



Appeal Decision

Site visit made on 6 February 2024

by Thomas Shields MA DipURP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 April 2024

Appeal Ref: APP/T5150/C/22/3296971

9 Buxton Road, London, NW2 5BL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (hereafter "the Act").
 - The appeal is made by Ben Adler (Willesden Investments Limited) against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 9 March 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises to a House in Multiple Occupation (HMO) and one flat AND the erection of a single storey rear extension and rear dormer to the premises.
 - The requirements of the notice are:
 - STEP 1 Cease the use of the premises as a House in Multiple Occupation (HMO) and one flat, and cease its occupation by more than ONE household.
 - STEP 2 Remove all internal partitions, items, materials and debris associated with the unauthorised change of use from the premises, including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets.
 - STEP 3 Demolish the unauthorised single storey rear extension and rear dormer, remove all items and debris arising from that demolition, and remove all materials associated with the unauthorised use and development from the premises.
 - STEP 4 Restore the internal configuration to the original layout before the unauthorised change of use took place. For the avoidance of doubt, this should include a kitchen, dining room and lounge on the ground floor, and three bedrooms and a bathroom with WC on the first floor.
 - STEP 5 Restore the land to its condition before the breach took place.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of 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 notice be corrected in Schedule 4, Step 1 by:
 - inserting a full stop after the word "flat" and deleting the words "and cease its occupation by more than ONE household".
2. It is directed that the notice be varied by:
 - In Schedule 4, Step 2, deleting all of the wording therein and substituting instead the following wording:

"Remove all internal partitions, items, materials and debris associated with the unauthorised change of use of the premises, including all kitchens (except for one kitchen on the ground floor) and remove bathrooms/shower

rooms and toilets so that there are no more than two bathrooms and two toilets,

OR

Restore the internal configuration to the original layout before the unauthorised change of use took place. For the avoidance of doubt this includes a kitchen, dining room and lounge on the ground floor and three bedrooms and a bathroom with toilet on the first floor”.

- In Schedule 4 deletion of Step 4 and Step 5.
3. Subject to the correction and variations the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

Application for Costs

4. An application for an award of costs was made by the Council against the appellant. This application is subject of a separate Decision.

Procedural Matters

5. Using powers available to me under section 176(1) of the Act I have corrected the wording of Schedule 4, Step 1 to require that the mixed use of the premises as a HMO and one flat to cease. That more accurately reflects the unlawful use alleged in the notice. I am satisfied this correction can be made without causing injustice to any party.
6. The appeal initially lodged by the appellant included grounds (b) and (e) but these were withdrawn by the appellant during the appeal process.
7. My consideration of the remaining grounds of appeal, and disputed matters therein, are not dependent upon an internal inspection of the property. As such my inspection of only the exterior of the property on 6 February 2024 is sufficient for the purposes of the appeal. Both parties who were absent at the scheduled visit agreed the appeal could be determined on this basis.

Background

8. No. 9 Buxton Road is a traditionally constructed two-storey terraced dwellinghouse. The appellant acquired the property in 2020 and subsequently carried out works to the building comprising a rear single storey ground floor extension and a rear dormer extension. The Council’s investigation of complaints regarding the extensions and the use of the property culminated in the issue of the enforcement notice on 9 March 2022.
9. Given the withdrawal of ground (b) the appellant no longer disputes the use of the property changed from a single dwellinghouse to a mixed use of a HMO and one flat. He also accepts that the change was a material one requiring planning permission.

The appeal on ground (c)

10. An appeal on ground (c) seeks to argue that the matters alleged in the notice do not constitute a breach of planning control. The burden of proof falls to the appellant and the test of the evidence is on the balance of probability. The

appellant's appeal on this ground is made in respect only of the operational development comprising the two extensions.

11. The appellant's case¹ is that both extensions were carried out at a time when the property was still in lawful use as a single C3² dwellinghouse, before the material change to a mixed use of HMO and flat took place, and thereby benefit from the planning permissions ("permitted development") available within the GPDO³. In this regard, as to the actual timing of the works that took place, some documentary evidence⁴ has been submitted indicating the works were completed mid to late September 2020. Documentary and other evidence from the Council and from a third party also indicate construction around that time.
12. However, there is no convincing evidence submitted by the appellant to demonstrate the extensions were carried out and used as part of the lawful use of the property as a single dwellinghouse before the unauthorised material change of use to a mixed use of HMO and flat occurred. The Council's evidence, and that of a third party, indicates more likely to me that during the short period of time between August and October 2020 the appellant carried out the extensions as part of the property's conversion to the unauthorised mixed use. Indeed, the appellant himself acknowledges the works were carried out to facilitate the change of use (albeit originally claiming under ground (b) the conversion was to a C4⁵ HMO only).
13. Consequently, on the balance of probability, I find the extensions cannot properly be regarded as permitted development extensions in the way the appellant asserts. Rather, they were a single operation of works integral to the breach of planning control, being the material change of use to a mixed use of the property as a HMO and one flat. Article 3(5) of the GPDO sets out that permission granted by Schedule 2 does not apply if (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful. As such I conclude that the extensions do not benefit from the GPDO Part 1 permitted development rights.
14. Since the extensions are not permitted development and do not benefit from any other planning permission, they constitute a breach of planning control. The appeal on ground (c) therefore fails.

The appeal on ground (a)/deemed application for planning permission

15. I deal with the extensions first in respect of the effect upon the character and appearance of the area and upon the living conditions of future occupiers.
16. Similar to other properties in the street the only usable and private amenity space for occupiers is quite modest being the approximately 40m² of rear garden area. The footprint of the conservatory takes up a substantial proportion of that outside area such that it falls below the London Plan standards for a family dwellinghouse. Consequently, it results in an unacceptable level of harm to occupiers' living conditions.

¹ Appellant Statement of Case, para. 2.1

² Class 3 (Dwellinghouses) Town and Country Planning (Use Classes) Order 1987

³ Town and Country Planning (General Permitted Development) (England) Order 2015 - Article 3 and Classes A and B, Part 1, Schedule 2.

⁴ Building Control completion certificate dated 19 October 2020; Affidavit, Joseph Adler (freeholder), dated 4 August 2022

⁵ Class 4 Town and Country Planning (Use Classes) Order 1987

17. The rear dormer extension appears bulky and dominant in the roof plane and is overly prominent in views in the context of small back to back rear gardens. Moreover, the Council's evidence that it has not been set down from the ridge by a minimum 0.3 metres, and thereby in conflict with the Council's SPD2⁶, is not disputed with any substantial contrary evidence. As such, I find the dormer extension results in unacceptable harm to the character and appearance of the host property and the immediate area.
18. Planning conditions would not overcome the harm I have identified from the physical form and effects of the extensions as constructed. I acknowledge that there are a few extensions similar to these two in the area. However I do not know how long ago they were constructed, whether they benefit from planning permission, or whether they are unauthorised. Moreover, the merits of any new development should be judged, as I have done so, in the context of latest adopted national and Development Plan policies. In this regard I find the significant harm I have described resulting from the extensions conflicts with the requirements of Policies DMP1 and BH13 of the Brent Local Plan (2022).
19. I also note the appellant's claimed "fall-back" position that the extensions are comparable with what could be achieved as permitted development once the building has returned to a lawful use. However I find this fall-back argument to be a chimaera.
20. S57(4) of the Act states "where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out". As such, there is no provision within the Act for any use, other than a lawful preceding use, to be reinstated following compliance with an enforcement notice. Where the preceding use was not lawful, the property will have a nil use.
21. That is the case here. As confirmed by the appellant⁷ there was a further (unauthorised) intervening use to a C4 HMO. Consequently, there is no lawful residential use that can now be reinstated without the grant of a further planning permission, and hence no fall-back available in terms of permitted development rights.
22. Notwithstanding the above, even if permitted development rights were available as a fall-back position, there is no evidence before me to indicate that such a scheme would result in the same or greater harm than I have described resulting from the constructed extensions. In this regard there would still be no true fall-back position of any weight. For all these reasons the appeal on ground (a) fails.

The appeal on ground (f)

23. Section 173(4)(a) and (b) of the Act states that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first (a) is to remedy the breach of planning control which has occurred, the second (b) is to remedy any injury to amenity which has been caused by the breach. Hence, an appeal on ground (f) is a claim that the notice requirements exceed what is

⁶ Supplementary Planning Document 2: Residential Extensions and Alterations (2018)

⁷ Appellant Statement of Case, para. 1.3

- necessary to remedy the breach of planning control, or, as the case may be, to remedy any harm to amenity resulting from the breach.
24. In this regard the notice requires the complete cessation of the use and the return of the building back to its previous internal and external condition. It is clear therefore that the purpose of the notice falls under 173(4)(a) to fully remedy the breach of planning control.
25. The appellant's case that the property should be allowed to be used as a C4 HMO is without merit. Such use does not form part of the matters alleged for the purposes of the ground (a)/deemed application for planning permission, and moreover is not relevant to an appeal under this ground (f) appeal.
26. The Council does not object to the appellant's suggestion that it would be more reasonable to allow the retention of 2 bathrooms. I also agree that such provision would not be unusual for a property of this size and in the context of modern living standards. I have therefore varied and amalgamated the wording of Steps 2 and 4 so that the appellant has a choice of which to implement. Given such variations the requirements of Step 5 results in unnecessary duplication. I have therefore deleted Step 5.
27. The appeal on ground (f) therefore succeeds, but limited to the extent I have set out above.

The appeal on ground (g)

28. The ground of appeal is that the period of time for compliance with the notice requirements falls short of what should reasonably be allowed. The notice requires compliance within 6 months.
29. I am mindful that any harm resulting from a breach of planning control should be remedied as soon as possible. The appellant seeks a period of 9 months on the basis the notice would need to be served on tenants, with possible eviction proceedings and associated delays through the Court process, and requires alterations that could only take place after tenants had vacated the property.
30. However, this is not a credible argument. Given the potential consequences and penalties arising from failure to comply with a legal obligation to comply with the notice requirements within a specified time limit, the notice requirements ought to be regarded by the appellant as an overarching priority. With that in mind there is no doubt in my mind that 6 months, in the absence of any overriding delay, is a sufficient and reasonable period of time to comply with the notice requirements (as varied). In this regard there is no convincing evidence before me to indicate tenants would not leave voluntarily, with or without notice being given.
31. Moreover, should eviction proceedings become necessary, a landowner would be able to rely on the provisions of s179(3) of the Act which provides a statutory defence against prosecution where the owner has done everything they could be expected to do to secure compliance with the notice. This would include imposed delay due to eviction proceedings and Court processes. The appeal on ground (g) therefore fails.

Thomas Shields

INSPECTOR