The Planning Inspectorate

Appeal Decisions

Inquiry Held on 21 November 2017

Site visit made on 21 November 2017

by Stephen Brown MA(Cantab) DipArch RIBA

an Inspector appointed by the Secretary of State

Decision date: 06 February 2018

Appeal A: ref. APP/T5150/C/16/3155655
First and second floors, 63 Chamberlayne Road, London NW10 3ND

- 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 Iraj Elghanian against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice, ref. E/16/0200, was issued on 30 June 2016.
- The breach of planning control alleged in the notice is without planning permission the material change of use of the first and second floors of the premises to six self-contained flats.
- The requirements of the notice are:
  - STEP 1 Completely and permanently cease the use of the first and second floors as more than ONE flat.
  - STEP 2 Remove all kitchens except ONE and all bathrooms, except TWO, from each of the premises.
  - STEP 3 Remove all partitions, doors, facilities, fixtures and equipment that facilitate the unauthorised use of the premises into multiple flats.
  - STEP 4 Remove all waste materials, items and debris associated with the unauthorised change of use to multiple flats.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. The prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended do not fall to be considered.

Appeal B: ref. APP/T5150/C/16/3175229
First, second, and third floors, 63 Chamberlayne Road, London NW10 3ND

- 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 Iraj Elghanian against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice, ref. E/17/0243, was issued on 27 April 2017.
- The breach of planning control alleged in the notice is the material change of use of the premises from one to six flats.
- The requirements of the notice are:
  - STEP 1 Completely and permanently cease the use of the first, second and third floors of the premises as more than ONE flat.
  - STEP 2 Remove all kitchens and cooking facilities, except ONE, from the premises and remove all associated debris and materials arising from this removal from the premises.

STEP 3 Remove all bathrooms and bathroom facilities, except TWO, from the premises and remove all associated debris and materials arising from this removal from the premises.

STEP 4 Remove all partitions, doors, facilities, fixtures and equipment that facilitate the unauthorised use of the premises to flats.

STEP 5 Return the layout of the premises to a single self-contained flat as the layout was before the unauthorised development took place.

- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f), and (g) of the Town and Country Planning Act 1990 as amended. The prescribed fees have not been paid within the specified period, and the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended do not fall to be considered.

Appeal C: ref. APP/T5150/C/16/3162309
First, second and third floors, 79a Chamberlayne Road, London NW10 3ND

- 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 Iraj Elghanian against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice ref. E/13/0520, was issued on 28 September 2016.
- The breach of planning control alleged in the notice is the material change of use of the premises from one to six flats.
- The requirements of the notice are to:

STEP 1 Completely and permanently cease the use of the first, second and third floors of the premises as more than ONE flat.

STEP 2 Remove all kitchens and cooking facilities, except ONE, from the premises and remove all associated debris and materials arising from this removal from the premises.

STEP 3 Remove all bathrooms and bathroom facilities, except TWO, from the premises and remove all associated debris and materials arising from this removal from the premises.

STEP 4 Remove all partitions, doors, facilities, fixtures and equipment that facilitate the unauthorised use of the premises to flats.

STEP 5 Return the layout of the premises to a single self-contained flat.

- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f), and (g) of the Town and Country Planning Act 1990 as amended. The prescribed fees have not been paid within the specified period, and the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended do not fall to be considered.

Decision

Appeal B: ref. APP/T5150/C/16/3175229
Appeal C: ref. APP/T5150/C/16/3162309

1. Both appeals are dismissed and the enforcement notices are upheld.

The Inquiry

2. Evidence at the Inquiry was taken under oath or solemn affirmation.

Preliminary matters

3. The Council have confirmed in writing that enforcement notice A – relating to first and second floors, no. 63 Chamberlayne Road – has been withdrawn. I have therefore given no further consideration to Appeal A.

4. A written application for an award of costs in relation to Appeal A was made by the appellant against the Council in December 2016. It was confirmed at the Inquiry that this was not being pursued.

5. In the 'legal' grounds of appeal (b) and (c) the burden of proof is on the appellant to demonstrate that on the balance of probabilities, on ground (b), the alleged breaches have not occurred as a matter of fact, and on ground (c), that there has been no breach of planning control.

Background matters

6. Both appeal properties stand within a parade of commercial premises on the eastern side of Chamberlayne Road, and both have commercial users on the ground floor – a café and a shop. There were originally two floors above the commercial uses, but following grants of planning permission, rear dormers were built on both buildings[1], and rooflights inserted to form attic storeys.

7. The 2013 planning permission for no. 63 also granted permission for use of the upper floors as a 4-bedroom, self-contained residential unit. In 2016 an application was refused for a LDC for a proposed change of use of the first and second floor flat from Use Class C3 to Use Class C4[2]. A further application was made for retrospective planning permission for use of the first and second floor flat as a House in Multiple Occupation (Use Class C4)[3]. The Council declined to determine this application.

8. At the time of my visit no. 63 was configured with a single unit of accommodation on the attic floor, 2 units on the second floor, and 3 units on the first floor. The units vary in area from 11.2 to 12.7 square metres. Each unit has a kitchen installed in the single main room. These provide a sink, cooker, fridge, worktops, storage cupboards and a washing machine. There is also a built-in wardrobe in each unit. There are WC/shower/washbasin compartments immediately adjacent to each unit. Each is accessed via a small lobby.

9. Enforcement officers had visited no. 79a in July 2013, and concluded it appeared to be in use as a six-bedroom HMO. In June 2014 a LDC was granted for use of the maisonette on the first, second and third floors as a Use Class C4 HMO[4]. The layout at that time consisted of 3 bed-sitting rooms on both first and second floors, each with an en-suite WC/shower/washbasin compartment, and a shared kitchen and dining room on the attic floor. This was significantly different from the present layout, which I describe below.

10. No. 79a is configured in broadly the same way as no. 63, although somewhat larger, and with some units of more complex arrangement. Notably, the attic unit has a shower/washbasin cubicle accessed directly off the main room, with

[1] Planning permission ref. 13/2823, dated 28 October 2013 – 63 Chamberlayne Road. Planning permission ref. 11/1944, dated September 2011 – 79a Chamberlayne Road.
[2] Decision notice ref. 16/0392, dated 11 April 2016.
[3] Application ref. 16/3397.
[4] Decision notice ref. 14/1592.

the WC cubicle on the floor below, again with lobby access directly from the stairway. Furthermore, one of the three units on the first floor is a duplex, with a separate staircase leading to a bedroom on the second floor. This latter unit again has a shower/washbasin cubicle off the upper room, and a separate WC cubicle directly off the main stairway. It is common ground that in April 2015 an online search showed the property advertised as self-contained flats, and at a visit on 9 February 2016 a Council officer saw it was configured as 7 self-contained flats.

11. Alterations were made at some time in 2016 to remove what were the main entrance doors to the units, so that the lobbies are now directly accessible from the stairways, and the main door to the units has become what had been the inner lobby door. The appellant accepts that this is the case.

The appeal on ground (b)

12. This ground is that the alleged breach has not occurred as a matter of fact. All the appellant's witnesses acknowledged that both properties had been in use as 6 self-contained flats each providing the basic cooking and WC/washing facilities until at least April 2016. The original entrance doors to the flats were then removed so that the lobby and WC/shower compartment of each flat was accessible from the stairway landings. As a result, at the time the enforcement notice was issued in June 2016 it is claimed the properties were in use as HMOs.

13. Given the concession that the buildings had both been in use as 6 self-contained flats, it is evident that the alleged change of use had taken place as a matter of fact. It was also conceded that no planning permission had been obtained for this change of use. While it is claimed that the flats had become a HMO by the time the enforcement notice was issued, that does not alter the fact that there had been change of use to flats. Notwithstanding subsequent changes resulting from removal of entrance doors, the allegation that there had been a breach of planning control by creating 6 flats in each property was on the balance of probabilities correct. The appeal on ground (b) therefore fails.

The appeal on ground (c)

14. This ground is that there has not been a breach of planning control, and is argued on the basis that the change that has taken place is permitted development under Class L of Part 3, Schedule 2 of The Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO). Class L gives permission for the change of use of a building from a use falling within Class C3 (dwellinghouses), to a use falling within Class C4 (houses in multiple occupation), and *vice versa*.

15. However, the history of the buildings indicates a different sequence of events. In the case of no. 63 there was a change from a 4-bedroom flat – that is, a single dwelling house in Use Class C3 – to 6 self-contained flats, before the change to what the appellant now claims to be a Class C4 HMO. In the case of 79a, there was change from the lawful use as a Class C4 HMO to 6, or possibly 7, self-contained flats. Again this was before the change to what the appellant claims to be a Class C4 HMO. Both sequences include a change to use as multiple flats from use as a single dwellinghouse. I am satisfied that in both cases, given the probably significant change in occupancy, and/or pattern of use of the buildings these were material changes.

16. As regards no. 63, the 6 self-contained flats were clearly separate C3 dwellinghouses. Section 55(3)(a) of the principal Act sets out 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, and of each part of it so used. This was not a use permitted by the GPDO, no planning permission was obtained for the change, and on the balance of probabilities there was a breach of planning control.

17. The appellant argues that the term 'dwellinghouse' can be interpreted more widely for Class L than other Classes, given the definition in GPDO *Article 2 - Interpretation*, that:

    '*except in Part 3 of Schedule 2 to this Order (changes of use),* (a dwellinghouse) *does not include a building containing one or more flats, or a flat contained within such a building'*.

    On its face, that definition could permit a change from a building that is used as a Class C4 dwellinghouse – such as no. 79a - to a building containing one or more flats. However, such a change is precluded by the restriction set out in paragraph L.1(a), that development is not permitted by Class L if it would result in the use:

    'as two or more separate dwellinghouses falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order of any building previously used as a single dwellinghouse falling within Class C4 (houses in multiple occupation) of that Schedule'.

18. It is common ground that the lawful use of no. 79a was until mid-2016 as a Class C4 HMO. Its change to 6 separate self-contained flats - each a dwellinghouse in its own right – was precluded from permitted development by paragraph L.1(a). Given the removal of the generous sized shared kitchen and dining room space on the attic floor of the building in its former state as a lawful HMO[5], and the lack of any meaningful shared facilities - which I deal with below – I consider this was a material change of use for which planning permission was required. No planning permission was obtained and there was therefore, on the balance of probabilities, a breach of planning control.

19. The present layout of no. 79a is so significantly different from that shown in the 2014 LDC application, that I do not consider the appellant can reasonably claim that he has reverted to the lawful use immediately preceding that enforced against.

20. S.254 of the Housing Act 2004 sets out the meaning of a House in Multiple Occupation, and includes the criteria (a), that the building, or part thereof, consists of one or more units of accommodation not consisting of a self-contained flat or flats, and (f), that two or more of the households who occupy the living accommodation share one or more basic amenities, or the living accommodation is lacking in one or more of the basic amenities.

21. In the case of both these properties, although the shower/WC/wash-basin compartments are accessible from the main stairways, there is a compartment available in very close proximity to each unit, and clearly associated with it. The lobbies themselves, with the outer door frames in place, give the appearance of a private space. I looked at each of them, and although some were empty of personal possessions, I saw that in the majority there were

[5] As shown on drawing HD766/9001 submitted with the 2014 LDC application ref. 14/1592.

personal hygiene items such as towels, shower-mats, soap, shampoo, toothpaste and toothbrushes. These clearly belonged to occupants of the associated living rooms, and in my view there is no realistic sense in which these facilities are shared, and no substantial evidence was put forward to suggest otherwise.

22. In my view, as a matter of fact and degree, the basic amenities are available for exclusive use of each of the units. Occupants may choose to use them in a different way, but that does not alter the fact of their availability for exclusive use. The removal of outer entrance doors to the lobbies was clearly a contrivance in an attempt to meet the HMO definition, and circumvent planning control. As the Council say, all units in both properties are effectively self-contained flats.

23. I appreciate that Inspectors in other appeals have concluded that even where there are equal numbers of living units and sanitary facilities, but access to those facilities is directly available from common parts, these units should not be seen as self-contained flats. I am not familiar with the detailed plans in those cases. However, from what I have seen in the present cases before me, as a matter of fact and degree, the units should be regarded as self-contained flats.

24. The appellant argues there are shared aspects of the properties such as a single electrical supply, a single heating boiler, communal WiFi, and a TV signal amplifier. These facilities are probably beneficial to occupants, but they are not the basic amenities, as defined as necessary in s.254(8) of the Housing Act 2004. In my view none of the units in either property lack the basic amenities.

25. Even if I had not come to this conclusion, the appellant accepts both properties were used as self-contained flats until mid-2016. I have concluded that for both properties this was an unlawful change. GPDO Article 3(5)(b) states that:

    'The permission granted by Schedule 2 does not apply if in the case of permission granted in connection with an existing use, that use is unlawful'.

    In my view the appellant cannot rely upon unauthorised changes of use to justify his claim there has been no breach of planning control.

26. The appellant argues that the Council were wrong to issue an enforcement notice against the change of use to flats, when that use had already ceased. The Council responded by reference to the High Court case of *Blackburn*[6], in which the Judge stated 'the fact that he (the claimant) had ceased to (live in his caravan) prior to service of the enforcement notice is of no consequence'. The appellant claims to differentiate this case by saying that in there was one material change of use from a single dwelling to six self-contained flats, followed by another material change of use from self-contained flats to a HMO. However, while the Council might have issued new notices against the HMO uses, I do not accept that it was incorrect to continue action against the unlawful uses that were pivotal in the planning history.

27. I am aware that the Council have issued licences for the two properties as HMOs, as required by the Housing Act 2004. However, in doing so it is apparent that the relevant department took no account of whether the

[6] *Andrew Blackburn v the First Secretary of State and S Holland District Council* [2003] EWHC 671 Admin.

properties were being lawfully used as HMOs in planning terms, and I do not consider the licences provide proof that the uses were lawful.

28. I conclude that on the balance of probabilities there has been a breach of planning control in both Appeals B and C. No planning permission has been obtained, and the appeals on ground (c) therefore fail.

The appeal on ground (f)

29. This ground is that the requirements of the notice are excessive, and that lesser steps would overcome the Council's objections.

30. The purpose of the notice is to remedy the breach of planning control, and the requirements are essentially to cease the use as self-contained flats, revert to the use of each property as a single flat, and return to the layout prior to the unauthorised development.

31. The appellant argues there is a fall-back position in that the properties could lawfully be put to Use Class C4. However, as concluded above, the buildings are no longer in use as single dwellinghouses, and permitted development rights are not available for this change.

32. It is also argued that a single dwellinghouse may well have more than the two sets of bathrooms/bathroom facilities, and more than one kitchen. That may be so, but no scheme has been proposed as to how this might be put into practice, particularly since existing sanitary and kitchen facilities are rather minimal, and it is not at all obvious which of these facilities might be retained.

33. I am not satisfied that lesser steps have been proposed that would overcome the Council's objections. The appeal on ground (f) therefore fails.

The appeal on ground (g)

34. The appellant claims that the six month compliance period for each notice is too brief, and that 12 months should be allowed in order for the works to the carried out with least disturbance to occupants. However, this appears to presuppose that he can create two HMOs, with essentially the same occupants. This may be possible, but would require planning permission to do so. In any case, no programme to illustrate how the works might be achieved has been put forward.

35. As the Council say, they are the Local Housing Authority, and would have some responsibility for any necessary re-housing. Furthermore, if reliable evidence were put forward to show why works were taking longer than 6 months, it would be possible for the Council to extend the compliance period under the provisions of s.173A(1)(b) of the Act.

36. I consider the 6 month compliance period to be adequate. The appeal on ground (g) therefore fails.

Conclusions

37. For the reasons given above I consider that the appeals should not succeed.

Stephen Brown

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

James Findlay QC	of Queen's Counsel, instructed by Salisbury Jones Planning.
He called:	
Michele Glazebrook BSc(Hons) MCIEH CEnvH	Chartered Environmental Health Practitioner.
Igal Levy BA(Hons)	Estate Agent, Principal of Mile Estate Agents
George Vasdekys	Chartered Town Planner, Partner of Salisbury Jones Planning.

FOR THE LOCAL PLANNING AUTHORITY:

Nigel Wicks MRTPI	Chartered Town Planner Enforcement Services Ltd.
He called:	
Kushal Patel	Planning enforcement Officer The London Borough of Brent Council.
Zsuzsa Szeles	The London Borough of Brent Council.

DOCUMENTS

1 Attendance list.
2 The Council's letter of notification of the appeal, dated 23 October 2017, and the circulation list.
3 Letters of representation.
4 Statement of Common Ground.
5 Appendices to Ms Glazebrook's proof of evidence.
6 Appendices to Mr Levy's proof of evidence.
7 Appendices to Mr Vasdekys' proof of evidence.
8 Appendices to Mr Patel's proof of evidence.
9 Appendices to Ms Szeles' proof of evidence.
10 Transcript of the House of Lords case *Young v Secretary of State for the Environment & Others* [1983] 2 AC 662
11 Transcript of the High Court case *Andrew Blackburn v First Secretary of State & South Holland District Council* [2003] EWHC 671 Admin.
12 Mile Estate Agents - property details for a bed-sit to let in Chamberlayne Road.
13 The Council's letter, dated 21 November 2017 confirming withdrawal of Appeal A.
14 Confirmation of HMO licences.
15 Draft Statement of Common Ground, and related e-mail correspondence.