The Planning Inspectorate

Appeal Decision

Inquiry held on 4 June 2013

Site visit made on the following day.

by Stephen Brown MA(Cantab) DipArch RIBA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 21 October 2013

Appeal Ref: APP/T5150/C/13/2191236
64 Craven Park Road, London NW10 4AE

- 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 appeal is by Mr P Chadwick (Baby Bird Ltd) against an enforcement notice issued by the Council of the London Borough of Brent.
- The Council's reference is E/09/0108.
- The notice was issued on 15 December 2012.
- The breach of planning control alleged in the notice is without planning permission the change of use of the premises, outlined bold on the plan attached to the notice, to a shop and five self-contained flats (incorporating the creation of a flat at lower ground floor level and timber-framed fence and gated access/enclosure to the rear).
- The requirements of the notice are to:
  1. Cease the unauthorised use of the property as a shop and 5 self-contained flats.
  2. Remove all internal partitions, fixtures and fittings which facilitate the unauthorised use.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
- The prescribed fees have been paid within the specified period, and the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Summary of decision: the appeal is dismissed and the enforcement notice upheld.

The inquiry

1. Evidence at the inquiry was taken under oath or solemn affirmation.

Background matters

2. The appellant bought the property in January 2008, when it had a shop on the ground floor and 2 areas used as either storage or flats on the upper floors. Planning permission had been granted in 2006 for erection of a first floor front extension, front and side dormer windows and first floor side extension, and 3-storey rear extension to facilitate conversion of the building to a shop and 4 self-contained flats with associated off-street parking spaces and communal amenity space to the rear[1]. In order to reduce costs the appellant obtained a further planning permission for construction of an essentially similar, but simplified scheme including 4 flats[2].

[1] Decision notice ref. 06/3628.
[2] Decision notice ref. 08/0555.

3. The approved schemes entailed rationalisation of the ground floor shop area, and inclusion of an access passage from the street frontage to the rear of the building. Behind the shop, where the levels are split, there would have been a duplex 2-bedroom[3] flat on the lower ground and ground floors. On the first floor would be two flats, one with two bedrooms to the front of the building mainly over the shop area, the other with one bedroom to the rear. The fourth, one-bedroom flat would be on the second floor, within the attic/dormer space.

4. The appellant started works in 2008, but decided for economic reasons he would construct 5 self-contained flats instead of the approved 4 flats. As built, the external appearance of the building remained much as the approved schemes. However, internally it is arranged with a 2-bedroom flat on the lower ground floor (Flat 1), and another 2-bedroom flat on the ground floor (Flat 2). There are then two 2-bedroom flats on the first floor (Flats 3 & 4), with the fifth, one-bedroom flat in the attic/dormer (Flat 5). The parties agree that planning permission 08/0555 has not been implemented.

5. Furthermore, the Council agree that they do not seek cessation of the ground floor shop use. They also accept that if the ground (a) appeal and deemed planning application succeed, their concerns about amenity space, site landscaping, cycle and refuse bin storage could be met by imposition of suitable conditions.

The appeal on ground (b)

6. This ground is that the breach has not occurred as a matter of fact. The appellant argues that the works of extension and conversion were so substantial that when substantially completed there was no use from which there was a change to self-contained flats.

7. At the time they were bought by the appellant the land and building were in use as a shop and 2 flats, or storage space. These uses essentially continued until the works of conversion and extension were started. Following the works, and occupation, or re-occupation of the flats and shop the use of the land and buildings had become a shop and five self-contained flats. The old use clearly ceased at some point, and the new use became established.

8. The appellant's response to the Planning Contravention Notice issued by the Council included the information that the flats had first been occupied in February 2009, following substantial completion of the works at the end of November 2008. It is argued that the period between these two dates should be seen as a period of non-use, from which there could be no material change of use.

9. This case entails the conversion and extension of an existing building to a shop and residential units – it is not a newly built scheme. It has little resemblance to that in the *Welwyn Hatfield*[4] Supreme Court case, where a new building was built on open land in the Green Belt, and it was determined that there had been no change of use. Furthermore, the conclusion was reached that a brief period of no use – between substantial completion of the building and its occupation – followed by a change of use to a single dwelling house was

[3] An ambiguity on Drawing 3 revision 1, approved under planning permission 08/0555, shows the Ground and Lower Floor Flat as being either 2 or 3-bedroom.
[4] SSCLG and Anr v Welwyn Hatfield Borough Council *[2011] UKSC 15.*

counter-intuitive. It was not natural to talk of a house built to live in as undergoing two different uses or non-use and then use – especially in so short a period. I consider similar situation exists here, and that the period between claimed substantial completion and date of occupation cannot properly be considered as non-use. Furthermore, I cannot accept that during this process the use of the site was abandoned, or became a nil use. If that were the case, almost no substantial re-development and re-occupation of land would entail a material change of use.

10. I note that Section 336 of the Act includes the definition that 'use' in relation to land does not include the use of land for carrying out of any building or other operations on it. It follows that the construction period cannot be seen as a period of non-use.

11. Overall, I consider that a material change of use has taken place, from the earlier use as a shop and 2 flats – or storage areas – to the current use as a shop and 5 flats. No planning permission has been obtained, and a breach of planning control has occurred. The appeal on ground (b) therefore fails.

The appeal on ground (d)

12. This ground is that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. The appellant's principal argument is that the operational development was substantially complete at the end of November 2008, about 2 weeks before the enforcement notice was issued. This substantial completion signalled the start of the new use – not as the Council claim at the time of first occupation in February 2009.

13. The appellant's evidence for the date of substantial completion principally comprises 4 Building Control site visit record sheets, invoices for supply and installation of kitchen equipment, purchase of refrigerators, and invoices for supply of plumbing goods and services.

14. The site visit record sheets span the period from 19 June 2008 to 2 February 2009. The first mainly records construction of the dormer, works to the shop, including installation of a portal frame, and plastering on the first floor. The second, dated 15 September 2008 records completion of the dormer roof and plastering works, as well as mechanical and electrical services second-fix, and installation of sound-proofing. On 4 November 2008 it is recorded that all the structural steel frame was in place, sound-proofing placed between new joists, and mechanical vents provided for all bathrooms and kitchens, as well as progress with the fire alarm and emergency lighting systems. I note that at this stage the inspector describes the works as 'conversion to upper floors, 4 flats' – rather than 5 flats as were constructed. There is no further record until 2 February 2009, when the visit apparently concerned completion of the scheme, and it was recorded that the test certificates for the new fire alarm and emergency lighting systems were outstanding.

15. It appears to me that the Building Control inspections are incomplete, and do not give a clear picture of when the works were substantially completed.

16. Invoices dated 13 October 2008 show that materials and labour relating to heating and plumbing were provided, but give little indication of the stages of work to which they apply, or what was done. Further invoices show that fixtures for 5 kitchens were bought on 24 October 2008, as well as 5

refrigerators about a month later. A receipt from a building company dated 10 November 2008 acknowledges payment for installation of 5 kitchens at the appeal property. I do not consider installation of kitchen fixtures gives a particularly firm indication of the completion date of the project as a whole – many other aspects of the works may still have been outstanding.

17. In enforcement appeals that raise legal issues – such as this - paragraph 8.15 of Annex 8 to Circular 10/97[5] advises that the burden of proof is on the appellant, whose evidence should be precise and unambiguous in order to show that on the balance of probabilities the appeal should succeed.

18. To this end it is reasonable to expect quite comprehensive evidence on the progress and completion of works. It is notable here that there are few records of specific payments to, or invoices from any principal contractor or subcontractors, no notes or correspondence between parties concerning progress, no evidence of any contracts entered into by the developer that could be expected to include the project completion date. This is surprising for a moderately complex project like this, particularly for someone such as the appellant, who is evidently an experienced developer. To my mind the records submitted provide a remarkably sketchy view of the progress of works and their completion, and cannot be regarded as either precise or unambiguous.

19. Furthermore, the building was on a temporary electrical supply until 3 February 2009, when the permanent connection was installed, and as the building control inspection record shows, commissioning certificates for the fire alarm and emergency lighting systems were outstanding. The appellant also records in his response to the Planning Contravention Notice submitted in April 2011 that the use of the 5 flats began in February 2009. It is also apparent that Council Tax for the 5 flats was paid from February/March 2009.

20. I accept that that the change of use could be said to start from the time the flats became capable of occupation, rather than when they were actually occupied. However, the evidence for substantial completion by the end of November is slender. While the timing of the permanent electrical connection was probably beyond the appellant's control, it remains a significant factor in indicating whether the premises could be occupied. In my view the lack of a permanent electrical supply until early February 2009 would effectively prevent proper letting of any of the property. Overall, on the balance of probabilities I consider it unlikely that the material change of use of the property, as indicated by substantial completion of the works, took place 4 years or more before 15 December 2012. The appeal on ground (d) therefore fails.

The appeal on ground (a) and the deemed planning application

21. This ground is that planning permission should be granted for the development enforced against.

22. The Council maintain that the quality of accommodation in all the flats is poor. Notably, they all fall below the gross internal floor areas set out as *minima* under Policy 3.5 of the London Plan 2011 – with the possible exception of Flat 3 – dependent upon whether it has 3 or 4 occupants. Furthermore, they do not meet the minimum standards for floor areas set out in the Council's Supplementary Planning Guidance (SPG) of 2002[6]. The Council also maintain

[5] Government Circular 10/97 – 'Enforcing Planning Control: Legislative Provisions and Procedural Requirements'.
[6] Supplementary Planning Guidance 17 – 'Design Guide for New Development'.

that there is insufficient landscaped outdoor amenity space and that the development lacks cycle and refuse bin storage space.

23. From my inspection of the appeal site and its surroundings, and from the representations made at the Inquiry and in writing I consider the main issues in this appeal to be:

- Whether the flats provide satisfactory living conditions for their occupants in terms of floor space and provision of outdoor amenity space.
- The effect of the development on general activity in the area, and the pressure it might cause in terms of provision of transport infrastructure, educational facilities, and open space for sport, and whether a legal agreement should be required to make contributions to environmental improvement in the Borough.

24. Development plan policy put forward includes the London Plan 2011 and the London Borough of Brent Unitary Development Plan (UDP) of 2004. I consider policy of particular relevance to this appeal to be as follows. London Plan Policy 3.5 seeks to ensure that housing developments should be of the highest quality, and includes minimum floor space standards that should be adopted. UDP Policy H18 seeks to promote acceptable standards in the quality of flat conversions, and ensure that flats have acceptable standards of accommodation, and have regard to room size standards set out in the Council's Supplementary Planning Guidance SPG 17.

Living conditions

25. The minimum space standards set out in the London Plan are: 50 square metres for a 1 bedroom 2 person flat, and 61 and 70 square metres for 2-bedroom flats for 3 and 4 people respectively. The Borough SPG17 standards are 45 square metres for a I bedroom 2 person flat; 55 square metres for a 2 bedroom 3 person flat, and 70 square metres for a 2 bedroom 4 person flat.

26. As built, Flats 1, 2, 3, and 4 each have 2 bedrooms, and Flat 5 has 1 bedroom. They have the following areas: Flat 1 – 39.55 square metres; Flat 2 - 48.13 square metres; Flat 3 - 62.85 square metres; Flat 4 - 39.38 square metres, and Flat 5 – 37.61 square metres. These areas were provided by the appellant, and were not challenged by the Council.

27. Flats 1 and 2 are significantly below the recommended minimum areas for 2-bedroom flats, whether intended for 3 or 4 people. I do not accept that it would be reasonable to include the external amenity space of Flat 1 as part of the floor area. As the Council say, Flat 3 is suitable in area for 3 people, while Flats 4 and 5 are well below the recommended minimum standards for 2-bedroom and 1-bedroom flats respectively.

28. Looking at the flats, it appeared to me that Flat 1 has very cramped bedrooms, even though one of the rooms is clearly only suitable for a single bed, but even so is cramped. Flat 2 suffers from much the same problem, although I saw that a high proportion of the available area has been given up to circulation space, indicating a poorly arranged layout. For both flats the bedrooms look out onto an extremely narrow side access passage.

29. Flat 3 has a double bed in the bedroom facing the street, and bunk beds in the rear bedroom, and I assume it is intended for a family with children. Nevertheless, it is still below the minimum area for 4 people. I note also that the clumsy internal arrangement results in a cramped space available for dining. Flat 4 has cramped bedrooms, and a relatively cramped living/dining area. Flat 5 also has a cramped kitchen/living/dining area, mainly as a result of the reduction in usable area below the sloping ceiling.

30. As to private outdoor amenity space, there is an enclosed private space for Flat 1, which also provides the access to the unit. None of the other flats have any outdoor space allocated – landscaped or otherwise. However, the site is of considerable depth and it is apparent that such space could be provided, as well as space for parking, refuse bins and bicycles, as sought by UDP Policy H18. If planning permission were to be granted it would be feasible to impose a condition requiring provision of these things. However, that is not sufficient to overcome the existing deficiencies of the flats.

31. Overall, I conclude on the first main issue that as a result of the cramped spaces arising from their inadequate floor areas - below those recommended as *minima* - and of poorly considered layout, the flats provide unsatisfactory living conditions for their occupants. The scheme does not accord with the aims of London Plan Policy 3.5, or with those of UDP Policy H18. Furthermore, it does not accord with aims of paragraph 17 of the National Planning Policy Framework to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings.

Potential increase in activity

32. Turning to the second main issue, the Council's reasons for issuing the notice are also on the basis that the development has led to increased activity in the area, which causes additional pressure on the provision of transport infrastructure and educational facilities, without any contribution towards sustainable transport improvements, or school and nursery places. Similarly, there is increased pressure on the use of existing open space without contributions to enhance open space, sports facilities, or environmental improvement generally.

33. The appellant argues that it is unreasonable for the Council to include such objections on the basis that they have not quantified what contribution they seek, or on how many units. Nor do they specify which play space would benefit from a contribution, or otherwise justify their position. Furthermore, they did not require any contribution in the 2008 planning permission, although they might have done so

34. It appears to me that the greater number of residential units, and bedrooms created – as compared with the original 2 flats - will have put significant additional pressure on the elements the Council identify. There are no proposals to mitigate this harm. I consider an obligation to make a contribution towards improvements in these areas would accord with the requirements of Regulation 122(2) of the Community Infrastructure Levy Regulations in that it would be necessary to make the development acceptable in planning terms, and would be directly related to the development. Furthermore, the provisions of the Council's Supplementary Planning Guidance set out in clear terms the basis for a standard charge in respect of additional residential units, on the basis of the number of bedrooms created. In principle a contribution could be fairly and reasonably related in scale and kind to the

development. The fact that the Council did not seek any Section 106 contribution with the 2008 permission in no way prevents them from seeking one in this case.

35. The Inspectorate's Advice Note 16[7] advises that if it is intended to submit a planning obligation, it must be ensured that a final draft agreed by all parties to it should be submitted to the Inspectorate no later than 10 days before the inquiry or hearing opens. No draft obligation has been submitted to me, and there has clearly been no attempt to prepare one. There are no exceptional circumstances that suggested that this decision should be delayed in order to execute an obligation. Even had an obligation been submitted, it would not have overcome the harm I have found on the main issue. However, the lack of any obligation adds weight to my view that the appeal on ground (a) should be dismissed.

36. I conclude on the second main issue that the development significantly increases general activity in the area, and pressure in terms of provision of transport infrastructure, educational facilities, and open space for sport. A legal agreement should be required to make contributions to environmental improvement in the Borough, but none has been entered into. The development does not accord with the aims of UDP Policies TRN3, which aims to control the environmental impact of traffic, and TRN10, which aims to promote 'walkable' environments. Furthermore, it does not accord with those of CF6, which seeks contributions towards school facilities, and BE7 which seeks to improve the public realm and streetscape.

37. Overall, I consider the development causes significant harm to occupants of the flats in terms of floor space provided, and the lack of any contribution towards environmental improvements in the Borough exacerbates the harm caused by the development. I therefore consider the ground (a) appeal should be dismissed, and I intend to refuse planning permission on the deemed planning application.

The appeal on ground (f)

38. This ground is that the requirements of the notice are excessive, and that lesser steps would overcome the objections. The appellant suggests that alterations to the flat layouts could overcome the objections to the inadequate floor areas.

39. It is suggested that the partition could be removed between the 2 bedrooms in Flat 1, to form a bedroom and a dressing room. It is argued that the area of the flat would then be greater than the London Plan standard of 37 square metres for a 1-bedroom flat for 1 person. However, in my view that standard is based upon provision of a studio type flat – as is envisaged in the UDP standard of 33 square metres for a 1peron flat. Flat 1 already has a double bed in one of the bedrooms and a single in the other. Providing a single larger bedroom would in my view do little more than make this a 2-person flat with greater bedroom space. As noted above, the London Plan standard for a 1-bedroom 2 person flat is 50 square metres, and the UDP standard is 45 square metres, and the flat would still be below both these areas. Furthermore, as the appellant stated, the partition could be replaced at a later date without the need for planning permission, thereby neutralising the change.

[7] The Planning Inspectorate Good Practice Advice Note 16 - 'Submitting Planning Obligations'.

40. It is also suggested that one of the bedrooms in Flat 2 could be changed to make a second bathroom, and the existing bathroom made *en-suite*. Again it is argued that this would meet the London Plan standard. However, this would clearly be a flat suitable for 2 people, and would be of less area than the London Plan standard. It appears to me that providing 2 bathrooms in a 1-bedroom flat would be an entirely artificial and unnecessary arrangement, that again could revert to a 2-beroom flat.

41. For Flat 4 it is suggested that the smaller bedroom should be connected to the living/dining room and renamed as a 'snug', in order to provide a 1-bedroom flat. However, this would also result in there being 2 bathrooms for a 1-bedroom flat, and in my view would again be an artificial arrangement.

42. Flat 5 has an area of 37.61 square metres, and could be acceptable as a studio flat for 1 person, subject to suitable re-arrangement

43. Overall, the proposals for lesser steps entail what are essentially artificial re-arrangements, and do not address the more fundamental problem of there being 5 flats, of which four have 2-bedrooms. This appears to me a significant overdevelopment of the building. I do not consider the proposed lesser steps would overcome the Council's objections, and the appeal on ground (f) therefore fails.

The appeal on ground (g)

44. This ground is that the 6 month compliance period is too short, on the basis that a year would be necessary to remove existing tenants, remove the relevant internal partitions, and obtain planning permission for a new scheme.

45. Regarding the removal of tenants, I can see no good reason why they should not be given notice and find other accommodation within a 3 or 4 month period. This would leave 2 or 3 months for removal of partitions, which I consider quite realistic.

46. While it is not – and cannot be - a requirement of the notice that planning approval should be gained for a new scheme, I realise the appellant will want to obtain such permission. However, initial discussions could proceed immediately, and in my opinion a planning application could be made within 2 months, with a realistic expectation of a decision being made well within the 6 month period.

47. While most of the flats are sub-standard in terms of area, it must be borne in mind that the Council have already approved schemes for 4 flats within the same building envelope. Furthermore, the Council agree that in principle the building is suitable for use as a shop and flats. The main differences between the approved schemes and the scheme as built are that the ground and lower ground floors have been made into 2 two-bedroom flats rather than one 2-bedroom flat, and Flat 4 has two bedrooms rather than one. While the previous permissions are no longer extant, it appears to me they provide a basis to begin discussion of a scheme that might gain approval. This could be expected to reduce the period for obtaining planning permission.

48. Overall, I can see no reason why the requirements of the notice cannot be complied with within the 6 month period. If the appellant can provide *bona fide* reasons as to why he cannot comply within the period, the Council have the

power under Section 173A(1)(b) of the amended Act to extend the compliance period, and I can see no reason why they should not do so.

49. I consider the 6 month compliance period is adequate. The appeal on ground (g) therefore fails.

Conclusions

50. For the reasons given above and having regard to all other matters raised, I consider the appeal should not succeed. I intend to uphold the notice, and refuse planning permission on the deemed application.

Formal decision

51. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Stephen Brown

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Melissa Murphy	Of Counsel, instructed by GC Planning Partnership Ltd.
She called:	
Phillip Chadwick	The appellant.
Stephen Connell BA(Hons) DipTP MRTPI	Chartered Planning Consultant, Director of GC Planning Partnership Ltd.

FOR THE LOCAL PLANNING AUTHORITY:

Nigel Wicks	Director, Enforcement Services Ltd for Brent Borough Council.
He called:	
Scott Davies BA	Deputy Planning Enforcement Manager Brent Borough Council.

DOCUMENTS

1 Attendance list.
2 The Council's letter of notification of the appeal, dated 1 February 2013 with the circulation list.
3 Statement of Common Ground.
4 Appendices to Mr Chadwick's proof of evidence.
5 Appendices to Mr Connell's proof of evidence.
6 Appendices to Mr Davies' proof of evidence.
7 Receipts for purchase of refrigerators, all dated 20 November 2008.
8 The enforcement officer's delegated report.
9 Legal authorities submitted for the appellant - SSCLG and Anr v Welwyn Hatfield Borough Council *[2011] UKSC 15;* Sage v SSETR *[2003] 1WLR.*
10 Proposed planning conditions.
11 Legal authority put forward for the Council – R oao Sumner v SSCLG *[2010] EWHC 372 (Admin).*

PLANS

A Proposed layouts of flats under planning permission ref. 08/0555.