



Appeal Decision

Inquiry held on 23 and 24 April 2024

Site visit made on 24 April 2024

by Martin Allen BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 October 2024

Appeal Ref: APP/T5150/C/23/3329600

Flats 1-12 Affinity House, 66 Fourth Way, Wembley HA9 0BF, known as Former 6-10 Hallmark Trading Centre, Fourth Way, Wembley HA9 0BF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Amin Dharmeshkumar, NHMD Properties LLP against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice was issued on 7 August 2023.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land/premises to twelve flats.
- The requirements of the notice are to:
 - Step 1 - Cease the use of the premises as flats.
 - Step 2 - Remove all partitions, toilets, bathrooms and kitchens from the premises.
 - Step 3 - Remove all items, materials and debris, associated with the residential use, from the premises.
- The period for compliance with the requirements is: 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (f) and (g) of the Town and Country Planning Act 1990 (as amended).

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

Application for costs

1. An application for costs was made by Mr Amin Dharmeshkumar, NHMD Properties LLP, against the Council of the London Borough of Brent. This application is the subject of a separate Decision.

Preliminary Matters

2. At the Inquiry all evidence was taken on oath.

Validity of Notice

3. The appellant raises that the enforcement notice should be considered a nullity because it fails to specify the nature of the breach. However, from my reading of the notice, it is clear what the notice is directed at, the residential use of the building.
4. It was put to me that the enforcement notice issued is not valid as it contains no date stating when it is considered that the alleged breach of planning control commenced. However, Section 173 of the Town and Country Planning Act 1990 (as amended) contains no requirement to state such a date and I was not

directed to any requirement for this to be included. As such, I find no invalidity in these respects.

5. It was also raised by the appellant that the enforcement notice alleges development without planning permission, rather than the breach of any limitation. It was clear to me that the Council's position was that the entire development was unauthorised and did not benefit from any permission granted by the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). Therefore, I do not consider that this is a matter that renders the notice invalid.

Ground (c)

Whether the development was carried out as approved

6. The appeal site comprises a three-storey building that previously contained a storage use to the ground floor, with offices to the first and second floors above. On 27 December 2017, the Council granted approval (ref 17/4679) for the change of use from offices (Use Class B1(a)) to residential (Use Class C3) involving the creation of 12 x flats. This was following an application for prior approval made pursuant to Class O, Part 3 of the GPDO. With the application, the appellant submitted floorplans showing the layout of the flats that were proposed to be constructed.
7. There is no dispute between the parties that the development that exists on site does not accord with the floorplans that were submitted as part of the application, in that it remains that 12 flats have been created, but the layout of these units differs significantly from the submitted details.
8. The appellant asserts that Part O of the GPDO includes no requirement for floorplans to be submitted as part of an application for prior approval and thus the appellant is not beholden to those details that were submitted.
9. Nonetheless, the fact remains that the appellant chose to submit details with the application for prior approval which outlined how the development of 12 flats within the building would be achieved. It was on the basis of these details that the Council made its decision to grant prior approval of the details of the scheme. Accordingly, the development should have been carried out in accordance with these details, unless agreement was provided otherwise.
10. Paragraph W of Part 3, Schedule 2 of the GPDO sets out the procedure for applications for prior approval under Part 3, and sub-paragraph 12 sets out that development must be carried out in accordance with the details approved by the local planning authority "unless the local planning authority and the developer agree otherwise in writing".
11. It is clear from the evidence that I heard that the appellant made attempts to agree revised details of layout with the Council on numerous occasions. Initially by email in May 2020 the appellant provided copies of the approved plans and proposed amendments. No response was received from the Council. The appellant then in July 2020 submitted an application under Section 73, the Council refused this *inter alia* as there was no condition on the decision notice for 17/4679 which lists the plans. A further email was sent seeking clarification on the Council's seeming refusal to agree the amendments, a response was received indicating that the Council considered that physical works to the building meant that permitted development rights no longer applied.

12. Another email from the appellant in August 2020 specifically asked the Council to agree in writing to the proposed amendments to the layout. No response was received to this email. Following this, an application was made under Section 96A for a non-material amendment to the prior approval. The Council refused to validate this application.
13. There have therefore been attempts by the appellant to seek to agree the amendments in writing with the Council. However, while these attempts are noted, I am conscious of the specific wording of sub-paragraph 12 of paragraph W:

The development must be carried out—

(a) where prior approval is required, in accordance with the details approved by the local planning authority;

(b) where prior approval is not required, or where sub-paragraph (11)(c) applies, in accordance with the details provided in the application referred to in sub-paragraph (1),

unless the local planning authority and the developer agree otherwise in writing.
(my emphasis)

14. There must be an agreement between the two parties, the appellant and the Council, to any proposed changes. Despite the best efforts of the appellant, the Council provided no written agreement to the changes, and it is clear that there was no agreement in place. As a consequence, the development should have been carried out in accordance with the initially approved details. Whether or not there was any recourse open to the appellant to address the lack of agreement by the Council to the requested amendments is not a matter that falls within the remit of this appeal to determine.
15. Notwithstanding the above, the appellant contends that the actual departure from the approved details is not significant and can be described as “trifling”. The approved layout details show 6 flats on each of the first and the second floors, with each floor having 3 x 2-bed units and 3 x 1-bed units. The as-built layout comprises of 2 x bedsit/studio units, 8 x 1-bed units and 2 x 2-bed units. There are few, if any, of the internal partition walls in the same position as shown in the approved details. Entrances to units are in different positions, as are lifts and stairwells. On any comparison of the approved and as-built details, the changes are plainly evident and substantial. The as-built development is clearly a different scheme from that which gained prior approval and thus the development is not within the scope of that approval.
16. Immediately prior to the Inquiry, the appellant raised an additional matter in respect of the drawing numbers that are referenced within the decision notice granting prior approval under ref 17/4679, in that two of the drawings referred to are incorrect. In fact, it was accepted by the Council’s witness at the Inquiry that the cited plans do not exist.
17. In my view, this creates ambiguity within the decision notice as to what plans are to be referred to. In such circumstances, it is permissible to consider extrinsic evidence outside of the decision notice itself. In this case, this would include the details that were submitted with the application, i.e., the floor plans showing the layout of the units. This would also therefore indicate that the development should have been carried out in accordance with those details. It is

also pertinent to note that at all times the appellant was in no doubt as to which plans were required to be complied with, having made attempts to seek agreement to depart from them.

18. It has also been put to me that as the description of development simply refers to the creation of 12 flats, essentially that any scheme comprising 12 flats would have been permitted. I do not accept this. While Class O of the GPDO contained no requirement for the floor plans to be submitted, the appellant chose to provide them. These details were considered by the Council when making its decision. It was on the basis partly of these details that the Council granted prior approval. As such, the floor plans are relevant and should be adhered to.

The effect of works to the building

19. There have also been physical alterations to the building which must be considered under the ground (c) appeal. In Mr Wicks' Proof of Evidence at paragraph 3.4, various alterations that have taken place to the building are listed, these include the removal and replacement of the roof, including the roof covering and supporting structure, the removal and replacement of external walls at first and second floor, to both the front and rear, the removal of the second floor, including the slab and supporting steelwork and the replacement with new steelwork, timber joists and decking. There have also been other less substantial works including the replacement of all windows at first and second floors, the removal of a rear shuttered access, removal of 3 staircases and replacement with 2, the removal of all internal partitioning to the first and second floors and replacement with a different layout and various new structural steelwork. These works are shown in photographs attached to Mr Wicks' Proof of Evidence as Appendix 19.
20. Section 55(1) of the Act defines the meaning of "development" as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". Section 55(1A) sets out that "building operations" includes—
- (a) demolition of buildings;
 - (b) rebuilding;
 - (c) structural alterations of or additions to buildings; and
 - (d) other operations normally undertaken by a person carrying on business as a builder.
21. While Section 55(2) lists operations or uses of land that shall not be taken for the purposes of the Act to involve development. These include "(a) the carrying out for the maintenance, improvement or other alteration of any building of works which— (i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building".
22. It was put to me at the Inquiry that these works comprised repair and/or alteration, that some of the works affected only the interior, and those that affected the exterior did not materially affect the external appearance of the building. However, from the description of the works together with the visual extent of the works depicted in the photographs, I am of the view that the works that were undertaken to the building went beyond mere repair and/or alteration. They were substantial and extensive works of rebuilding and were structural alterations, which are sufficient to comprise building operations in their own right. As a result of this, I find that they do comprise development, and are not

excluded from being so by Section 55(2) of the Act, as is contended by the appellant.

23. These works were undertaken in the course of developing the building so that it could accommodate the proposed change of use, which was granted prior approval by the Council, and thus before the change of use began. The change of use is granted planning permission, following the grant of prior approval, subsequent to Article 3 of the GDPO. However, paragraph 5 of Article 3 states:

(5) The 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;

(b) in the case of permission granted in connection with an existing use, that use is unlawful.

22. In light of my findings above, that the physical works that were undertaken to the building were of such an extent as to comprise development, and that no planning permission was obtained for them, these works are unauthorised and thus unlawful. As a consequence of this, the appellant is not able to rely on the scheme which was given prior approval.
23. It was also contended at the Inquiry that as the Council indicated that it was not expedient to take enforcement action in respect of the physical alterations to the building, this resulted in those works becoming “lawful”. However, the works had not become lawful through the passage of time, or through the grant of any Lawful Development Certificate. As such, this does not change my view that the works are unauthorised.

Overall conclusion on ground (c)

24. The development of the site was not carried out in accordance with the approved details. There was no agreement to any variation. Even if there had been agreement to change the scheme, the physical works were such that they required planning permission, which was not obtained. Thus, these works to the building were unauthorised, meaning that the appellant cannot benefit from planning permission granted by the GPDO in any event. Accordingly, there has been a breach of planning control and the appeal under ground (c) must fail.

Ground (f)

25. An appeal under ground (f) is that the steps required to comply with the notice are excessive and lesser steps would overcome the objection. The notice sets out at Schedule 4 that its purpose is to remedy the breach of planning control.
26. The appellant sets out that the breach is minor, and if anything is a breach of limitation. However, I have found above that the development that has taken place is development without the benefit of planning permission. The appellant invites me to vary the enforcement notice to require conformity with the plans showing the amended layout of the building (which the appellant has previously attempted to agree with the Council). However, there exists no planning permission, either expressly granted or granted by the GPDO, for the development. As such, requiring conformity with plans in the absence of planning permission would go beyond the bounds of my power to vary the notice. No

other steps have been put before me that would remedy the breach of planning control.

27. I note reference by the appellant to the requirements being disproportionate, and interfering with the human rights of the occupants, including the best interests of the children that currently occupy the premises. However, such considerations do not fall to be considered under a ground (f) appeal, where my consideration is limited to whether the requirements are, in this case, excessive to remedy the breach of planning control. I find that they are not.
28. In the absence of any lesser steps being put before me that would remedy the breach of planning control, the appeal on ground (f) fails.

Ground (g)

29. The ground of appeal is that the time given to comply with the notice is too short. The notice requires the cessation of the use and the removal of all items associated with the residential use, within 6 months. The appellant argues that a period of 5 years would be the appropriate timescale.
30. I am conscious that the development is occupied by persons who are not well placed to be able to easily find alternate accommodation, and that there are families and children living within the building. In this regard I am particularly conscious of my obligations under the Human Rights Act 1998, particularly Articles 8 and 14 as highlighted by the appellant, and my duty under the Public Sector Equality Duty. I am also conscious of the best interests of the children occupying the building, and that these interests are a primary consideration.
31. There would be interference with the rights of the occupiers but for the reasons given above, this interference would be proportionate in light of the legitimate aims of facilitating a properly functioning planning enforcement regime. Balancing these competing interests, I find that a compliance period of 6 months would be unreasonably short, however the requested 5 years would be entirely excessive. I consider that a period of 12 months would be appropriate in this case, which in my view strikes an appropriate balance between the rights and needs of the occupiers, including the children, and the legitimate aim of remedying the breach of planning control.
32. Accordingly, the appeal on ground (g) succeeds to this limited extent.

Conclusion

33. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation.

FORMAL DECISION

34. It is directed that the enforcement notice is varied by:
- the deletion of 6 months and its substitution with 12 months as the time for compliance
35. Subject to the variation, the appeal is dismissed and the enforcement notice is upheld.

Martin Allen INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Ms Phillipa Jackson	Counsel for the Appellant
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She called

Mr Farid Afnan	Architect
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Ms Laura Jenkinson	Planning consultant
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FOR THE LOCAL PLANNING AUTHORITY:

Mr Edmund Robb	Counsel for the LPA
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He called

Mr Nigel Wicks	Planning consultant
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