The Planning Inspectorate

Appeal Decision

Site visit made on 17 October 2023

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3 November 2023

Appeal Ref: APP/M5450/C/22/3296808
Land at 29 Westleigh Gardens, Edgware HA8 5SQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Sunny Popat against an enforcement notice issued by the Council of the London Borough of Harrow.
- The notice was issued on 3 March 2022.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from a single family dwellinghouse to use as three self-contained flats.
- The requirements of the notice are: (1) Cease the unauthorised use as flats. (2) Remove all kitchens from the land except one. (3) Removal *(sic)* all bathrooms from the land except two. (4) Remove all internal partitions, doorbells and other paraphernalia from the host building on the land that enables the unauthorised use of the land as flats. (5) Remove from the land all materials and debris arising from compliance with the aforementioned requirements of the notice.
- The period for compliance with the requirement is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.

Decision

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

Preliminary Matters

2. During the course of these proceedings, the Council suggested that I should exercise the power available in s176 (1) of the Act to correct the notice so that the allegation is one of a mixed use as an HMO and a flat. There is no firm evidence however that what has occurred is other than a material change of use to three separate self-contained flats. In any event, to correct the notice as suggested would cause injustice to the appellant. It would undermine the basis of their ground (d) appeal, a mixed use being subject to the ten-year period for taking enforcement action in s171B (3) of the Act.

3. As there is no deemed planning application arising from an appeal on ground (a), the planning merits of the matters stated in the notice as giving rise to a breach of a planning control are not before me.

4. The Council referred to potentially making an application for an award of their costs in the appeal, but none has been forthcoming. I do not intend to initiate an award of costs against the appellant; there is little before me to indicate that they have behaved unreasonably resulting in the Council incurring unnecessary or wasted expense.

Application for costs

5. An application for costs was made by Mr Sunny Popat against the Council of the London Borough of Harrow. This application is the subject of a separate Decision.

Ground (d) appeal

6. The ground of appeal is that it was too late to take enforcement action against the breach of planning control alleged in the notice. It is for the appellant to show why their appeal should succeed on this ground, the relevant test of the evidence being on the balance of probability.

7. The appeal property contains an enlarged two-storey semi-detached dwelling which has been converted to three flats. A one-bedroom flat (flat 1) occupies most of the ground floor, with a studio flat (flat 2) in the single storey side extension. A one-bedroom flat (flat 3) is on the first floor. Each flat is self-contained, with its own kitchen and bathroom.

8. The appellant claimed that use of the property as three self-contained flats began in or around October 2014 and has since been continuous. At s171B (2), the Act provides that where there has been a breach of planning control consisting in the change of use of any building (which includes part of a building) to use as a single dwelling, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. Any four-year period is relevant in this regard, not just the four years immediately preceding the date of the notice.

9. A number of signed, dated and witnessed Statutory Declarations (SD) were submitted with the appeal. In one SD, witnesses state that they have occupied flat 1 continuously since 10 October 2014, the works to convert the property to three flats having commenced in May that year. Three SDs were from current and former occupiers of flat 2. In one of these SDs, witnesses state that they occupied flat 2 between 4 December 2014 and 3 July 2017. Another SD is from witnesses stating that they occupied flat 2 between 14 July 2017 and 13 June 2021. A further SD is from witnesses stating that they have occupied flat 2 since 7 October 2021. An SD was provided from witnesses who stated that they have been occupying flat 3 since 5 December 2014. In all these SDs the flats are described as having been self-contained, with a private kitchen and bathroom, throughout the periods of occupation. A neighbour also provided an SD which states that they have resided at their current address since 12 December 2015, during which time the property has been in uninterrupted use as three self-contained flats.

10. The SDs were accompanied by contemporaneous documentary evidence, including copies of signed and dated Assured Shorthold Tenancy Agreements (ASTs) in respect of flats 2 and 3. The premises details, names of the tenants, the dates of the ASTs and the period during which they were in force corresponds with the periods during which the respective witnesses state that they occupied flats 2 and 3. The occupiers of flat 1 explained in their SD that there were no ASTs in that instance, as one of them is a joint owner of the property. Copies of the owners' bank statements were also provided. These show receipt of regular payments from the tenants named in the ASTs for flats 2 and 3, the amount being paid also corresponding with the sums of rent specified in the respective ASTs.

11. More contemporaneous documentation, in the form of correspondence from the Council, was also provided. This included a letter dated 8 September 2016 which refers to the '*unauthorised conversion of the dwelling house into three flats and HMO*'. This letter, which followed an internal inspection, indicates that the Council were alive to the presence of three flats at the property by that

time. A similar inference can be drawn from a letter dated 19 September 2019 sent following another internal inspection, in which the Council referred to *'…the material change of use of the land from a single family dwelling house to three flats'.*

12. The SDs provide a consistent account of events at the property. The bank statements and ASTs provide clear contemporaneous documentary support for a pattern of continuous residential use of the three flats, apart from *de minimis* breaks in occupation in the case of flat 2, for a period greater than four years prior to the date of the notice. Other documentary evidence in the form of the above letters from the Council also provides a further measure of support for the appellant's claim. Consequently, in the absence of clear and compelling evidence to indicate otherwise, the appellant's evidence should be afforded significant weight.

13. The property was licenced under the Housing Act 2004 as a House in Multiple Occupation (HMO) for up to four households and eight occupiers in 2015. Even so, this does not necessarily mean that the property was actually in use at that time as what would normally be regarded as an HMO in planning terms. I note that, following the Council's letter of 28 September 2016, the appellant stated in an e-mail that they would be applying for planning permission to use the property as an HMO. However, that is clearly not the whole story. A copy of a subsequent e-mail was supplied in which the appellant stated that an application would be made for change of use of the property to flats. As far as I was made aware no application was forthcoming and, for reasons that were not made clear, the Council do not appear to have investigated matters further.

14. A copy of a drawing that accompanied a planning application made in 2016 for a single storey extension to the property[1], which showed an internal door on the ground floor between flats 1 and 2 was supplied. The Council implied from this that there had been no physical separation between accommodation on the ground floor at that time. Even so, the presence of such a door does not preclude the existence of separate areas of living accommodation on the ground floor of the property by that date. This point is illustrated by the photographs dated 23 October 2015 and 20 May 2022, supplied, which showed the 'flat 1' side of the door obstructed by a large item of furniture and the Council's photographs dated 5 November 2021, which showed the 'flat 2' side of the door obstructed by an upright fridge/freezer. Obstructing the door meant that there were in effect two separate self-contained areas of living accommodation on the ground floor at those times. It is not unreasonable, when looked at in the context of the totality of the available evidence, to conclude that the door is also likely to have been similarly obstructed at most other times.

15. During the Council's visit to the property on 10 September 2019, the internal door referred to above was left open so that all of the ground floor accommodation was accessible. If the Council had really believed that the use of the property was as an HMO at that time however, it is unclear why in the letter sent to the appellant following the visit they referred to a change of use to three flats as having occurred. For unexplained reasons, this investigation also seems to have been discontinued subsequently. The new HMO licence issued in 2019 is generally consistent with use of the property as three flats; each flat is identified in the licence and its occupation is limited to one household. Given the evidence of the continuity of the use as three flats, the recent permanent blocking up of the internal door at issue is of limited relevance in terms of whether such use is immune from enforcement action. Failing to register for Council Tax can happen for all sorts of reasons and in itself, is not determinative of use. As a result, none of the matters raised by

[1] Council Ref: P/3948/16.

the Council cast any significant doubt on the appellant's version of events at the property.

16. The Council argued that the appellant's conduct amounted to deliberate concealment. Relevant case law[2] confirms that in a planning enforcement context, the public policy principle that no-one should benefit from their own wrongdoing should be applied exceptionally. The statutory immunity periods must have been conceived, in part, as sufficient for a Council to normally discover an unlawful operation or use. Thus, there must be some connection between what is done to evade discovery and the statutory provision.

17. Little contemporaneous documentation, for example copies of other correspondence with the appellant or file notes, has been supplied to support the suggestion that the appellant sought to mislead the Council during their investigations. In the absence of firm evidence, it is not possible to ascertain the accuracy or otherwise of any of the statements attributed by the Council to the appellant regarding the property being used as an HMO. In relation to the obtaining of an HMO licence in 2015 and the appellant's reference to making a planning application for such use in 2016 correspondence, there is little to indicate that this was an attempt to divert attention from the actual use being made of the property at that time. In any event, such an approach by the appellant would seem unlikely, given that they later confirmed an intention to apply for use of the property as flats.

18. The appellant's explanation that the internal door at issue was opened up during the 2019 Council visit to facilitate the inspection is not implausible. Besides, if that had really been an attempt to conceal the use of the ground floor as separate flats it was plainly unsuccessful, as is evident from the Council's subsequent letter. Not registering for Council Tax could be viewed as an aggravating factor in terms of the appellant's conduct, but in itself would not be determinative. Accordingly, there is little evidence of actions that amounted to positive deception in matters integral to the planning process that were directly intended to and did undermine the regular operation of that process.

19. Therefore, I find that on the balance of probability the appellant has provided sufficiently precise and unambiguous evidence in respect of the continuity in the use of the property as three self-contained flats for a period of more than four years prior to the date of the notice. The matters raised by the Council do not materially affect the weight that should be given to the appellant's evidence; those matters do not cast doubt on the appellant's evidence or make their version of events less than probable. Furthermore, there is little evidence of conduct that would warrant depriving the appellant of the benefit of s171B (2). It follows that on the date of the notice it was too late for the Council to take enforcement action in respect of the material change of use of the property to three flats.

Conclusion

20. For the reasons given above I conclude that the appeal should succeed on ground (d). Accordingly, the enforcement notice will be quashed.

Stephen Hawkins

INSPECTOR

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[2] *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15.