



Appeal Decisions

Site visit made on 18 March 2025

by **Richard S Jones BA(Hons), BTP, MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 29 April 2025

Appeal A Ref: APP/C5690/C/23/3322051

Appeal B Ref: APP/C5690/C/23/3322052

Appeal C Ref: APP/C5690/C/23/3322053

Appeal D Ref: APP/C5690/C/23/3322054

406 to 408 Lewisham High Street, London, SE13 6LJ

- Appeals A, B, C and D are made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeals are made by Mr. T. Uthayakanathan (Appeal A), Mr Thambithurai Uthayakanathan (Appeal B), Mr Miller Developments Ltd (Appeal C) and Mr. T. Uthayakanathan Miller Developments (Appeal D) against the same enforcement notice issued by the Council of the London Borough of Lewisham.
 - The notice was issued on 19 April 2023.
 - The breach of planning control as alleged in the notice is without planning permission, the change of use of the first and second floors (including mezzanine floors) of the property to 7 (seven) self-contained flats; including alterations to the building and the erection of terrace(s) to facilitate the changes of use.
 - The requirements of the notice are to:
 - (1) Cease the use of the upper floors (including mezzanine floors, as shown in Plan 2, Plan 3, and Plan 4) as self-contained residential units.
AND
 - (2) Remove all sleeping, cooking, and washing facilities from each of the residential units on the upper floors as shown in Plan 2, Plan 3, and Plan 4). This includes all showers, toilets and sinks from the bathrooms, beds, and cooking facilities within each of the units located on the upper 2 floors (including the mezzanine floors).
AND
 - (3) Cease the use of the terrace located at the rear of the property, in the approximate area marked X on the plan 2.
AND
 - (4) Remove all materials, debris, waste, and equipment resulting from compliance with Steps (1), (2), and (3) of this notice from the land.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d) and (f) of the Town and Country Planning Act 1990 (as amended).
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Decisions

Appeals A, B, C and D

1. It is directed that the enforcement notice is corrected and varied by:
 - the deletion of the breach of planning control alleged in section 3 and its substitution with " Without planning permission, the material change of use of the first and second floors (including mezzanine floors and terrace) of the property to 7 (seven) self-contained flats; including alterations to the building to facilitate the changes of use".

- the deletion of requirement (1) in section 5 and its substitution with “Cease the use of the upper floors as shown in Plan 2, Plan 3, and Plan 4 (including mezzanine floors as shown on Plan 3 and terrace as shown on Plan 2), as self-contained residential units.
 - the deletion of requirement (3) and the following word “AND”, in section 5.
 - renumbering requirement (4) as requirement (3), in section 5.
 - the deletion of the words “6 (six) months after this notice takes effect” in section 6 and their substitution with “6 (six) months after this notice takes effect for requirement (1), and 9 (nine) months for requirements (2) and (3).
2. Subject to the corrections and variations, the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The appeals were made under grounds (b), (c) and (f). However, the appellants have raised issues which amount to a hidden ground (d) appeal. The Council has had opportunity to consider the representations made by the appellants and I have therefore determined the appeals with the additional ground.
4. For grounds of appeal (b), (c) and (d), the onus lies with the appellants to make their case on the balance of probabilities.
5. I note the appellants’ submissions regarding the internal layout, the modernisation of facilities and car parking. I also note the concerns raised over the requirements of the notice and the distress which would be caused to occupants. However, I am generally unable to consider matters of planning merits and personal circumstances because the appellant has not made an application for planning permission through a ground (a) appeal, which requires payment of a fee. However, I have taken account of the impact on occupants’ when considering the requirements of the notice and time for compliance.
6. I have also been appointed to determine appeals¹ against a separate enforcement notice alleging the change of use of part of the appeal property to a place of worship. Those appeals are subject to separate decisions.

The Appeals on Ground (b)

7. A ground (b) appeal is that the breach of control alleged in the enforcement notice has not occurred as a matter of fact.
8. The appellants argue that there has been no loss of employment use at the property and that the ground floor use remains commercial, albeit partly vacant. However, the loss of employment space forms part of the reasons for issuing the notice, rather than the alleged breach of planning control.
9. The alleged breach of planning control as clearly set out in section 3 of the enforcement notice is the change of use of the first and second floors (including mezzanine floors) of the property to seven self-contained flats; including

¹ Appeal Reference: APP/C5690/C/23/3322055, APP/C5690/C/23/3322056 and APP/C5690/C/23/3322057

alterations to the building and the erection of terrace(s) to facilitate the changes of use. The appellants do not argue that hasn't occurred.

10. I note that one of the appellants states that the upper floor rooms are not currently rented/leased as individual flats, but that is not the same as saying that the alleged change of use hadn't taken place at the time the enforcement notice was issued.
11. The Council explains that it conducted a site visit on 21 February 2023 and noted that the upper floors had been converted into seven self-contained flats. Photographs are provided from that date which show numbered, lockable doors to individual units. The photographs also show all seven units had their own kitchen, bathroom and bedroom, thereby providing the facilities required for day-to-day private domestic existence. The units were therefore capable of being used as self-contained flats at that time.
12. Moreover, having regard to the personal effects shown, at least three of the units were occupied, so were in actual use. Even if the other units were not occupied at that time, it is also likely, having regard to the facilities contained therein, that they were intended to be used as self-contained residential units. In all the circumstances, and on the balance of probability, the answer to the question, what use did those units have at that point, must be use as self-contained residential units.
13. Additional photographs are provided from the Council, from 18 April 2023 (the day before the notice was issued) showing key safe boxes for seven units adjacent to the main entrance, as well as additional internal photographs of the units.
14. It is therefore more likely than not, that at the time the enforcement notice was issued, a change of use of the first and second floors of the property to seven self-contained flats had occurred. Whether that is material is a matter for ground (c).
15. The appeals on ground (b) must therefore fail.

The Appeals on Ground (c)

16. A ground (c) appeal is that the matters alleged in the notice do not constitute a breach of planning control.
17. Consideration of ground (c) involves a two stage process: whether the matters constitute 'development' – and, if so, whether the development already benefits from a grant of planning permission.
18. The appellants' assert under ground (c) that the upper two floors have been in residential use since at least 2002. However, that is a matter for the ground (d) appeal below.
19. The Council identify the planning unit, subject to the enforcement notice, as comprising the first and second floors of Nos 406 to 408 Lewisham High Street. The appellants argue that the same first and second floors have a long established residential use as a large HMO and that the works recently carried out represent legitimate changes to the interior of the building, which do not affect its exterior.
20. S55(1) of the 1990 Act states that 'development' means 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. S57(1)

states that planning permission is required for the carrying out of any development of land.

21. S55(2)(a)(i) of the 1990 Act excludes from the definition of development set out in s55(1), works for the maintenance, improvement, or other alteration of any building which affect only the interior of the building. However, the internal works which have been carried out include the provision of facilities in each of the bedrooms for independent day-to-day living, and the likely removal of any pre-existing shared facilities.
22. Consequently, the nature of any residential use of the first and second floor has evidently changed with the creation of seven, self-contained flats and the loss of shared basic amenities associated with a HMO use, such as a kitchen. The character of the use will therefore also have changed to fully independent living. That also has planning consequences as the flats unlikely provide acceptable living conditions for occupants, not least because previously shared amenities, such as a kitchen, have been crammed, in some cases, into a single room providing all living space, save for a shower room. The provision of seven flats is also likely to generate an increased demand for car parking. Cumulatively, those aspects result in a significant difference in the character of the activities from what has likely gone on previously, as a matter of fact and degree.
23. Therefore, even if the first and second floors were lawfully used as a HMO, there has been a material change of use through the subdivision of that planning unit into seven separate planning units - seven self contained flats. That amounts to development, requiring planning permission, which is not shown to have been granted.
24. Moreover, even if the upper floors were being used for two flats, rather than a large HMO, S55(3)(a) of the 1990 Act provides that the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change of use of the building as a whole and each part of it which is so used. In other words, the provision of self-contained flats within what was a single dwellinghouse represents a material change of use of the whole building and each individual flat within. The word 'building' in s171B(2) must be read as defined in s336(1) as including any part of a building, and flats are dwellinghouses for the purposes of the 1990 Act.
25. The appeals on ground (c) fail.

The Appeals on Ground (d)

26. An appeal under ground (d) is that at the time the enforcement notice was issued, it was too late to take enforcement action.
27. S171B(2)² of the 1990 Act states that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. The enforcement notice was issued on 19 April 2023, so in order to succeed on this ground the appellants have to show that the use alleged in the notice began on or before 19 April 2019 and then

² Prior to the recent amendments which do not apply where the breach occurred before 25 April 2024

continued for at least four years thereafter so as to be immune from enforcement action through the passage of time.

28. As noted, the appellants argue that the upper two floors have been in use as residential premises since at least 2002, albeit with periods of vacancy. In that regard I note that planning permission was granted in April 2003³ for, “The alteration and conversion of the existing restaurant and residential accommodation at 406-408 Lewisham High Street SE13 to provide 2, four-bedroom, two-storey plus roof space dwellings, together with the demolition of the three-storey extension to the rear and alterations to the front and rear elevations”. The appellant asserts that this permission was implemented, resulting in two, four-bedroom units above a restaurant.
29. However, the Council has provided the approved plans which show a semi-detached type arrangement with each of the two units having ground, first and roof space accommodation, rather than two flats above a retained restaurant use which the appellant says operated until about six years ago. It is therefore unlikely that the development was carried out in accordance with the approved plans and that the planning permission was implemented, as a matter of fact and degree. Nevertheless, that does not necessarily mean a residential use did not or had not occurred. Indeed, the description of development for the 2003 permission alludes to an existing residential use at that time.
30. The appellants make further reference to an application made in 2012 for the change of use of the upper floors of the property to provide 10 bed and breakfast rooms in connection with the existing ground floor catering facilities. Existing floor plans labelled “B & B Change of Use Application” have also been provided, which are stamp dated by the Council’s Planning Service. Although not particularly clear, the likely date is 19 March 2012. Nevertheless, the plans were drawn earlier than that, being dated July 2010. They show an existing configuration at that time more akin to a large single HMO, rather than two flats, given that most of the rooms are annotated as bedrooms and there is one room which is annotated as a kitchen, and none are annotated as a lounge.
31. A delegated report concerning an application for advertisement consent in 2022 also refers to the existing property with a ground floor restaurant with a HMO at first and second floor levels. That is therefore consistent with the plans stamp dated in 2012.
32. The appellant has provided a notice issued by the Council under s239 of the Housing Act 2004 which refers to all dwellings and common parts within the appeal site, dated 17 November 2014. That clearly points to a residential use of the property at that time. However, an emergency prohibition order was issued some nine days later, prohibiting the use for sleeping and/or living accommodation due to the number of hazards identified as being unsafe for the occupiers. It is not shown or explained when a residential use recommenced, and compliance confirmation was not given until December 2021.
33. A signed letter from one of the appellants is provided which explains that he has managed and owned the appeal property for some 20 years and that since 2002 the upper floors have been in residential use and remain so. He says that at

³ Ref 02/052277

various stages the upper floors have been vacated due to the above referenced prohibition order, building work and the usual tenancy vacancy periods, but that residential use has been their sole function.

34. In that context, the Council refers to a planning contravention notice response in 2017 which indicates that only the ground floor of the property was in use at that time. The Council also refer to Google Streetview images from 2019 which show scaffolding in place and the upper windows boarded up.
35. Having regard to the above, it is likely that at some point, possibly after the grant of planning permission in 2003, the property was being used for a ground floor restaurant with the upper two floors being used for residential purposes, as two flats, rather than in the terms granted. It is also likely that sometime before 2010 there was a material change of use of the upper floors from two, four bedroom flats to one large HMO. However, there are undefined vacancy periods from 2014, which may or may not have affected the lawfulness of any HMO use, which would be subject to the 10 year time limit from enforcement action under s171(3) of the 1990 Act.
36. In any case, the ground (d) appeals are made in respect of what is alleged in the notice, which is a change of use of the property to seven self-contained flats. The notice does not allege a HMO use or use for two self-contained flats.
37. In that regard, the appellants do not explain when the flats were capable of being used as self-contained units of accommodation, by possessing all the necessary facilities for private domestic existence, nor do they explain when the actual use commenced. Indeed, no evidence has been provided to show that the material change of use to seven self-contained flats had begun by 19 April 2019. Nor has it been shown that use of any one of the flats had begun by that date. The Council on the other hand has provided photographic evidence to show that the upper floor windows of the appeal property were boarded up in April 2019, so it is likely that the flats were not completed until after that time, and thus have not gained immunity from enforcement action through the passage of time.
38. The ground (d) appeals fail.

The Appeals on Ground (f)

39. An appeal under ground (f) is that the requirements of the enforcement notice are excessive to remedy the breach of planning control or, as the case may be, the injury to amenity caused by the breach.
40. In this case, the breach is the change of use of the first and second floors to seven self-contained flats; including alterations to the building and the erection of terrace(s) to facilitate the changes of use. The requirements of the notice are, in short, to cease that use and remove all sleeping, cooking, and washing facilities from each of the residential units, including all showers, toilets and sinks from the bathrooms, beds, and cooking facilities, as well as cease the use of the terrace and remove all waste arising. The purpose of the notice is therefore to remedy the breach of planning control.
41. The appellants argue that stripping out all bathrooms, kitchens and sleeping facilities is excessive and that some facilities must be left for future residents. The Council states that it drafted the requirements based on the last lawful planning

position, being the use of the upper floors as ancillary accommodation to the ground floor commercial unit, so there would be no reason to retain any cooking or washing facilities.

42. The parties are therefore evidently divergent on the lawful use of the upper floors. From that before me, the position is unclear and it is, in any case, beyond the scope of this appeal to determine what the lawful use is (save that it is not for seven self-contained flats), including whether they can be lawfully used for different residential use (including large HMO), which would require some of the facilities to be retained.
43. An appeal on ground (g) has not been made. Nevertheless, the appellants have referred to the distress caused to occupants. I am satisfied that a six-month period for cessation of the use would minimise that and is proportionate. However, as the facilities would also have to be removed within that period, this would effectively shorten the time available to find alternative accommodation. In the circumstances, the period of compliance for the requirement to remove all sleeping, cooking and washing facilities should be extended from six months to nine months. This would allow the appellants opportunity to make an application with a view to resolving the use of the upper floors and potentially avoiding abortive works. It logically follows that the period for compliance should also be extended for the removal of all materials.
44. The requirements of an enforcement notice should logically follow from the allegation. In this case, the allegation includes the erection of terrace(s) to facilitate the change of use, whereas requirement (3) is to cease an unspecified use of the terrace at the rear of the property.
45. In the case of *Murfitt*⁴ it was held that where an enforcement notice is issued in respect of a material change of use, and works were carried out to facilitate the same, the notice may require that the 'ancillary' works are removed in order that the site is restored to its previous condition and the breach remedied. Enforcement notices can also address operational development in that context. Consequently, the enforcement notice is under-enforcing in requiring the use of the terrace to cease, rather than requiring its removal. I shall therefore correct the allegation to refer to the residential use of the terrace (which is evidently singular) and delete requirement (3) and incorporate ceasing the use of the terrace for residential purposes into requirement (1), so both parts of the notice logically follow from each other. I've also included the word 'material' in the allegation, as a breach can only arise from a material change of use.
46. The appeals on ground (f) succeed to the extent explained.

Richard S Jones

INSPECTOR

⁴ *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598