



Appeal Decision

Site visit made on 31 October 2023

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 December 2023

Appeal Ref: APP/E5900/C/23/3321271

Land at 504 Roman Road, London E3 5LU

- 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 David Ian of Wellhill Estates Limited against an enforcement notice issued by the Council of the London Borough of Tower Hamlets.
 - The enforcement notice was issued on 27 March 2023.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the ground floor rear shop area (use class E) of the premises, shown in the approximate location outlined in blue on the plan attached to the notice, to a residential use (use class C3a).
 - The requirements of the notice are
 1. Cease the use of the part of the building, shown in the approximate location outlined in blue on the plan attached to the notice, as a residential flat.
 2. Remove the cooking facilities (cooker and hob), sink, extractor unit and kitchen units from the residential kitchen area (indicated in Photo 1 of Appendix A attached to the notice) from the part of the building shown in the approximate location outlined in blue on the plan attached to the notice.
 3. Remove the residential shower room facilities, including shower unit, toilet and sink (shown in Photo 2 of Appendix A attached to the notice) from the part of the building shown in the approximate location outlined in blue on the plan attached to the notice.
 4. Make good any damage to the property and remove all debris occurring from compliance with steps 2 and 3 above.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. 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.

Application for costs

2. The Council has made an application for costs against the appellant. This will be the subject of a separate Decision.

Background

3. No 504 Roman Road comprises a modest two storey terraced building fronting Roman Road. It is currently laid out as three separate units with a commercial use (Patty Heaven, a take-away) operating from a single room accessed from Roman Road supported by a windowless kitchen and WC to the rear. The flat

the subject of the notice is accessed from the rear of the site where there is a pedestrian and vehicular access from Rosebank Gardens North. Metal gates open into a courtyard where there is an external staircase leading to an unused first floor unit above Patty Heaven. At ground level there is an entrance door leading into the flat and a bedroom window tucked underneath the staircase. Within the flat, besides the bedroom, there is an open plan living, kitchen, dining area and a bathroom that back onto Patty Heaven.

The ground (d) appeal

4. This ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The burden of proof in an appeal on this ground lies with the appellant. As such, the appellant needs to show, on the balance of probabilities, that the use of part of the building as a self-contained flat began more than four years before the notice was issued. In addition, that the use continued such that at any time during the four year period the Council could have taken enforcement action against the use. The relevant date is therefore 27 March 2019.
5. A use can only become lawful if it continues throughout the relevant period, to the extent that the Council could have taken enforcement action at any time. If the use ceased during that period or the flat became incapable of occupation due to construction works removing viable facilities needed for living, then, the Courts have held, as a matter of fact and degree, that time cannot count towards immunity. A finding needs to be made as to whether any periods of non-occupation were significant or not.

The appellant's case

6. The appellant's evidence comprises:
 - Copy of a two year lease dated 27 November 2013 with Mr I regarding the use of 504 Roman Road;
 - Copy of a lease dated 26 November 2015, as above;
 - Copy of a two year lease dated 29 March 2017, as above;
 - Copy of part of a licence made with Mr G relating to the rear ground floor of the premises;
 - Copy of part of a licence with Mr G for a period starting 1 January 2019 for rear ground floor area;
 - Letter dated 12 April 2023 from Mr G explaining he was granted a lease for the flat to the rear of 504 Roman Road;
 - Tenancy agreement for period 21 April 2020 to 20 April 2021 for Mr and Mrs F;
 - E-mail from Mr F dated 4 July 2021 saying he will move out on 4 August 2021;
 - Tenancy agreement for the period 10 September 2021 to 9 September 2022 for Mr and Mrs R;
 - Statutory declaration from the appellant;

- Statutory declaration from appellant's solicitor;
- Statutory declaration from appellant's accountant;
- Letter undated but signed from appellant's estate agent;
- Letter dated 25 April 2023 signed by neighbour who has lived to the rear of 504 Roman Road for 35 years;
- Letter dated 25 April 2023 and signed by the leaseholder of Patty Heaven;
- Copy of lease dated 21 January 2019 for the commercial unit;
- Copy of lease dated 10 June 2021 for the commercial unit;
- Letter from Business Rates dated 1 May 2019 regarding separate units within the property;
- Letter dated 10 October 2021 from Valuation Office Agency providing a Council Tax banding for the flat with effect from 1 July 2020;
- Land Registry certificate at time of purchase;
- Letter dated 10 September 2014 from the Council regarding a noise complaint;
- Copy of planning application made 20 December 2018 to change the use of the premises to a take-away;
- Plans for other planning applications;
- Existing tenant's recent medical history;
- Copy of receipt for enhanced plaster board;
- Energy performance certificate; and
- Electrical installation condition report.

The Council's case

7. The Council submit:

- Revenue officer site visit photographs taken 1 August 2019; and
- Revenue officer site visit photographs taken 2 June 2021.

Assessment

8. The appellant bought 504 Roman Road in 2013 (Confirmed on the Land Registry extract) and described it as one unit with a shop to the front, office/storage space above and living accommodation to the rear. The estate agent also describes it as having somewhat dated living accommodation to the rear. However, there are no photographs from this time to show the living accommodation and there are no copies of the sales particulars. Although the appellant and the estate agent describe the space as "living accommodation" it seems to me it was probably storage space. It had no window and as shown on the planning application plans from 2018 contained a kitchenette and a WC; such facilities are often found at the rear of a shop for use by the staff.

9. After buying the premises, the appellant leased the building to Mr I for several years for the sale of vintage clothing. Three leases are provided covering the period from 27 November 2013 until 29 March 2019 but none of them include a plan of the premises. The solicitor's statutory declaration states that Mr I "damaged the property rendering it uninhabitable" before he left in November 2018. Undated photographs attached to Mr Ian's statutory declaration show a wash hand basin lying on the floor, a smashed mirror and personal possessions such as clothes in disarray. These suggest that a flat had been created by blocking off the shop unit from the rear of the premises, however it was no longer possible to use it as such.
10. The appellant states he then engaged Mr G to "repair the flat" at his expense and to return it to "standard". In return he would be able to live in the flat for a nominal rent for a defined period. This was a gentleman's agreement and I note the licence signed between the parties makes no mention of a residential use, only a storage use. It required Mr G to pay business rates and it stated that no tenancy was conferred upon the occupier.
11. The licence was for the period 1 January 2019 until 31 December 2020 but due to the outbreak of the Covid-19 pandemic, Mr G left the building in March 2020. It is not clear when Mr G created the flat as it exists today but there are undated photographs attached to the appellant's statutory declaration showing a new door in a new position within the rear elevation and a new window. In the appellant's Final Comments, he states that the window was added after July 2019. Internal photographs show a new bathroom and an open plan kitchen, dining and living space.
12. The appellant claims a residential use began on 1 January 2019 but with no viable facilities for living at this point it seems to me this happened later, after they were fitted. Mr G says those works only took a few weeks. However, when the Council's Officer visited the site on 1 August 2019, he found the space had been gutted. The photograph shows there were no viable facilities for living, only an empty cavernous space. The appellant explains that there was a leak and the flat had to be stripped and re-fitted. Those works started late July 2019 and took a great deal of time. At this point I am satisfied that the use of the flat was not abandoned given the appellant's intentions and prompt actions.
13. By April 2020 all the works had been completed (as confirmed by the electrical installation condition report and energy performance certificate) and the flat was let to Mr and Mrs F. Thereafter, they moved on in August 2021 (email sent by Mr F confirming vacation date) and Mr and Mrs R moved in during September 2021 and continue to live there today (supported by Mrs R's medical history).
14. I am therefore satisfied that it has been demonstrated a self-contained flat was created by April 2020 and continuously occupied since then, bar a few insignificant weeks between tenants. However, this does not amount to four years continuous use. As I set out at the start of my decision, if a flat becomes incapable of occupation due to construction works removing viable facilities needed for living, then, as a matter of fact and degree, that time cannot count towards immunity and the clock starts again, so to speak, when there are new viable facilities for living in place. This is a different situation from when a flat

is perhaps redecorated or a new carpet is laid as it is still capable of occupation.

15. From the appellant's timeline, it has not been demonstrated that there was a self-contained flat in 2013 when he bought it. Any flat created by Mr I when he subdivided the premises into three units was destroyed by the end of November 2018. It seems Mr G created a flat but this was gutted in July 2019 after a leak. The Council would not have been able to take enforcement action against an unauthorised residential use at this stage, notwithstanding the presence of a mattress, oven and other materials from the flat being stored in the courtyard. A flat with viable facilities for living did not exist until April 2020.
16. In addition, I find Mr G's letter is contradicted by the Council's evidence. The solicitor's statutory declaration supports the appellant's statutory declaration but the accountant's statutory declaration does not specify whether the monies received from Mr G were for a residential rent or a commercial rent. The neighbour's letter supports the claim that Mr I created a flat. The Council's 2014 letter does not indicate where the noise came from and is addressed to The Manager, Pride Hair and Beauty. The letter refers to "excessive noise amounting to a nuisance coming from your premises" but there is no mention of residential use. The letters from Business Rates and the Valuation Office Agency are an official recognition that the property had been sub-divided.
17. The appellant has submitted a lot of evidence to show all his dealings with the site since he purchased it in 2013. During that time, he has had to resolve various difficult scenarios and has taken appropriate advice from his professional advisors. He has regularised the take-away use and sorted out the Business Rates and Council Tax.
18. However, having regard to the totality of the evidence, I am not persuaded, on the balance of probabilities, that the development of the flat and the residential use began more than four years before the relevant date and continued without material interruption for a period of four years thereafter. In the appellant's own words, the flat was damaged to the extent that it was uninhabitable in November 2018 and gutted in July 2019, with works not being complete until April 2020. The appeal on ground (d) therefore fails.

The ground (f) appeal

19. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to achieve its purpose. The purposes of a notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (s173(4)(a)) and/or to remedy any injury to amenity (s173(4)(b)). In this case the notice requires the residential use to cease and the removal of viable facilities for living. I therefore consider that the purpose of the notice is to remedy the breach of planning control.
20. In appealing on ground (f) the onus is on the appellant to specify lesser steps which in their view would overcome the objections to the development. The appellant objects to the removal of the kitchen and bathroom on the basis that they prohibit the previous use of the accommodation and that shop owners always had staff facilities. However, staff at Patty Heaven already have the use of a kitchen and WC which is acceptable to the Council as I noted at the site

visit that the premises currently has a 5 rating (the highest level) for food and hygiene.

21. It is considered that the kitchen and bathroom facilitate the material change of use and as such are integral to, and solely for, the purposes of facilitating that use. It is therefore appropriate and not excessive that the requirements include removal of all works integral to, and solely for, the purpose of facilitating the material change of use. The appeal on ground (f) therefore fails.

The ground (g) appeal

22. This ground of appeal is that the time given to comply with the requirements of the notice is too short. It is therefore limited in scope to a consideration of the actual time needed to carry out the work or actions specified in the steps.
23. The appellant submits that six months is not a reasonable period to comply with the requirements of the notice and that this should be increased to nine months, having regard to the human rights of the occupiers and the ill-health grounds of one of them.
24. As the Council point out, Mr and Mrs R are on a rolling tenancy and therefore the appellant is only required to give them two months' notice to recover possession of the property. Six months allows for there to be a delay in those proceedings, for example if there is a bout of sickness, as well as providing a reasonable period to remove the facilities. It is not considered that the physical works are particularly complicated and amount to no more than stripping out fixtures. This is unlikely to take more than a week. As such, having regard to the human rights of the tenants, it is considered that six months is a reasonable period of time to comply with the notice. The appeal on ground (g) therefore fails.

Conclusion

25. 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.

D Fleming

INSPECTOR