



Appeal Decision

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6th December 2024

Appeal Ref: APP/U5930/C/23/3333089

7 St. Mary Road, Walthamstow, LONDON E17 9RG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Mudasser Khan against an enforcement notice issued by Waltham Forest London Borough Council.
- The notice was issued on 12 October 2023.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the dwelling house to use as a mixed composite use of a HMO comprising of three bedrooms on the ground floor and four self-contained flats (Two on the first floor and two on the second floor).
- The requirements of the notice are to:
 1. Cease the use of the property as a mixed composite use consisting of a house in multiple occupation (HMO)(C4 Use Class) comprising 3 bedrooms on the ground floor and 4 self-contained flats, revert the property back to its previous authorised C3 dwellinghouse use.
 2. Remove all fixtures and fittings associated with the use of the property mixed composite used consisting of a HMO C4 use class and 4 flats including but not limited to all signage, door locks and door numbers.
 3. Remove all additional kitchens within the property including any microwaves, kitchen cupboards, sinks, countertops and laundry machines so that only one kitchen area remains within the property.
 4. Remove all additional bathrooms, including hand wash basins, WC toilets and showers added to the property so that only one bathroom remains on each floor.
 5. Remove any additional gas or electricity metres that facilitate the use of the four unauthorised flats.
 6. Remove all forms of subdivision and partitioning within the property.
 7. Remove from the property all associated debris resulting from compliance with the above steps.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (d) and (f) of the Town and Country Planning Act 1990 (as amended).

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

Applications for costs

1. An application for costs has been made by the Council against the appellant. This application will be the subject of a separate decision.

Procedural Matters

2. No site visit has been carried out as the appeal can be decided purely on the basis of the technical and/or legal interpretation of the facts. All the information needed is included with the appeal documents and so a decision

can be reached on the papers¹. There are no objections from the parties to proceeding in this way.

3. The appellant's grounds of appeal contain submissions that amount to an appeal under ground (c), namely, that there has not been a breach of planning control in respect of the C4 HMO use. The Inspector is duty bound to consider all the submissions made by the appellant regardless of whether they are made under a particular ground of appeal and as such the Council were invited to respond to these submissions.
4. The Council's response mistakenly took the view that the appellant was seeking to introduce new arguments, which is not the case as the submissions are already made. The Council submit "the introduction of new grounds by the Planning Inspectorate at this stage risks creating a perception of partiality, as it could be interpreted as assisting the appellant and the inclusion of additional grounds, particularly when not expressly raised by the appellant themselves." The appellant confirmed this was not the case and I shall therefore proceed on the basis that the Council has declined to make any comments.

The appeals on grounds (b) and (c)

5. In appealing on ground (b) the burden of proof is firmly on the appellant. He has to demonstrate that the matters stated in the notice relating to the material change of use of the property have not occurred as a matter of fact.
6. When looking at whether there has been a material change of use, it is often helpful to use the concept of the planning unit. The property was previously in use as a single family dwellinghouse. This was a single planning unit where the unit of occupation had one primary use. The Council now allege that there is a mixed use but it is not clear whether they mean this is taking place within a single planning unit or whether they consider the unit of occupation comprises two or more physically separate areas occupied for different and unrelated purposes.
7. I find, as submitted by the appellant, and seen by the Council, that the internal layout of the property is that of five flats. There is a two bedroom flat with a storage room on the ground floor, then two flats per floor on the first and second floors. All tenants have their own front door which is accessed from the shared hall and stairs. This is not unlike a purpose-built block of flats. No tenants have to walk through another tenant's living area to access their flat and each unit is physically and functionally separate from each other.² There are therefore additional planning units compared to what existed previously.
8. The Council allege that the ground floor flat is used as a C4 HMO as three unrelated individuals occupy the bedrooms and the storage room but based on the information before me, I find this does not result in a 'composite use' of the whole property. This is because a 'composite use' is where the whole property is regarded as a C4 HMO use, in accordance with the converted building test set out in section 254 of the Housing Act 2004. That would only be the case where there was 1 planning unit laid out with shared facilities and some self-containment but that is not the case here.

¹ Procedural Guide: Enforcement notice appeals – England, updated September 2024, paragraph 9.2.11.5 "A site visit won't be needed for every appeal. It is for the Inspector, or their representative, to decide whether to conduct one."

² *Burdle and Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

9. Instead, there are two distinct alleged breaches of planning control which are the material change of use of the property into self-contained flats and the material change of use of the ground floor flat to a C4 HMO.
10. I agree with the appellant that the wording of the allegation is incorrect and the appeal on ground (b) succeeds to that extent. Rather than correct the wording of the allegation at this point, I consider it would be more useful if I were to consider the ground (c) appeal first in relation to the second allegation.
11. An appeal on ground (c) is that there has not been a breach of planning control. This may be because for example planning permission already exists for the development or, as claimed in this case, development has not occurred. This is because the alleged change in use from use as a two person flat, falling within use class C3, to use by three unrelated persons, falling within use class C4, is not material.
12. The appellant states that the occupation of the storage room as a bedroom by a third resident was unknown to him. This was a friend of the tenants and their name was not on the tenancy agreement. They began living there in January 2023 and this was seen by the Council at their June 2023 site visit. Thereafter the tenants were given notice and the use ceased by November 2023.
13. It has been held in case law that a change of use can only be material by bringing about a definable change in the character of the main use of the land. In other words, there needs to be some significant difference in the character of the activities from what has gone on previously. Environmental impacts might evidence such a change in character but they are not the cause of the change.
14. The character of the area around the appeal site is residential and it is likely given the proximity of the site to the city centre that some of the housing stock will have been converted to flats and some will be in use as HMOs. The Council advise that the site lies within a Restricted Dwelling Conversion Ward and that an Article 4 Direction came into force in 2014. This has the effect of removing permitted development rights to change from a Class C3 dwellinghouse to a Class C4 HMO. This is a tool often used by Councils to maintain a supply of dwellinghouses for use by families and is an indication that some of the dwelling stock has already been lost to more intensive uses.
15. When looking at the effect of one additional person on the use of the ground floor flat, I find the development would result in an increase in the intensity of the use. However, that would not automatically lead to a noticeable change in the character of the use, which would remain residential. The change in the comings and goings from the appeal site from an additional occupier would go unnoticed in my view in an area where the type of dwelling stock has already changed.
16. An additional occupier could lead to the production of more waste and I note the Council received a complaint about waste piled outside the appeal site in March 2023. However, the Council's photographs show there are already six wheeled refuse bins outside the property, which store a variety of waste produced by the occupiers of all the flats. The complaint may therefore have been a single occurrence.

17. In addition, no evidence has been put forward by the Council that an additional occupier would result in a demand for on-street parking or indeed that there is parking stress in the area, though I note the single yellow line restricting parking outside the site. It is often submitted that a HMO use results in an increase in food deliveries and online purchase deliveries but since the Covid-19 pandemic the same could be said for all sorts of households. As such, it is not accepted that an additional occupier would lead to a noticeable change in deliveries leading to a noticeable change in the character of the flat or the wider area.
18. In the absence of any evidence to the contrary, I therefore conclude that the occupation of the ground floor flat by three unrelated individuals did not amount to development within the meaning of section 55 of the Town and Country Planning Act 1990 (the 1990 Act). This is because there was no demonstrable change in the character of the use and therefore the change was not material. The alleged material change of use does not constitute a breach of planning control and the appeal on ground (c) succeeds.
19. Prior to dealing with the ground (d) appeal, I will therefore direct that the allegation is corrected to without planning permission, the material change of use of a single dwellinghouse (use class C3) into self-contained flats.

The ground (d) appeal

20. 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 material change of use of the property into self-contained flats occurred before the relevant date. The relevant date for this breach of planning control is 12 Oct 2019, namely more than 4 years before the notice was issued. This is because each flat is classed as a single dwelling unit for the purposes of section 171B(2) of the 1990 Act.
21. The appellant states he bought the property on 14 March 2003 when it was in use as a dwellinghouse. Between January and February 2013 he undertook internal works to convert it into flats known as:
- Flat 1 (ground floor, one bedroom),
 - Flat 2 (1st floor rear studio),
 - Flat 3 (1st floor front, one bedroom),
 - Flat 4 (2nd floor rear studio) and
 - Flat 5 (2nd floor front studio).

The evidence to support the works of conversion comprises Domestic Electrical Installation Condition Reports (DEICRs) and Gas Safety certificates. The DEICRs are dated 10 January 2013 and 1 March 2018. The 2013 reports show that the cooker and shower in Flats 2-5 were tested by a qualified supervisor from Cedar Electrical. The January date indicates that the works to create the flats must have been carried out sooner than 2013 as it is unlikely that they were carried out in 10 days as they would have involved significant plumbing and rewiring of the building. The 2018 DEICR reports cover all the flats and, once again, the showers and cookers were tested. For Flats 1 to 3 and 5 the

inspector noted "Tested and inspected 10% as I could not reach all points due to property being inhabited".

22. The Gas Safety certificates are dated April 2013-April 2023 and are in relation to Flat 1 only as it is the only property with a boiler. There is no other evidence to indicate when the building works took place such as Building Control records but based on these documents, I am satisfied that the flats were most probably substantially complete by January 2013.
23. Thereafter, the appellant entered into a three-year rental agreement with Room City Limited (RCL), a letting agency, to find tenants and to manage the rental. This was renewed for a year afterwards. Copies of the signed tenancy agreements indicate that tenants occupied all of the flats beginning 1 April 2013 until 31 Dec 2014 and then new tenants moved in to all of the flats on 1 April 2015 until 31 December 2017.
24. Monthly bank statements from 1 March 2013 until 31 December 2017 show that, other than for October 2015 and March 2017, RCL made payments every month which equated to the rent shown in the agreements. The entry on the statements is labelled "RoomCity x5 St Mary's". Although the statements do not show rent being directly paid by individual tenants, I consider it is unlikely that RCL would make their payment to the appellant if they had not received the rent from all of the tenants.
25. During 2018 the appellant added a single storey extension to Flat 1 to provide two bedrooms with the original bedroom becoming a windowless store room/home office. This extension is evident from the appellant's dated aerial photographs.
26. The Council submit that they determined a prior approval planning application for the extension in 2018 but it appears they did not visit the site beforehand. The submitted drawings only showed the ground floor layout and did not show that it was separated from the upper floors. In addition, the uses of the existing rooms were labelled as kitchen, dining room and rear reception and the proposed room uses were labelled as kitchen, dining, rear reception and dining.
27. Following the end of the contract with RCL the appellant took on the management of the property. He secured tenants for Flats 2, 3 and 5 for January 2018 with tenants signing an agreement for Flat 4 in March 2018 and June 2018 for Flat 1. The evidence shows that the flats continued to be occupied until the date of the notice. Rental income spot checks on the various bank statements show the payment of rent from individual tenants throughout their tenancies. The appellant's case is therefore that more than 4 years continuous use has occurred since April 2013 until the date of the notice and, as such, the development is now immune from enforcement action.
28. This though is disputed by the Council on the grounds that there has been positive deception by the appellant. This began in 2013 when the appellant failed to notify the Council Tax department about the changes he had made to the property. Council Tax officers had a marker against the property that it may be a HMO but this was removed in June 2017 when their file notes record the owner's brother stated he lived at the property and therefore he should be made liable for the tax. It was also claimed in August 2017 that the property was undergoing refurbishment.

29. When the appellant applied on 9 June 2015 for a Private Rented Property Licence (PRPL) he stated the property was in single occupation with 4 occupants living as one household. In addition, he stated that there was only 1 kitchen, 2 bathrooms, 1 lounge and 4 bedrooms. The application was accompanied by a Gas Safety certificate completed on 11 June 2015 by JR Gas & Plumbing Services LTD. Their engineer confirmed that the boiler and the cooker in the kitchen were safe to use.
30. This contradicts the evidence of the Gas Safety certificates for the flats dated between April 2013 and April 2023 provided by Azhar Heating. When the Council investigated who carried out the inspections for these certificates, they found that the named individual was not registered on the Gas Safety Register UK in April 2013 or 2014 to carry out work for Azhar Heating.
31. In January 2018 the appellant completed an application form for Prior Approval for a Large Home Extension. This application procedure is only for dwellinghouses, as defined in the Town and Country Planning (General Permitted Development) (England) Order 2015, and does not permit extensions to flats. The appellant stated in the application form that the extension was for a lounge and dining area but the extension as built accommodates two bedrooms instead.
32. Finally, the Council were only able to access the property with a warrant to carry out an inspection in June 2023. A neighbour confirms that they often saw Council officers left waiting outside the property on numerous occasions, unable to gain access.
33. The appellant has responded to these points as follows. His explanation for the PRPL was that he "regrets the provision of nonsensical information on the application form". He states he found himself in a difficult position, "torn between disclosing the pre-existing situation or acknowledging the unauthorised conversion into five flats". With regard to the Gas Safety certificates, he "does not recall the details" of the commissioning process and with regard to the Prior Approval process, he was not aware of the detailed requirements and that he was in the hands of his architectural technician. Unfortunately, he misses the point the Council were making about Council Tax and he offers no explanation as to why the Council needed to obtain a warrant to gain access. Overall, he suggests that the misrepresentations stemmed more from incompetence rather than deliberate actions to mislead.
34. The concept of positive deception set out in case law is a high threshold to cross and is fact sensitive. The failure to register for Council tax can sometimes be characterised as "lying low" rather than a positive step taken to conceal the use from the Council. However, I find that is not the case here having regard to the other actions taken by the appellant. The second act of deception was when completing the application form for the PRPL in 2015. Whilst the appellant regrets that now, at the time I find his actions were deliberate, not "nonsensical" as they consciously concealed the actual use of the property. There was no mistaking the ticking of the boxes that declared for example "house in single occupation" or that there was one residential unit. I regard this action was therefore also calculated to mislead and hide the true use of the property.
35. Finally, when the Prior Approval application was made, I find that action also amounted to deliberate and positive conduct intended to conceal from the

Council something which the appellant knew to be a breach of planning control. The appellant seeks to excuse himself on the basis that he used an architectural technician when making the application. However, the technician was not the agent for the application and even if he was a "sleeping agent" or simply the person who drew the plans, he would have had some knowledge of the planning process even if the appellant did not.

36. In conclusion, I find there was active positive deception in matters integral to the planning process. Added to which the appellant deceived the Council tax team and the Environmental Health team, both of which could have shared information with the Planning Enforcement team. It seems to me those deceptions were also directly intended to undermine the planning process and escape enforcement.
37. The appellant portrays himself as perhaps inept but it seems to me his actions demonstrate that he is perhaps a risk taker and there is no doubt he has profited from his deception. It has been held in the Courts that it is not necessary to consider whether conduct has been truly egregious and there can be deliberate concealment even where the use is seen. For example, in this case the flats were presumably advertised for rent on more than one occasion.
38. Overall though, as a matter of fact and degree, and on the balance of probabilities, I find the appellant's actions demonstrate his intention to circumvent planning control and to deceive the Council. It follows such conduct disentitles the appellant from benefitting from the section 171B(2) provisions. The *Welwyn Hatfield*³ and *Jackson*⁴ judgements indicate that such conduct takes the case outside of the scope of the section 171B(2) time limit, in the interests of public policy. As such, the ground (d) appeal cannot succeed.

The ground (f) appeal

39. The appeal on ground (f) was made in relation to the wording of the allegation prior to my correction. It is now obsolete and therefore the appeal on ground (f) does not succeed.
40. However, it is necessary to vary the steps following the correction of the allegation and, having regard to section 173 of the 1990 Act, it is sufficient to simply specify the discontinuation of the use. No submissions have been made that any part of the internal layout or fittings other than one kitchen, one WC and one bathroom were in place before the breach took place. It follows it is therefore sufficient to specify the restoration of the land to its condition before the breach took place. In addition, there are no powers to require the resumption of a previous use and therefore references to that should be deleted.

Other Matter

41. Submissions have been made by a third party regarding the extension. The Council state that this is the subject of a separate enforcement notice. There is no appeal against this notice and therefore the submissions do not fall to be considered by me.

³ *Welwyn Hatfield Council v SSCLG & Beesley* [2011] UKSC 15

⁴ *Jackson v Secretary of State for Communities and Local Government* [2015] WL 113622

Conclusion

42. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variations.

Formal Decision

43. It is directed that the enforcement notice is corrected by the deletion of the words in the allegation and their replacement with, "Without planning permission, the material change of use of a single dwellinghouse (use class C3) to self-contained flats"; and varied by,

- The deletion of the words in Steps 1 and 2 and their replacement with, "Step 1, Cease the use of the property as self-contained flats" and "Step 2, Remove all fixtures and fittings associated with the use of the property as self-contained flats."

44. Subject to the correction and variations, the appeal is dismissed and the enforcement notice is upheld.

D Fleming

INSPECTOR