tenants under Article 8, and Article 1 of the First Protocol, and consider that the interference is proportionate and necessary.

[9] Openness, fairness and impartiality.

50. Drawing all of the above together, I have found the development to be contrary to the relevant policies of the development plan and no material considerations of sufficient weight have been advanced to justify a decision other than in accordance with the development plan. Therefore, I conclude that planning permission ought not to be granted for the matters stated in the notice. Accordingly, the appeal on ground (a) fails.

Conclusion

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

Formal Decision

52. 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.

F Cullen

INSPECTOR