Planning Inspectorate

Appeal Decision

Site visit made on 12 May 2025

by A U Ghafoor BSc (Hons) MA MRTPI ACMI fCMgr

an Inspector appointed by the Secretary of State

Decision date: 28th May 2025

Appeal Ref: APP/T5150/C/23/3321258
58A Ealing Road Wembley HA0 4TQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the "1990 Act").
- The appeal is made by Mr Kalpesh Lakha on behalf of Agategold Ltd against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 20 March 2023.
- The breach of planning control as alleged is the material change of use of the first and second floors to a House in Multiple Occupation (HMO) incorporating shared accommodation on the first floor and a self-contained flat on the first and second floors.
- The requirements of the enforcement notice are to: 1) Cease the use of the premises as flats 2) Cease the use of the premises as a HMO. 3) Remove all internal partitions, items, materials and debris associated with the unauthorised change of use, including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets, and 4) restore the internal configuration to the layout which existed prior to the unauthorised change of use taking place, as shown in "Plan A" attached to the issued notice.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (c), (d), (a), (f) and (g) of the 1990 Act.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed after correction, and planning permission is granted in the terms set out in the Formal Decision.

Ground (c)

1. The onus of proof is on the appellant to show that the alleged matters do not constitute a breach of planning controls. The argument is a simple one, namely, that the material change of use of the appeal property's upper floors to an HMO and a self-contained flat is permitted development (PD) pursuant to Article 3, Schedule 2, Part 3, Class F and L to the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended and abbreviated as "the GPDO").

2. Class G to Part 3 came into force on 1 August 2021[1]. It allows the following*:* development consisting of a change of use of a building from a use within Class E (commercial, business and service) of Schedule 2 to the UCO[2] to a mixed use for any purpose within that Class and as up to 2 flats. The Council say that the previous use of the upper floors to no. 58, which is a retail outlet at ground floor level, was in light industrial use. They assert that in such circumstances Class G does not apply but that proposition is fundamentally wrong.

3. Firstly, the definition of "building" is given at article 2 to the GPDO includes "…any part of a building". The first and second floor to no. 58 clearly meets that definition. You next turn to the definition of Class E as set out in the UCO. This classification is wide-

[1] Amended by statutory instrument The GPDO was amended by The Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No. 2) Order 2021.

[2] The Town and Country Planning (Use Classes) Order 1987 as amended ("the UCO").

ranging and encompasses several use classes previously described as Class A1 for example, and B1. Attention is immediately drawn to Class E sub-section (g)(iii), which clearly and unambiguously states use, or part use, for all or any of any industrial process. The only qualification is that the latter is a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

4. The appellant says that the upper floors were first used as a small HMO and self-contained flat during 2013 or 2014. If that is correct, the appellant cannot rely on Class G because it came into force in 2021. Even if Class G provisions apply to the facts of this case, the GPDO does not operate in isolation and includes limitations and conditions, and it certainly does not apply retrospectively. Paragraph G.1 explains that the PD right in Class is subject to several conditions and I must draw attention to sub-section (d). This clearly sets out the following: before beginning development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to matters listed in (i) to (v). There is no evidence before me to suggest the appellant complied with this condition.

5. The second challenge is also doomed to fail because Class L came into force on 15 April 2015. Ground (c) is worded in the present tense: '…do not constitute a breach…' An appellant may rely upon matters occurring since the date of issue of the notice to show that, at the time of the decision, what was alleged does not amount to a breach of planning controls. However, the matters alleged had occurred before the notice was issued.

6. It appears to me that the appeal parties got into a slight muddle and misinterpreted the effect of the relevant statutory instrument to the facts. For the reasons given above, my complete answer is that the alleged matters constitute a breach of planning controls because express planning permission is required, and it has not been obtained. Ground (c) fails.

Ground (d)

7. The onus of proof is upon the appellant. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided the appellant's evidence alone is, on the balance of probability, sufficiently precise and unambiguous. The claim is that the alleged development is immune from enforcement action due to the passage of time, but the appeal parties seem to be confused as to which time limit applies.

8. I start with the relevant unit of occupation. Clearly, Flat A is a self-contained unit of accommodation at first floor, and it is a 3-bedroom HMO providing accommodation for up to 6 people. Flat B is a self-contained flat at part first and second floor. I say part because the landing at first floor level has a dual-purpose – a small section has a kitchenette. The accommodation is accessed from a shared entrance hall, but each unit is accessed behind their own secure front door. The evidence presented indicates the described layout existed at the date the notice was issued.

9. The Council issued a Planning Contravention Notice[3]. It says that they issued the notice having considered the replies to searching questions. The agent says that the appellant incorrectly completed the questionnaire and confused the description of the

[3] Submitted on 3 November 2022.

internal layout and use. Clearly, the material change of use of the first floor to an HMO incorporating shared accommodation is only limited to the first floor and does not extend to the second floor. The majority floor area of the latter is in use as a self-contained flat. In my judgement, each unit forms a physically and functionally separate planning unit. Contrary to the Council's own arguments, the breach is adequately defined and does not reflect an HMO incorporating a flat.

10. Prior to the change in April 2024, although transitional arrangements apply, a 10-year time limit applies to the matters alleged in the notice as issued. However, the notice was issued before the change in the law. The former s171B(2) of the 1990 Act said the following with my emphasis: *Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.* However, the 4-year time limit does not apply in cases where there has been a change of use to an HMO or some other residential use where units are not self-contained. Even if there has been a material change in use to a use within Class C4, that is, use of a dwellinghouse as a HMO, there will not have been a change of use to a single dwellinghouse. While there is now harmonisation in time limits, the 10-year rule set out under s171B(3) applies in HMO cases.

11. The appellant's sworn testimony explains when, how and at what point in time the upper floors were converted to provide two separate units of accommodation. The Council granted express planning permission for operational development on 29 June 2012. Planning permission was subsequently granted for two rear dormer windows on 11 January 2013. [4] Curiously, the layout of the existing and proposed floor plans clearly shows residential accommodation at first and second floor level.

12. The appellant's evidence of how and when the change of use began in January 2014 is both consistent and precise, and it largely matches with some of the Council's own documentary records. For instance, the appeal premises was registered on the Valuation Office Agency website as one residential unit. It is unclear as to which part of the building 58A relates to but that is not fatal, because the appellant's sworn testimony is that the two residential units were created in January 2014. There is nothing before me to discredit that claim.

13. The energy performance (EPC) record does not necessarily undermine the appellant's version of the events. The concession is that an EPC for "mid floor flat" was certified on 17th March 2020 and the top floor flat assessed 27 November 2022. However, this kind of evidence does not discredit the claim that the two units were first created in 2014. Nor does it undermine the assertion that the units have been in residential use since that time, especially when there is independent evidence corroborating the claim that the upper floors were converted during 2013 and from 2014 used for residential purposes. The fact that EPCs were obtained much later does not discredit the appellant's claims or cast doubt over his version of the events.

14. There is some confusion over the HMO license application. The appellant disputes that the application made on 18 December 2014 and 24 May 2021 confirm the upper floors were a single unit. The first application was deleted but the second was granted by the housing authority in May 2021. The appellant maintains that the application was made for the building and not for each separate unit of occupation, but it relates to 58A. Nonetheless, the details given by the housing authority, at section 1.2, are

[4] The erection of first floor extension to provide one self-contained studio flat over two floors ref 11/2217.

inconsistent with the layout described by the local planning authority. For example, the licence relates to the use of the upper floors as an HMO for no more than 7 persons, but occupancy levels clearly describe the internal setup and layout as follows: 3 x bedrooms (1st floor) and a 1-bedroom self-contained flat. Clearly, HMO officers visited the property and saw the existing layout. I am not convinced that the confusion over HMO license sufficiently undermines or brings into question the appellant's version of events.

15. The appellant's supporting documentary evidence corroborates when each unit had been first used for residential purposes. It is particularly instructive of the conversion work and subsequent occupation of each unit by tenants and the agent's description of their use is consistent with the facts, the sequence of the events, and the nature and scale of the residential activity. Alongside documentary evidence showing that regulatory frameworks were fully complied with at regular intervals, inspection reports have been provided, and these do not appear to be doubtful. Indeed, there is no evidence to undermine the veracity or credibility of this kind of evidence.

16. My own observations are that the condition of both units suggests residential use spread over significant length of time. There are signs of substantial wear and tear resembling residential occupation.

17. In the absence of any firm evidence to the contrary, I take at face value the evidence presented by the appellant because both the sworn testimony combined with the documentary information is consistent and unambiguous. It clearly shows to me that Flat B provided facilities for day-to-day domestic existence well before the relevant date, which is 20 March 2019. Actually, the factual evidence supports the contention that Flat B was created in January 2014 and used as such thereafter for a continuous period without significant interruption.

18. The Council's misplaced reference to *Bansal* does not assist. I have applied principles established in *Thurrock*, *Swale* and *Maxwell Estates*[5] to the facts of this case and consider that had the enforcement officers investigated the alleged breach of planning controls back in January 2014 or at any time thereafter, they could have taken enforcement action against an unauthorised residential use of the upper floors. It did not and the self-contained flat at part first/second floor is now immune from enforcement action.

19. On the other hand, the position is less certain in relation to Flat A and its use as an HMO. At its highest the appellant's own evidence demonstrates that the HMO use began in January 2014, which is after the relevant date. The misplaced belief is that the 4-year time limit applies to such breaches of planning controls and so the agent placed all his eggs in that specific basket. Clearly, the arguments in favour of the HMO immunity fail.

20. For all the above reasons, ground (d) succeeds in part only.

Ground (a)

21. Flat B is immune from enforcement action. My consideration of the merits will therefore focus on the use of Flat A as an HMO. The site is in an area where an Article 4

[5] *Bansal v MHCLG* (EWHC 1604 (Admin) 2021), *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226; [2002] JPL 1278, *Swale BC v FSS & Lee* [2005] EWCA Civ 1568; [2006] JPL 886 and *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin); [2020] JPL 532.

Direction removes PD rights for such a use, and it requires express planning permission.

22. The **main issue** is the effect of the HMO use on the living conditions of existing and future occupiers having regard to the following: (1) the standard of accommodation (2) waste disposal (3) general disturbance.

Accommodation

23. The Council argues that the unauthorised use has resulted in an overly intensive use of the property and in the provision of sub-standard accommodation. I agree with the appellant that, given the available size of the rooms and layout of the shared bathroom and kitchen, Flat A, in practice, could accommodate 3 to 6 persons. In my assessment, the size and layout of Flat A provides sufficient outlook and daylight to shared areas as well as bedrooms. I consider that the available accommodation is suitable for HMO use. Given the site's location above a retail unit in a mixed residential and commercial area, the site is well served by public transport and is within walking distance of various shops. There is no evidence to suggest the accommodation has, or is likely to, generate parking pressure.

Waste management

24. Flat A and B are accessed from the rear of the premises and there is no rear garden, which is highly unsurprising given the layout of the block in which no. 58 sits. I observed that the rear of the premises is used to store waste collection containers. That is the same for other commercial properties in this location and was reflected in plans and details submitted with previous applications to the Council in 2011 and 2012. Whilst I acknowledge the absence of a waste management plan, I fail to see how such a plan is likely to be of particular benefit in making the use acceptable in planning terms. This is because there is adequate dedicated space for the waste collection containers and, clearly, they are in use.

General disturbance

25. In this context the Council's assessment is unclear. This is because it describes the development as an HMO incorporating a flat. Be that as it may, an intensified residential use of the upper floors to no. 58 is likely to generate comings and goings associated with residential activity. The level of use is likely to be noticeable to nearby residents, but Flat B is immune from enforcement action as I have found above.

26. Nonetheless, the HMO use of Flat A is likely to generate significant level of activity associated with residential living. However, the site is located within a block of commercial properties. Given the significant length in time the property's first floor has been in shared accommodation, the characteristic of the HMO use, individually or cumulatively, is unlikely to materially harm living conditions of nearby residents given the siting and location of the appeal property.

Conditions and conclusion on the main issue

27. I have not been provided with suggested conditions. The use of the HMO at Flat A will be subject to separate licensing regime. I do not consider it necessary to impose conditions to the use of Flat A as HMO. It's size and layout are sufficient as a small HMO. Nor is there any specific evidence a waste management plan is needed to make this specific use acceptable in planning terms.

28. Contrary to the Council's approach, I consider that the use of Flat A as a HMO does not, and would not, have a materially harmful effect on the living conditions of existing or future occupiers having regard to the above matters. The scheme complies with the main aims and objectives of policies DMP1, BH10, BH11, BH13 and BH7, of Brent's Local Plan (2022). It does not materially conflict with policy BT2, T6 or D6 (Table 3.1) of the adopted London Plan (202), and the advice as set out within Supplementary Planning Document No. 1 or national planning policy.

Overall conclusions - the notice and grounds of appeal

29. The alleged breach of planning control is better described as follows:

"Material change of use of the first floor to a House in Multiple Occupation (HMO) incorporating shared accommodation and a self-contained flat on the first and second floors".

All the evidence reflects this description, and I am content no injustice would be caused to any party if I am to amend the allegation, which I will do.

30. For all the above reasons, the appeal on ground (d) succeeds in part, because the use as a self-contained flat is time barred. It fails in connection with the use of the first floor to an HMO incorporating shared accommodation.

31. On ground (a), having regard to the notice as corrected, the development plan as a whole and other relevant considerations, planning permission should be granted for the material change of use of the first floor to a HMO incorporating shared accommodation on the first floor. The deemed planning application succeeds to that extent.

32. As a consequence of allowing ground (d) in part and granting planning permission for the use of the first floor as an HMO, the notice will be quashed. There is no need to consider and determine grounds (f) and (g).

Formal Decision

33. It is directed that the enforcement notice be corrected in section 3, the alleged breach of planning control, by the deletion of the text and substitution therefor by the following text:

> "*Material change of use of the first floor to a House in Multiple Occupation (HMO) incorporating shared accommodation and a self-contained flat on the first and second floors*".

34. Subject to this correction, the appeal is allowed, and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely material change of use of the first floor to a House in Multiple Occupation incorporating shared accommodation, at 58A Ealing Road Wembley HA0 4TQ, referred to in the notice.

A U Ghafoor

INSPECTOR