



Appeal Decision

Inquiry held on 14 May 2024

Site visit made on 14 May 2024

by Diane Lewis BA(Hons) MCD MA LL.M MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11th June 2024

Appeal Ref: APP/N5090/C/23/3314429

Land at Flat 4, The Spinney, 22 Hendon Wood Lane, London NW7 4HR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr GMP Fitzgerald against an enforcement notice issued by the Council of the London Borough of Barnet.
- The notice, reference ENF/1464/21, was issued on 1 December 2022.
- The breach of planning control as alleged in the notice is: Without planning permission, the making of a material change of use of the land to use as a dwellinghouse and the construction of a single storey building (shown shaded in purple on attached Drawing 01) incidental to making of the change of the use.
- The requirements of the notice are to:
 1. Restore the land to its condition before the breach took place by ceasing its use as a dwelling and demolishing the building.
 2. Permanently remove all constituent materials resulting from the works in 1. above from the land.
- The period for compliance with the requirements is 5 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (e), (f), (g) 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.
- At the inquiry all witnesses gave their oral evidence under solemn affirmation.
- The appellant made an application for costs against the Council and the Council made an application for costs against the appellant. These costs applications are dealt with in separate Decisions.

Summary of Decision: The appeal is dismissed and the enforcement notice upheld with corrections and a variation.

Preliminary Matters

1. The appellant raised two matters concerning the validity of the enforcement notice.

The Henderson principle

2. The appellant made submissions on the *Henderson* principle throughout the appeal proceedings.
3. In so far as relevant to my considerations, there is nothing in the planning history to demonstrate the Council previously sought to take enforcement action in respect of Flat 4 concerning the alleged breach described in the enforcement notice issued on 1 December 2022 and which is the subject of this appeal.

4. Flat 4 was in existence and occupied for residential purposes (as a Class C4 HMO) when an enforcement notice was issued on 24 May 2016 in relation to The Spinney. However, the 2016 enforcement notice did not allege any unauthorised development or seek to take any action in respect of Flat 4, whether in relation to use or operational development, a fact that is agreed in the statement of common ground¹. The action now being taken by the Council is not identical or the same as in 2016 and the current action is not based on the same issues that were decided previously. Through the current enforcement proceedings the Council is not seeking to re-litigate on the alleged breach in relation to Flat 4. Having considered all the submissions on this matter the notice will not be quashed.

Nullity/invalidity

5. Section 173 of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) sets out the matters an enforcement notice should contain. The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 (SI 2002/2682) in Part 2 sets out the additional matters to be specified in an enforcement notice and requires an explanatory note to accompany a copy of the notice served by the local planning authority (Regulations 4 and 5). Case law has shown that an enforcement notice is a nullity if it is so defective on its face it is without legal effect.
6. In accordance with Regulation 4(a) the enforcement notice at paragraph 4 states the reasons why the local planning authority considered it expedient to issue the notice. The appellant may disagree with the reasons but such matters may be pursued through the various grounds of appeal available.
7. The notice identifies the land to which the notice relates as Flat 4, which is situated at The Spinney, 22 Hendon Wood Lane. The plan attached to the notice identifies the larger Property shown edged in black. The area enclosed by dotted black lines on the plan refers to a planning constraint but this does not affect the proper identification of the Property. Drawing 01 shows more specifically the building Flat 4. I am satisfied the enforcement notice complies with Regulation 4(c), which requires a notice to specify the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise. There is nothing in the early documentation to indicate the appellant was uncertain about Flat 4 as the land in question.
8. Regulation 5, responding to section 173(10) of the 1990 Act, requires every copy of an enforcement notice to be accompanied by an explanatory note that includes information on the right of appeal and a list of the names and addresses of the persons served with a copy of the notice. These requirements are not specific to the content of an enforcement notice and failure to fully comply would not render a notice null or invalid.
9. In this instance, the annex to the enforcement notice set out the right to appeal. The copy of the enforcement notice served on the appellant was accompanied by a covering letter, which referred to the grounds of appeal available, an information sheet provided by the Planning Inspectorate and a schedule of persons served. There was the information to enable the appellant to exercise their right of appeal and comply with Regulation 5. The submissions

¹ The Planning Statement in support of a Lawful Development Certificate application made by the appellant also states Flat 4 was not part of the 2016 enforcement notice. Council's Appendix 17 at paragraph 1.7

by the appellant on this point have not demonstrated the enforcement notice is a nullity or, in the alternative, invalid.

Conclusions

10. The two preliminary matters advanced by the appellant do not provide a basis for quashing the enforcement notice. The enforcement notice has all the essential content and is not hopelessly ambiguous and uncertain. The notice is not a nullity and is not invalid.

Enforcement notice

11. Having regard to the very recent *Caldwell* judgement², the building known as Flat 4 was not incidental but fundamental to the alleged material change of use. The building was substantially completed before 1 December 2018, more than four years before the date the notice was issued and is immune from enforcement action. The description of the alleged breach of control requires correction. Consequently, the requirements also should be corrected to ensure consistency.
12. At the inquiry the Council put forward corrected wording for the alleged breach and requirements. The amended wording for the matters which appear to constitute the breach of planning control is "Without planning permission, the making of a material change of use of Flat 4 to use as a dwellinghouse." The amended single requirement is "Restore the land to its condition before the breach took place by ceasing its use as a dwellinghouse." The time period stated in paragraph 4 would be four years, not ten years. The appellant agreed to the proposed corrections and did not seek to argue any injustice would arise.
13. I am satisfied the corrections will not cause injustice to the appellant or the local planning authority. I intend to correct the notice accordingly, also retaining the reference to drawing 01 to identify the building in question. The grounds of appeal will be assessed against the corrected wording of the notice.
14. The residential unit is consistently referred to as Flat 4 by the appellant and the Council. I will continue to use the same address and description even though the building is single storey and the unit does not form part of a larger building where the separate dwelling units are divided horizontally³.

Appeal on ground (e)

15. The issue is whether copies of the enforcement notice were served as required by section 172 of the 1990 Act. Section 172(2) states on who an enforcement notice should be served and section 172(3) states the timescale for doing so.
16. The appellant stated in an email dated 9 May 2024 that this ground was no longer being advanced. However, the appellant returned to related matters at the inquiry and so this ground will be considered.
17. The appellant received a copy of the notice together with the accompanying notes and letter. The appellant maintained the envelope did not provide any

² *Secretary of State for Levelling Up, Housing and Communities v Caldwell* [2024] EWCA Civ 647

³ The Town and Country Planning (General Permitted Development) (England) Order 2015, in article 2 Interpretation states "flat", except in Part 20 (construction of new dwellinghouses) of Schedule 2 to this Order or 11 in the expression "flat roof", means a separate and self-contained set of premises constructed or adapted for use for the purpose of a dwelling and forming part of a building from some other part of which it is divided horizontally.

indication of the importance of the contents but did not say whether the envelope was delivered by post or by hand.

18. Section 329 of the 1990 Act sets out the alternative modes for the service of documents under the 1990 Act, including delivery by hand and delivery by post, where the document should be sent in a pre-paid registered letter or by recorded delivery. The Council officer certified that the notice was served on the appellant by hand on 5 December 2022 and I have no reason to doubt this.
19. The date of service was within 28 days of 1 December 2022, the date the notice was issued and not less than 28 days before the specified date of 12 January 2023, the date when the notice would have taken effect if an appeal had not been made. The service of the notice took place in accordance with the requirements of section 172(3) of the 1990 Act.
20. The appellant questioned whether the correct authority was in place to issue the notice referring to a scheme of delegation, contracts of employment and public law powers. This is not a matter for me to pursue and determine through a planning appeal under section 174 of the 1990 Act. I have covered the matters to do with Regulation 5 and the information accompanying the notice under the second preliminary matter above.
21. Even if there were any defects in service, they can be disregarded because the appellant has made an appeal and no substantial prejudice has been shown (section 176(5)). The appeal on ground (e) fails.

Appeal on ground (b)

22. The issue is whether the matters stated in the alleged breach of planning control have occurred and more specifically whether at the time the notice was issued Flat 4 was in use as a dwellinghouse.
23. The appellant agreed Flat 4 was in use as a dwellinghouse as a one bedroom unit when the notice was issued in December 2022. The appeal on ground (b) fails. Whether a material change of use occurred without the necessary planning permission will be considered under ground (c).

Appeal on ground (c)

24. The onus is on the appellant to show on the balance of probability that the matters stated in the allegation (as corrected) do not constitute a breach of planning control.
25. The meaning of development includes the making of any material change in the use of any buildings or other land (section 55(1) of the 1990 Act). Subject to the stated provisions, planning permission is required for the carrying out of any development of land (section 57(1)).
26. The issue is whether the use of Flat 4 as a dwellinghouse amounted to a material change in the use of the building and if this development occurred whether it was authorised by a development order. Drawing 01 shows a single 1 bedroom dwellinghouse falling within Schedule 1 Part 3 Class C3 of the Use

Classes Order⁴ and the main parties presented their respective cases on the basis of a Class C3(a) dwellinghouse⁵.

Under-enforcement

27. In summary, the appellant relies on the fact Flat 4 was sited within the red line edging shown on the aerial photograph attached to the 2016 enforcement notice. The Council was aware of the existence of Flat 4 at that time but did not specifically identify the unit as being subject to the enforcement action. The appellant submitted the Council's failure to require the removal of Flat 4 or the cessation of the unauthorised use resulted in the implied grant of planning permission under the operation of section 173(11) of the 1990 Act, based on the principle established in the *Barrington* case 1997.
28. Under section 173(11) where an enforcement notice in respect of any breach of planning control could have required any building or works to be removed or any activity to cease, but does not do so, and all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A (planning permission for development already carried out) in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.
29. I agree with the Council that the leading judgement on the interpretation of section 173(11) is that by the Court of Appeal in 2004 *Fidler v Secretary of State*⁶. Subsection (11) only applies to buildings, works or activities included in the description of the alleged breach of planning control in the enforcement notice. It does not operate to grant planning permission for other possible breaches of planning control or for everything else remaining on site once the notice has been complied with, even if not mentioned in the notice.
30. As applied to Flat 4, the 2016 enforcement notice did not include development at Flat 4 within the description of the matters which appeared to constitute the breach of planning control. Flat 4 was not sited within the areas edged blue, green and yellow identified in the description and on the related aerial photograph. Therefore the requirements could not have covered development at Flat 4. There was no under-enforcement in relation to Flat 4 and planning permission was not granted by operation of section 173(11).

Permitted development

31. The evidence shows that the unit was previously a five bedroom house in multiple occupation (HMO), a Class C4 use⁷. This was a matter of common ground between the appellant and the Council, although the dates of the HMO use are not agreed. I refer to an intervening sui generis use in the appeal under ground (d).
32. In the ground (c) appeal, the appellant submitted the change in status from Class C4 use to a Class C3 use did not amount to development, the conversion

⁴ The Town and Country Planning (Use Classes) Order 1987 as amended.

⁵ Class C3(a) is use as a dwellinghouse (whether or not as a sole or main residence) by a single person or by people to be regarded as forming a single household.

⁶ *Fidler v Secretary of State and Reigate and Banstead Borough Council* [2004] EWCA Civ 1295

⁷ The Town and Country Planning (Use Classes) Order 1987 Class C4 Houses in multiple occupation: Use of a dwellinghouse by not more than six residents as a "house in multiple occupation".

to Class C3 is permitted development and is lawful as pursuant to section 55(2)(f) of the 1990 Act.

33. These points are not consistent but each will be addressed in turn. When Flat 4 was in use as a Class C4 HMO the residents were not members of the same family and did not live together as a single household. The probability is that the character of the use of the unit was materially different to its use as a Class C3 dwellinghouse having regard to the numbers of residents, the probable pattern of comings and goings and the type of residential unit available. The planning consequences of each use would be different, as indicated by the development plan policy distinguishing these two forms of residential use. As a matter of fact and degree a change from a Class C4 HMO to a Class C3 dwellinghouse used as a sole or main residence amounted to a material change of use, which is within the meaning of development set out in section 55(1) of the 1990 Act.
34. The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the GPDO) through article 3(1) grants planning permission for the classes of development described as permitted development in Schedule 2 to the Order, subject to the provisions of the Order. One such provision is set out in article 3(5) whereby permitted development rights which are attached to specified uses of land cannot be relied upon where the existing use is unlawful.
35. Applied to the facts in this appeal, Part 3 of Schedule 2 to the GPDO permits changes of use. Class L permits development consisting of a change of use of a building from a use falling within Use Class C4 (HMO) to a use falling within Use Class C3 (dwellinghouses). However, no planning permission was granted for the HMO use. To be lawful, a period of 10 years of continuous use would be required in order to gain immunity from enforcement action (section 171B(3)).
36. On the appellant's evidence Flat 4 was in use as an HMO between October 2015 to November 2018 and hence was not in continuous use as an HMO for the required 10 year period to gain immunity from enforcement action. The Council submitted the HMO use ended around January 2019 and so again the 10 years would not have been achieved. Even if the period was four years, using the appellant's evidence on dates the HMO did not become lawful through the passage of time - October 2015 to mid November 2018 amounts to just over 3 years.
37. Therefore the evidence has not demonstrated that the HMO use was lawful. A material change from use as a Class C4 HMO to use as a Class C3 dwellinghouse was not permitted development. Planning permission was required to authorise the Class C3 use and no permission was granted.
38. For completeness, section 55(2) of the 1990 Act identifies the operations or uses of land which for the purposes of the Act do not involve development. Section 55(2)(f) includes the use of buildings for any purpose falling within the same use class. This provision is not applicable to Flat 4 because the Class C3 dwellinghouse is a different use class to a Class C4 HMO.

Conclusion

39. The appellant has failed to discharge the onus of proof. A material change of use of Flat 4 to use as a dwellinghouse took place, the development was not

authorised by planning permission and a breach of planning control occurred. The appeal on ground (c) fails.

Appeal on ground (d)

40. The issue is whether the material change of use of Flat 4 to use as a Class C3 dwellinghouse took place before 1 December 2018 and whether the Class C3 use continued uninterrupted for a period of four years thereafter.
41. The onus is on the appellant to prove their case and the standard of proof is the balance of probability. The appellant's case on this ground of appeal emerged at the inquiry, principally through the oral evidence of the appellant and then confirmed in the closing submissions. The appellant accepts there was development consisting of a material change of use to use as a dwellinghouse. The previous use is stated to be a Class C4 HMO. The appellant dates the occurrence of the development to mid November 2018, that is more than four years before the date of the enforcement notice of 5 December 2022. The appellant concludes the use is lawful.
42. To confirm, the relevant date is 1 December 2022, not 5 December 2022 cited by the appellant. The date of the 5th was taken from the date on the site plan attached to the notice, which corresponds with the date the notice was served. However, the enforcement notice is clearly dated 1 December 2022. This date of issue is acknowledged by the appellant on the appeal form and other appeal documents, such as the inquiry statement.
43. By way of background, the planning history shows that the appellant applied in September 2021 for a lawful development certificate (LDC) for use as 7 self-contained flats for a site that included Flat 4. At the time the Council concluded that there was insufficient evidence to demonstrate the lawfulness of Flat 4⁸. A further application for a LDC in respect of Flat 4 alone was made on 2 November 2023 for "use of the building as one self-contained dwelling unit within Class C3 of the Use Classes Order". On 10 May 2024 the Council determined to refuse to issue a certificate⁹. In its proof of evidence for the current appeal the Council referred to evidence submitted by the appellant in support of the 2023 LDC application.

Evidence on use

44. The use as an HMO commenced in October 2015, a fact both parties agreed. Subsequently the appellant applied for a licence. The Council's Environmental Health Officer (EHO) who inspected Flat 4 on 2 November 2018 provided a file note that recorded the internal layout. At that time the unit was divided to provide 5 bedrooms, a kitchen and a bathroom. The EHO wrote to the appellant on 8 January 2019 and although a licence was issued the occupation was limited to zero because of the undersized rooms. Appendix 1 to the licence set out that the zero permitted level of occupancy could be achieved when the relevant tenancy, tenancies or licence to occupy came to a natural end or at the end of a period of no more than 18 months beginning with the date of the licence, whichever occurred first.

⁸Council's proof of evidence paragraphs 5.2, 5.3

⁹ The amended description on the refusal notice was use of building as 1 no. self-contained flat. The address was The Spinney 22 Hendon Wood Lane.

45. The EHO also advised that a file note showed he had a conversation with the appellant on 3 March 2021, who confirmed the unit was let as a one bed flat and was no longer an HMO. An email dated 22 March 2021 confirmed this information. As a result the HMO licence was revoked on 6 May 2021. The appellant did not dispute any of this information and the probability is the EHO's accounts are accurate, being based on contemporary file notes. Accordingly, as a matter of fact Flat 4 was in use as an HMO on 2 November 2018, the date of the internal inspection.
46. The appellant said because the accommodation was found to be too small he asked people to leave and within ten days three people had moved out. By 10/12 November two people remained living in the unit. One person left around 17 March 2019, very shortly after St Patrick's day. The fifth tenant (tenant HF) continued living in Flat 4 and later was joined by his wife. The appellant considered the material change of use occurred by around mid November following the EHO's inspection and the reduction in the number of residents from five to two. At that point the appellant submitted it was not legally possible for Flat 4 to be an HMO.
47. There are factors which call into question the appellant's chronology of events. There was no urgency or immediate requirement from a licensing point of view to immediately terminate the tenancies of residents. As the EHO explained, the licence worked by natural decrease as rooms were vacated. In addition, the timing is not consistent with the evidence of tenant HF, who in a statutory declaration stated he "noticed from 2019 onwards that a number of guys started to leave but their rooms were not being occupied by other people". By 2019 he was looking to be joined by his wife and because the other tenant was aiming to move he approached the landlord to see if he was prepared to let the property as a single flat. All necessary partitions were taken down to give a one bedroom flat, he was granted an assured shorthold tenancy and they have lived there since.
48. The declaration of tenant HF, although not entirely consistent on dates throughout, clearly dates the reduction in the number of HMO tenants to the beginning of 2019. This timing is consistent with the date of the EHO letter and HMO licence, which lend weight to its accuracy. At the inquiry the appellant considered tenant HF mixed up the dates and the evidence was incorrect. However, the statutory declaration was submitted in support of the appellant's own application dated 2 November 2023 for a LDC for the use of Flat 4 as one self-contained dwelling unit within Class C3. In making the LDC application, a declaration was made that the facts stated were true and accurate.
49. Furthermore, the Council explained why in their view the commencement of the Class C3 use did not immediately follow the initial reduction in the number of tenants. The probability is the remaining two tenants did not live together as a single household and so the building was in a sui generis use. In the absence of contrary evidence from the appellant I attach substantial weight to this assessment.
50. Additionally, a tenancy agreement dated 22 May 2019 between the appellant and tenant HF, where the rent was £700 per month, indicates the use of Flat 4 as a dwellinghouse. The probability is the material change of use took place around that time, rather than the earlier date in November 2018 put forward by the appellant.

Conclusions

51. The appellant's personal evidence on the chronology of occupation is contradicted by evidence from one of the tenants and is made less than probable when considered in the context of the documented outcome of the HMO inspection. Moreover, the timing of the material change of use to use as a Class C3 dwelling has to take account of when Flat 4 was in use by residents who were not living as a single household. The appellant's evidence overall is not sufficiently precise and unambiguous and has failed to show on the balance of probability that a material change of use of Flat 4 to use as a Class C3 dwellinghouse took place before 1 December 2018. The use as a dwellinghouse, as described in the notice, is not lawful and the appeal on ground (d) fails.

Other matters in the legal grounds of appeal

52. Much was made of the aerial photographs. However, putting aside the poor quality of the photographs, for the purposes of this appeal there is no need to establish the precise date when the building was substantially completed. The key point, over which there is no dispute between the main parties, is that the building has become lawful through the passage of time. The building was substantially completed at the latest by the beginning of October 2015.
53. There also was a dispute between the main parties on whether the building was first used at most for a few months as a store and workshop before the use as an HMO. The more relevant matter is the date of the commencement of the HMO use, a date on which the parties agree and which the evidence shows was on the balance of probability in October 2015. The HMO use cannot have achieved lawfulness.

Appeal on ground (a), deemed planning application

54. The deemed planning application is for the material change of use to use as a dwellinghouse as shown on Drawing 01, the development described in the corrected breach of planning control.
55. The appeal site is within the Metropolitan Green Belt. The main issues are:
- Whether the material change of use is inappropriate development in the Green Belt. In the event inappropriate development has taken place, whether the harm by reason of inappropriateness and any other harm is clearly outweighed by other considerations to provide the very special circumstances to justify the development.
 - Whether the dwellinghouse provides a high standard of amenity for existing and future users, taking into account the amount and quality of internal space and the standard of private outside amenity space.

Green Belt

56. The National Planning Policy Framework (the Framework) in paragraph 155 sets out forms of development that are not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. One of the categories of development is the re-use of buildings provided the buildings are of permanent and substantial construction. At the inquiry the Council and the appellant agreed this was the relevant

criterion to apply in the deemed planning application. The disagreement focused on whether the Flat 4 building was of permanent and substantial construction.

57. Flat 4 was substantially completed in 2015. The information available is that the initial construction provided concrete footings, brick piers and floor joists, later followed by the erection of timber walls and a roof. Before its use as residential accommodation bathroom facilities were added, walls insulated, internal partitions erected and windows provided. In 2019 some internal partitions were removed to create a one bedroom unit. Therefore the works and alterations required to facilitate the change of use were primarily internal affecting the room layout. There is no evidence of extensive alterations, rebuilding or works to the external fabric. For the purposes of the policy criterion the building is considered as a matter of fact and degree to be of permanent and substantial construction. To complete the picture in terms of the current position, at the beginning of 2023 part of the partition separating the bedroom and living room was removed.
58. The change of use was within an existing building that previously was used for residential accommodation. Flat 4 is sited within a developed site enclosed by similar single storey buildings and where there is an established car parking area. The material change of use has not resulted in a loss of openness, nor does it conflict with the purposes of including land within the Green Belt.
59. In conclusion, the material change of use involving re-use of an existing building is not inappropriate development in the Green Belt. The development is not harmful to the openness of the Green Belt or to the purposes of including land within it. Very special circumstances do not have to exist to justify the development. There is no conflict with policy to protect the Green Belt in the Framework and Policy DM15 of Barnet's Local Plan¹⁰. Nevertheless, it does not necessarily follow that the development is acceptable in terms of other planning issues.

Living conditions

60. Policy D6 of The London Plan 2021 requires housing development of high quality design, providing adequately sized rooms with comfortable and functional layouts which are fit for purpose. Table 3.1 sets out the minimum internal space standards for new dwellings (which includes new build, conversions and change of use). The Housing SPG seeks to ensure the home is a comfortable place of retreat.
61. Referring to Table 3.1, a 1 bedroom 1 storey dwelling with 1 bedspace for 1 person should have a minimum gross internal floor area (GIA) of 39 square metres (sq. m) and 1 sq. m of built-in storage. Where a studio/one single bedroom 1 person dwelling has a shower room instead of a bathroom, the floor area may be reduced to 37 sq. m. A 1 bedroom 1 storey dwelling with bedspace for 2 persons should have a minimum GIA of 50 sq. m and 1.5 sq. m of built-in storage. The appellant considers the relevant GIA is 37 sq. m and the Council say 50 sq. m.
62. Flat 4 was in use as a 2 person unit at the time the notice was issued and the evidence indicates that was the intended level of occupation in the change-over

¹⁰ Barnet's Local Plan Development Management Policies September 2012

period from a HMO. The tenancy agreement dated 22 May 2022 names two tenants. As shown on Drawing 01 attached to the notice, the dwelling was divided to provide a bedroom separate from the living area. The appellant confirmed the removal of the partitions took place later, in 2023, to create a 'studio' unit. I consider that the 2 person unit should have a minimum GIA of 50 sq. m, with 1.5 sq. m of built in storage as set out in Table 3.1 and explanatory notes.

63. The agreed GIA is 39.48 sq. m¹¹, which I confirmed with both parties at the inquiry. Even though requested¹², agreed dimensions of each 'room' were not provided. On the site visit I noted as currently laid out there is limited circulation space within the bedroom because of the narrowness of the space between the front and rear walls. No attention was drawn to any built-in storage, although the appellant later referred to 'kitchen cabinets and free-standing wardrobes'¹³. I conclude the internal space is significantly below the minimum standard, which detracts from the comfort and function of the dwelling.
64. There are windows on the rear and side elevations of the dwelling (plus a small bathroom window near the front door) but the unit is partially enclosed, with raised ground close to the rear elevation and flat 1 very close to part of the side elevation. The siting of the dwelling and the size and position of windows restricts the amount of natural light and direct sunlight (if any), and results in little visual interest in the outlook.
65. The London Plan expects private outdoor space to be practical in terms of shape and utility and offer good amenity. Policy D6 states where there are no higher local standards in the borough Development Plan Documents a minimum of 5 sq. m of private outdoor space should be provided for a 1-2 person dwelling. Policy DM02 of the Barnet Local Plan expects compliance with the standard in the Sustainable Design and Construction SPD. The SPD requirement is 5 m² of space per habitable room for a flat and 40 m² of space for a house with up to four habitable rooms.
66. The area of amenity space currently available for the sole use of the residents of Flat 4 is 8 sq. m, following subdivision of the larger open area shown on Drawing 01. The space has little privacy, being very near to the entrance to the appellant's office and the entrance to Flat 3. The shape of the space constrains how it may function and be used. I conclude that the area of private outdoor space is not of the standard of amenity required by the development plan. There are small pockets of communal space on the site but these do not adequately make up for poor quality private amenity space to serve the dwellinghouse.
67. Overall, the unit falls far short of the high quality living environment claimed by the appellant. The development fails to comply with Policy D6 of The London Plan and Policy DM02 of the Barnet Local Plan.

Other planning considerations

68. The building is within a larger site providing residential accommodation in a mix of low buildings and mobile homes that have become lawful through the

¹¹ Statement of common ground page 2

¹² Pre-Inquiry Note 3

¹³ Closing submissions page 8

passage of time. On adjacent land to the rear is a commercial yard, described as a scaffolding yard and more recently in February 2022 by the appellant as a waste recycling yard. The planning history does not indicate positive planning and the Property does not appear to benefit from careful planning, whether in terms of the standard of built development or landscaping.

69. By contrast the Spinney is located in a pleasant area where the ribbon development extending along Hendon Wood Lane is spacious and the surrounding open land includes farmland, recreation grounds and woodland. There are sites valued for their nature conservation interest. The dwelling unit, which is below the required standards, would consolidate residential development on the larger site and in so doing detract from the local environment nearby.
70. The policies in the development plan requiring high quality homes are in accordance with the objective of securing sustainable development. The development fails to comply with these policies. The weight I attach to this harm is not overcome by the residential unit's location on previously developed land, the absence of harm to the Green Belt and the possible minor economic and social benefits.
71. The Convention right under Article 8¹⁴ affords a right to respect for home and family life. However, Article 8 is a qualified right whereby an individual's right may be restricted in the public interest. In this case the public interest is in securing sustainable development and ensuring that homes meet the required standards set out in the development plan. On the other hand, Flat 4 has provided a home for the current occupiers for around five years now and who have stated they are happy living there¹⁵. A refusal of planning permission and upholding of the notice would have a serious consequence for them because of the prospect of losing their home. Nevertheless, given the substantial weight of the development plan, the balance is in favour of the wider public and community interest, subject to such an outcome being necessary and proportionate.

Planning conditions

72. Planning Practice Guidance advises that when used properly conditions, by mitigating the adverse effects, can enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission.
73. The conditions agreed in the statement of common ground, in summary, would limit permitted development rights, control the residential use to Class C3(a) and require retention of the amenity space. The first two conditions would be necessary to safeguard the amenity of neighbouring residents and the third is directed at the amenity of the occupiers of Flat 4. However, they would not mitigate the identified harm and no improvements to the living accommodation would result.
74. Conditions also could require the provision of cycle parking and refuse and recycling facilities. The same conclusion applies – they would not affect the size of the unit or the size, amenity and useability of the outdoor space.

¹⁴ Article 8 is enshrined in UK law by the Human Rights Act 1998.

¹⁵ Appendix 11 to the Council's proof in the statutory declaration dated 2 September 2023 paragraph 8.

Other matters

75. The appellant considered fairness and consistency in decision making strongly support granting permission for Flat 4. However, Flat 4 is not the only property where the Council has taken enforcement action, a further example being the enforcement notice issued in 2016. The fact some uses, buildings and structures acquired immunity from enforcement action is not a sufficient reason or justification to allow a below standard residential unit. Similarly, even though the building now comprising Flat 4 is lawful, the current use as a Class C3 dwelling house is not acceptable when tested against the relevant planning policies.
76. The appellant also restated submissions related to the Henderson rule and the claimed abuse of process. I have addressed and dismissed this line of argument in the preliminary matters. In the event I had agreed with the appellant the enforcement notice would have been quashed and the ground (a) appeal would not be for consideration.

Planning balance and conclusion

77. The material change of use does not harm the Green Belt and there is no reason to refuse permission on Green Belt grounds. The main factor against the development is the poor design and layout of the residential unit. The living conditions for the occupiers do not achieve the required standards and the change of use to provide a Class C3 dwellinghouse is not in accordance with the development plan as a whole. The proposed planning conditions would not adequately address the identified harm. The policy requirements are in the public interest and the other remaining considerations identified by the appellant have little weight.
78. The balance is against the development and the appeal on ground (a) does not succeed. I am satisfied that this outcome is proportionate when full account is taken of the Article 8 rights of the current occupiers.

Appeal on ground (f)

79. The main issue is the whether the requirements are excessive to achieve the purpose of the notice.
80. In light of the *Caldwell* judgment the Council accepted the description of the alleged breach requires correction (as explained earlier in this decision) and, as a result of that correction, to require the demolition of the building would be excessive. I agree and the wording of the requirements will be corrected accordingly. To that extent the appeal succeeds on ground (f).

Appeal on ground (g)

81. The issue is whether the compliance period of five months is reasonable and proportionate.
82. National planning policy confirms the importance of effective enforcement. Considerations on ground (g) include what the recipients of the notice will have to do in practice to carry out the required remedial steps, how much time would be reasonable for that purpose and the level of harm caused by the breach of planning control.

83. The appellant initially requested a period of 18 months to enable the occupants to find alternative accommodation or, if necessary, to pursue legal proceedings to secure vacant possession of the unit. In closing submissions the appellant considered a period of one year would be a reasonable solution.
84. As proposed to be corrected, the single requirement is to cease the unauthorised use as a dwellinghouse. No physical works to the building are required.
85. The unit was let under an assured shorthold tenancy. The tenancy commenced on 22 May 2022 and was for an initial fixed term of two years ending on 22 May 2024. At the end of the term, unless the tenants have given at least one calendar month's written notice to terminate the agreement, the tenancy will continue as a contractual periodic tenancy. The appellant stated the tenants must then be given two months to vacate the dwelling. It is understood the same two tenants who entered into the tenancy agreement still live there. The Council certified they were served with a copy of the enforcement notice on 5 December 2022. They would know about the enforcement proceedings and the need to vacate the unit in the event the notice was upheld. Having said that, the appellant and the tenants probably hope the appeal would be successful.
86. The two occupiers have lived at Flat 4 for several years now and as far as I could see they have done their best to make the unit a home. According to the appellant they would have difficulty finding alternative affordable accommodation. However, it is necessary to uphold the notice in response to planning policies that have been subject to due process and which aim to secure high quality new homes. In the circumstances a compliance period of eight months would be proportionate and strike the right balance when considering the public interest and the occupiers' right to respect for their private and family life and their home.

Conclusion

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

DECISION

88. It is directed that the enforcement notice is corrected:

- In paragraph 3 by the deletion of the description of the alleged breach of planning control and its substitution with the words "Without planning permission, the making of a material change of use of Flat 4 (shown shaded in purple on attached Drawing 01) to use as a dwellinghouse."
- In paragraph 4, in the first sentence delete "ten years" and substitute "four years".
- In paragraph 5 by the deletion of the wording of requirement 1 and the substitution of the wording "Restore the land to its condition before the breach took place by ceasing its use as a dwellinghouse." and by the deletion of requirement 2.

89. It is directed that the enforcement notice is varied in paragraph 6 by the substitution of 8 months as the time for compliance.
90. Subject to the corrections and variation 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.

Diane Lewis

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Giuseppe Nicastro LL.B	Advocate and witness
He called	
Mr GMP Fitzgerald	The Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Ms Georgina Fenton	Barrister
She called	
Mr Robert Favell	Deputy Planning Manager Enforcement

INTERESTED PARTIES:

Councillor Caroline Stock	Councillor, Totteridge and Woodside Ward
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DOCUMENTS submitted at the inquiry

- 1 Appellant's application for an award of Costs
- 2 Site photographs by the Council dated 24 February 2022
- 3 Appellant's Statement of Common Ground
- 4 Statement of Common Ground minus the disputed comments on behalf of the appellant
- 5 Aerial photograph dated 9 July 2015 submitted by the Appellant
- 6 Licence to Occupy submitted by the Appellant
- 7 Council's opening submissions
- 8a Appellant's submissions/Closing statement The Henderson Principle
- 8b Appellant's closing submission on under enforcement