The Planning Inspectorate

Appeal Decisions

Inquiry held on 10 and 11 December 2019
Site visit made on 11 December 2019

by Jessica Graham BA(Hons) PgDipL

an Inspector appointed by the Secretary of State

Decision date: 20th February 2020

APPEAL A Ref: APP/T5150/C/19/3226928
Mercury House, 7 Heather Park Drive, Wembley HA0 1SS

- 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 made by RSBS Developments against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 29 March 2019.
- The breach of planning control as alleged in the notice is the material change of use of the premises from office to 16 dwellings.
- The requirements of the notice are
  Step 1: Cease the use of the premises as dwellings
  Step 2: Remove all fixtures and fittings associated with the use of the premises as dwellings including the removal of all kitchens, all bathrooms, bedrooms and internal partitions and any other item associated with the unauthorised change of use.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(a),(c),(f) and (g) of the Town and Country Planning Act 1990 as amended.

SUMMARY OF DECISION: The appeal succeeds on ground (g) only, and the enforcement notice is upheld as varied in the terms set out below in the Formal Decision.

APPEAL B Ref: APP/T5150/X/18/3196810
Mercury House, 7 Heather Park Drive, Wembley HA0 1SS

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by RSBS Developments against the decision of the Council of the London Borough of Brent.
- The application Ref 17/5046, dated 27 November 2017, was refused by notice dated 2 February 2018.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use of former B1(a) office space to form 4 apartments at nos. 1, 2, 9 and 10.

SUMMARY OF DECISION: The appeal is dismissed.

APPEAL C Ref: APP/T5150/W/18/3196816
Mercury House, 7 Heather Park Drive, Wembley HA0 1SS

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by RSBS Developments against the decision of the Council of the London Borough of Brent.
- The application Ref 17/3268, dated 24 July 2017, was refused by notice dated 27 October 2017.
- The development proposed is "external alterations to a building (retrospective)".

SUMMARY OF DECISION: The appeal is dismissed.

Background

1. All three appeals concern the two-storey building known as Mercury House. In June 2015 the Appellant applied to the Council, in accordance with the GPDO as it then was[1], for a determination as to whether its prior approval would be required for the change of use of the premises from office to 16 residential units. On 14 August 2015 the Council issued a notice to the effect that its prior approval was both required, and granted ("the 2015 Approval").[2] Works to implement this approved change of use commenced in September 2015.

2. A few months later, planning permission was sought and obtained for a first-floor extension relating to the lawful office use of the building.[3] This was to have been constructed above an existing ground-floor extension. However, during the course of the works to convert the building to residential use, the existing ground-floor extension was demolished and a two-storey extension constructed in its place, with a slightly larger footprint.

3. It is common ground that this two-storey extension did not have planning permission. It is also common ground that two of the 16 residential units (nos. 3 and 11) incorporated floorspace contained in the unauthorised extension, and so had a larger floor area than that shown in the plans submitted with the application for Prior Approval.

4. In light of the Council's concerns about unauthorised development, in December 2016 the Appellant demolished the first floor of the two-storey extension, leaving the ground floor in place. The Council having expressed the view that the retained ground-floor extension appeared larger than the original, further works were undertaken in June-July 2017, with the intention of making it the same size as the original single-storey extension.

Main issue

5. The key area of difference between the parties, and the main issue for Appeals A and B, is whether or not the change of use of the premises from office to residential was lawful in the light of the 2015 Approval. I shall resolve this issue first, as the outcome will decide the ground (c) appeal on Appeal A; it will also determine the extent of the cases brought under each of the other grounds on Appeal A, and inform the outcomes of Appeal B and Appeal C.

[1] *The Town and Country Planning (General Permitted Development) (England) Order 2015*, as it existed prior to the amendments introduced by *The Town and Country Planning (General Permitted Development) (England)(Amendment) Order 2016*
[2] Ref: 15/2580
[3] Ref: 15/4157

The lawfulness of the change of use from office to residential

The relevant parts of the GPDO, as it stood at the date of the 2015 Approval

6. Article 3 of the GPDO grants planning permission for classes of development described as Permitted Development in Schedule 2. Class O of Part 3 of Schedule 2 is development consisting of a change of use of a building, and any land within its curtilage, from a use falling within Class B1(a) (offices) to a use falling within Class C3 (dwellinghouses).

7. Paragraph O.1 lists the circumstances in which development is not permitted by Class O, none of which are relevant here. Paragraph O.2 sets out the condition subject to which development under Class O is permitted. This is that before beginning the development, the developer must apply to the local planning authority (LPA) for a determination as to whether the prior approval of the authority will be required as to the transport and highways impacts of the development, contamination risks on the site, and flooding risks on the site. The condition states that the provisions of paragraph W apply in relation to that application.

8. Paragraph W sets out the provisions which apply to all applications, under Part 3 of Schedule 2 of the GPDO, for a determination by the LPA as to whether its prior approval will be required. Sub-paragraph 2 is a list of what must accompany the application. This is, in its entirety, (a) a written description of the proposed development, which, in relation to development proposed under Class C, M, N or Q of this Part, must include any building or other operations; (b) a plan indicating the site and showing the proposed development; (c) the developer's contact address; (d) the developer's email address if the developer is content to receive communications electronically; and (e) where sub-paragraph (6) requires the Environment Agency to be consulted, a site-specific flood risk assessment; and also any fee required to be paid.

9. Sub-paragraph W.12(a) provides that where prior approval is required, the development must be carried out in accordance with the details approved by the LPA, unless the LPA and the developer agree otherwise in writing.

The status of the plans submitted with the application

10. The application that was the subject of the 2015 Approval was accompanied by (among other things) a set of layout plans, showing the footprint of each of the 16 proposed flats within the floorspace of the office building as it then stood.

11. The extent and nature of the supporting information to be submitted with any prior approval application will be largely a matter for the applicant, subject to compliance with the provisions of paragraph W, and bearing in mind that the LPA will need sufficient information to establish whether or not its prior approval as to the relevant matters will be required. The Appellant rightly notes that Paragraph W(2) does not specifically require the submission of layout plans: it simply requires "a plan indicating the site and showing the proposed development." There is however some merit in the point made by Mr Wicks in his evidence for the Council, to the effect that in cases such as this where the proposed development consists solely of a change from office to residential use, with no attendant building operations, it is difficult to see how such development could be "shown" on any plan other than a floorplan indicating the proposed layout.

12. But be that as it may, the facts of this particular case are that the Appellant did submit a set of layout plans with the application, showing the proposed floorspace of the 16 residential units within the envelope of the office building as it then existed. In response to my questions at the inquiry, Mr Allen very fairly accepted that these plans, having been submitted with the application and listed on the Council's decision notice, must form part of "the details approved by the local planning authority" for the purposes of Paragraph W 12(a), although he imposed a caveat that it would be necessary to assess the extent to which they had in fact been relevant to the Council's decision.

13. In closing submissions, the Appellant argued that it is only those details that need the approval of the LPA that are "approved", and any details that are not relevant to the approval are not such details, even if they are shown on the plans. I am not persuaded that this approach can be correct, since it seems to me that it would introduce an unacceptable level of uncertainty into the process. Establishing the scope of the development approved by the Council would be dependent upon first assessing the extent to which the content of the plans and documents listed on the decision notice had, or had not, informed the Council's determination of the application. In the absence of any obligation upon the Council to identify the "relevant" details in its notice of approval that would be a difficult, if not impossible, task.

14. For example, the plan numbered 1032-9 Rev C, which is listed on the decision notice as having accompanied the application, shows eight self-contained flats within the ground floor of the building and fourteen car-parking spaces within its grounds. Since "transport and highways impacts of the development" was one of the three matters that could potentially have required the Council's prior approval, it seems highly likely that the number and layout of the on-site parking spaces will have been relevant to the Council's assessment of that issue. What is less clear is whether the extent of the floorspace within each flat (which could be indicative of potential future capacity for additional bed spaces) would have been taken into account. The problem with adopting the approach preferred by the Appellant is that it is not clear, to anyone reading the decision notice and referring to the content of plan 1032-9, which of the details shown on that plan "needed" the approval of the Council and so should be treated as forming part of the approved details; and which other details might be ignored as not having been relevant.

15. In my judgment, it is appropriate to regard all of the supporting plans and documents listed on the approval notice as forming part of the details approved by the Council, without the need to attempt an assessment of their relevance. The Appellant points out that an applicant who provided more information than required by paragraph W(2) would then be at greater risk of potential breach than an applicant who provided the bare minimum. But I do not share the Appellant's view that this would result in any unfairness. In the event that such an applicant were later minded to differ from the additional material submitted with the application, and to carry out the development otherwise than in accordance with the details approved by the LPA, paragraph W12 permits this to happen provided the written agreement of the LPA is obtained. If the details in question were not relevant to the LPA's decision in the first place, there would be no reason for it to withhold its agreement.

16. Taking all of this into account, I consider that the submitted plans showing the layout of the residential units, within the envelope of the building as it then

stood, formed part of the details approved by the Council. By operation of Paragraph W(12)(a), the development was required to be carried out in accordance with those approved details unless the LPA and the developer agreed otherwise in writing. No such agreement was made.

The departure from the plans submitted with the application

17. It is common ground that the conversion of the office to residential units differed from what was shown in the layout plans. The Council's case is that as a consequence, the development as carried out did not benefit from the 2015 Prior Approval. The Appellant contends that any deviation from the approved details should be considered de minimis; or even if not de minimis, not substantial, such that the only breach of planning control could be a breach of limitation.

18. The Appellant's case is not that the works to the extension were de minimis, but rather that the ongoing departure from the approved plans – now that the unauthorised extension has been reduced in size to approximately the same dimensions as the original unauthorised extension – is de minimis. My attention was drawn to the findings in *Orange,*[4] and I accept the Appellant's point that, in the terms used in that judgment, planning permission for the change of use from office to residential in this current case "crystallised" in August 2015 when the Council issued its decision notice that prior approval was granted. The Appellant contends that the question is whether subsequent events have meant that permission is lost.

19. It seems to me that even if the permission were not lost it might still be the case that it had not been implemented. So rather than starting from a comparison of the approved plans and the building as it stands today, the first question is whether or not the material change of use of the appeal site implemented the crystallised permission. If it did, that change of use was lawful and that is the end of the matter. If it did not, it will then be appropriate to consider whether subsequent events have nevertheless resulted in the permission having been implemented.

Establishing when the change of use took place

20. As the Appellant rightly notes, the 1990 Act does not define when a change of use occurs. The point was considered in *Impey*[5], where it was held that "change of use to residential premises can take place before the premises are used in the ordinary and accepted sense of the word." Donaldson LJ went on to consider the question of how much earlier there can be a change of use, and said "It may well be that during the course of the operations [to convert them to residential accommodation] the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree".

21. In this particular case, the Statement of Common Ground (SoCG) records that works for the residential conversion of the site commenced in September 2015; the demolition of the original single-storey extension commenced in December 2015/January 2016; and the "two-storey extension (shell)" was completed in mid-February 2016. The SoCG sets out the dates of the first letting of each of the 16 flats on the appeal site, the earliest of which was Flat 11, on 18 June

[4] *R (Orange PCS Ltd) v Islington LBC* [2006] JPL 1309
[5] *Impey v Secretary of State for the Environment* (1980) 47 P&CR 157

2016. Notably, there is no evidence that any of the flats were capable of, or available for, residential use prior to the occupation of Flat 11 in June 2016.

22. The SoCG records that on 26 October 2015 the partitions were ready for "first fix", and that on 18 November 2015 the partitions were up, and "being finished with sound bloc boards". The Appellant contends that by this stage, works to commence the residential use had reached the point at which it could no longer be said that the office use could resume, so a material change of use had occurred. I do not share that view. It seems to me that putting up partitions would not of itself necessarily change the character and use of the space from office to residential: many office buildings are subdivided into smaller units, which can then be let individually. In the absence of any indication that domestic bathrooms, kitchens, bedrooms or any other residential facilities had been installed by this stage, I see no reason why the lawful office use of the premises would have been precluded from continuing.

23. Further, the first flat to be occupied was Flat 11 on the first floor, which incorporated space provided within the unauthorised extension. Since the SoCG indicates that only the "shell" of the extension was completed by mid-February 2016, I consider it highly unlikely that Flat 11 (or Flat 3, immediately below it on the ground floor) would have been in a fit state for residential occupation by that stage. Certainly there is no evidence to suggest that they, or any of the other flats, were.

24. There then followed a period of some 4 months before the letting of the first of the flats. I appreciate that the residential conversion is likely to have been completed, and the flats readied for occupation, at some point prior to the date of the first letting but in the absence of any further evidence on that point, I cannot draw any firm conclusions as to when that occurred.

25. In summary, I consider that on the balance of probabilities, the change of use from office to residential had not taken place by mid-February 2016; at that stage only the shell of the extension had been completed, and there is no evidence that the residential conversion had progressed beyond the erection of soundproofed partitions. It must however have occurred by 18 June 2016, when the first of the flats was let and, on the evidence of the Appellant, occupied. I conclude that the material change of use took place between mid-February 2016 and 18 June 2016.

Whether the variation from the approved details was "de minimis"

26. The Appellant submits that there were two separate developments: a change of use (of the office building) and operational development (the two-storey extension), and that these were separated in time, purpose, type of development and availability of extant permission. However, as set out above, the evidence is that the residential conversion work and the construction of the unauthorised extension were contemporaneous. I have found that the change of use of the building took place after the shell of the unauthorised two-storey extension had been constructed, and it is common ground that the newly formed residential units, as they were first created and first occupied, incorporated floorspace provided by the extension which had not been part of the 2015 Approval. Specifically, as shown in the plans provided by the Appellant at the inquiry (Document 2), Flat 3 on the ground floor had a larger bedroom and kitchen/dining room, and the floor area of Flat 11 on the first floor was increased by at least 50%.

27. On that basis, I conclude that the change of use of the office building did not take place prior to, or separately from, the erection of the two-storey extension. Similarly, there is no evidence to suggest that the unauthorised extension was constructed, or used, for any purpose other than providing residential accommodation. The residential conversion works and the construction of the extension appear to have been carried out in consort, and to the same end. I see no reason why the additional residential floorspace provided by the extension should not be taken into account when considering the variation between the details approved by the 2015 Approval, and the material change of use which actually took place.

28. I accept the Appellant's point that there are some circumstances in which deviation from approved details might be regarded as de minimis; the example given at the inquiry, and agreed by the Council, was the installation of a different make of oven from that shown in the plans. I also note the Appellant's undisputed evidence that the floorspace provided by the two-storey extension was about 4% of that of the existing building. But in my judgment, the construction of this extension amounted to considerably more than a minor alteration, and resulted in a significant increase in the size of one of the flats. As such, I do not consider that the difference between the layout plans of the 2015 Approval, and the residential conversion of the office building as it was when the material change of use took place, can reasonably be regarded as "de minimis".

Whether the departure from the approved details amounted to a breach of limitation, or development without planning permission

29. The paragraph W(12)(a) requirement that development be carried out in accordance with the details approved by the local planning authority, and the implications of departing from it, were considered by the High Court in *Pressland*[6]. It was held that the requirement serves to define the permission granted: its function being "to define or limit what is permitted (just as the grant by a local planning authority of planning permission for a development in accordance with the application made for it would do)". If the development is not carried out in accordance with such details then the breach of planning control is not a breach of condition. It is either the carrying out of development without the required permission for it, or a failure to comply with a limitation subject to which planning permission was granted.

30. The Appellant points out that the Court of Appeal's judgment in *Garland*[7] is authority (on an earlier version of the GPDO) for the principle that it is only a "substantially different" development than that which was permitted which is to be regarded as development wholly without the planning permission granted by the Order; otherwise, if the difference is "trifling", it is a breach of limitation.

31. It is fair to note that in this current case, the development that has taken place is the same, in kind, as that permitted by the 2015 Approval: that is, the former office building has undergone a residential conversion into 16 one-bedroom flats. I also note that the floorspace provided by the two-storey extension in the current case was about 4% of that of the existing building,

[6] *Mr J E Pressland v The Council of the London Borough of Hammersmith & Fulham* [2016] EWHC 1763 (Admin)
[7] *Garland v Minister of Housing and Local Government* (1969) 20 P&CR 93: the terms quoted are from Lord Denning MR at p.102

whereas the extended dwellinghouse under consideration in *Garland* exceeded the maximum permitted volumetric capacity by some 25%.

32. However, I do not think it necessarily follows that the development here is not "substantially different" from that which was approved, or that the differences are only "trifling". In *Garland*, the resulting development under consideration was the same, in kind, as that permitted by the GPDO: that is, an extension to a dwellinghouse. Davies LJ expressed what had happened as "…what the General Development Order permits might be called "X". Mr Garland was not content with the "X" which was the maximum permitted by the order, and he built "Y" as well, making the development "X" plus "Y" and, consequently, a development which was not permitted." It seems to me that what has happened in the current case might be expressed similarly, with "X" the building whose change of use was permitted by the GPDO, and "Y" the additional two-storey extension that was not part of the 2015 Approval.

33. I consider that following *Garland* and *Pressland*, the assessment of whether a breach of planning control amounts to development without permission or, alternatively, failure to comply with a limitation, will depend in large part on the facts of the case and the nature and importance of the differences between the development permitted and the development as carried out.

34. In this case, the approved details did not simply amount to a written description and plan showing the location of the development, but included a layout plan which identified the floorspace of each of the two storeys of the building as it then stood, and detailed the size and layout of the units to be created within them. This information may well have informed the Council's assessment of whether its prior approval was needed (and if so, could be granted) in respect of transport and highway impacts of the proposal. The development that was carried out did not depart from the approved details solely through the omission or addition of internal details, such as partition walls or stairways. Rather, the departure involved the unauthorised construction of a substantial extension, which increased the floorspace of one of the flats by at least 50%.

35. In my judgement, the differences between what was approved and what was built are considerably more than trifling, and the resulting development is substantially different to that permitted by the 2015 Approval. On that basis, I conclude that the breach of planning control which took place here amounted to development without permission.

Whether or not the change of use implemented the planning permission which crystallised with the 2015 Approval

36. Drawing all of this together, I have found that the layout plans submitted with the application formed part of the "approved details" of the 2015 Approval. The change of use of the premises from office to residential was not carried out in accordance with those approved details. The deviation from the approved details was more than "de minimis" or "trifling", and I consider that the Council was correct to characterise the breach of planning control as development without planning permission rather than a failure to comply with a limitation subject to which permission was granted.

37. I conclude that the material change of use which took place between mid-February 2016 and 18 June 2016 did not implement the crystallised grant

of planning permission. It is perhaps worth noting that this conclusion does not equate to, or imply, a finding that the permission was therefore "lost".

The application of Article 3(5) of the GPDO[8]

38. The Council contends that since the residential use that took place did not benefit from the 2015 Approval and was not lawful, and the construction of the two-storey extension and its subsequent demolition and alteration constituted a series of unlawful building operations, the effect of Article 3(5) of the GPDO is that the permission granted by Schedule 2 does not apply. The Appellant disputes this, on the basis that since Article 3 of the GPDO is not a retrospective provision which could undermine a "crystallised" permission, it is not here engaged.

39. The provisions of Article 3(5) are as follows:

> *The permission granted by Schedule 2 does not apply if –*
>
> *(a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;*
>
> *(b) in the case of permission granted in connection with an existing use, that use is unlawful.*

40. The Interpretation section of the GPDO, at Article 2(1), provides that:

> *"building"… includes any structure or erection and… includes any part of a building*
>
> and
>
> *"existing", in relation to any building or any plant or machinery or any use, means… existing immediately before the carrying out, in relation to that building, plant, machinery or use, of development described in this Order.*

41. It is also worth noting that Article 3(1) of the GPDO grants planning permission for the classes of development described in Schedule 2 "subject to the provisions of this Order".

42. With this in mind, it seems to me that whether the LPA has issued a notice granting its prior approval, or whether it has determined that its prior approval is not required (or whether an application for prior approval was duly made, but not decided by the LPA within the relevant time period, such that the development may proceed without it) it must still be necessary – as in cases where prior approval is not required at all – for the development to accord with the terms of the GPDO when it is subsequently carried out. For certain classes of Permitted Development the GPDO imposes a pre-commencement condition[9] requiring an application for a determination as to whether the prior approval of the LPA will be required as to certain specified matters. But in determining that application, the LPA is confined to deciding the issue of prior approval; it is not required, or empowered, to issue a definitive determination as to whether the proposal constitutes "Permitted Development" in the terms of the GPDO.

[8] Here, references to the GPDO are to the consolidated Order, as it now stands following the amendments introduced by *The Town and Country Planning (General Permitted Development) (England)(Amendment) Order 2016,* but there has been no material change to Article 3(5).
[9] At Paragraph O.2.(1), in this case

43. That being the case, the existence of a notice of grant of Prior Approval satisfies the pre-commencement condition and "crystallises" the permission but does not, in my view, serve to override the need to assess whether the development that has been carried out accords with the other provisions of the GPDO. If events subsequent to the grant of Prior Approval resulted in the circumstances set out at (a) or (b) of Article 3(5) at the time the development was carried out, the "crystallised" permission would not apply.

44. Looking firstly at 3(5)(b), the use of the building in this case, at the time the 2015 Approval was granted, was as an office. That use was lawful, and did not change between the grant of Prior Approval and the carrying out of the development here at issue (that is, the material change of use to residential which, I have established above, took place between mid-February 2016 and 18 June 2016). So the use of the building immediately prior to the carrying out of the development was lawful, and Article 3(5)(b) would not prevent the "crystallised" permission from applying.

45. Turning then to 3(5)(a), I note the Appellant's contention that this should not apply because the grant of permission relied on is "in connection with an existing use". However, the permission is also "in connection with an existing building"; the particulars and status of that building are relevant to the terms of Permitted Development within Class O, so I consider Article 3(5)(a) to be relevant here.

46. There is no dispute that the building as it stood on the date of the 2015 Approval was constructed lawfully. But on the evidence discussed above, the unauthorised two-storey extension (in "shell" form) was in place before the material change of use from office to residential took place. The building operations involved in the construction of that part of the building were unlawful, so Article 3(5)(a) is engaged and the "crystallised" planning permission that flows from Article 3(1) does not apply. This accords with *Evans*[10], where it was held that if the building operations involved in the construction of any part of the building are unlawful, the permitted development rights granted in connection with the existing building do not apply.

47. I do not think that this interpretation is at odds with the judgment in *Orange.* There, the issue for the Court of Appeal was whether the developer had an accrued right to develop the site in accordance with the details submitted in the application at least from the date of issue of the Prior Approval Notice, so that the right to develop was unaffected by the subsequent designation of the land as a Conservation Area. In reaching the conclusion that in a prior approval case, the planning permission accrues or crystallises upon the developer's receipt of a favourable response from the LPA to his application, Laws LJ observed that it would surely be unjust if the developer's reliance on the grant of prior approval could be defeated by the "adventitious fact" of a conservation area designation. He also observed that an express grant of planning permission by the LPA, once made, cannot ordinarily be undermined by a later change in the status of the land.

48. Here, there is no dispute that the developer had an accrued right to develop the site in accordance with the details submitted in the application from the date of the 2015 Approval Notice. But in this case the potential disruptor of

[10] *Evans v SoS CLG* [2014] EWHC 4111 (Admin)

that right is not an adventitious event over which the developer had no control; rather, it is the developer's own action in undertaking unauthorised additional works that engaged Article 3(5). A parallel here with an express grant of planning permission might be where the development that has been carried out conflicts with the terms of the permission. In such cases, while the grant of permission is not itself undermined, it may well be held not to have been implemented at all.

49. In my view, that is the effect of Article 3(5)(a) in the current case. The planning permission that crystallised with the grant of the 2015 Approval was not undermined, or lost, but it could not apply to the material change of use that took place in 2016.

The subsequent alterations to the unauthorised extension

50. Following the change of use of the premises, the SoCG records that in December 2016 the second storey of the unauthorised extension was demolished and then in June-July 2017, works were undertaken to the remaining single-storey extension to make it the same size as the original ground-floor extension. Planning permission was not sought or granted for these works. The Appellant considers that the building as a whole now accords very closely with what was shown in the layout plan approved in 2015, subject to very minor variations, such that the "crystallised" permission granted by the 2015 Approval has now been implemented.

51. However, I am not persuaded that the works carried out in 2016 and July 2017 could either implement the permission which crystallised with the 2015 Approval, or retrospectively render the material change of use of the premises Permitted Development.

52. The making of a material change in the use of land, like the carrying out of operational development, involves a sequence of events which has a beginning and an end. For the reasons set out above I have been unable to be precise about when the change of use from office to residential occurred here, but have concluded that it had taken place by 18 June 2016 at the latest. The time to assess whether or not this act of development constituted Permitted Development was when it took place; if it did not qualify as Permitted Development at that time, there is no provision for subsequent works to retrospectively bring about that qualification. It is not argued that there has, since 18 June 2016, been a reversion to office use then subsequent material change to residential use which might have implemented the crystallised permission.

53. In Evans (supra) the Court considered the contention that the effect of Article 3(5) of the GPDO is not to suspend or terminate all permitted development rights which might pertain to a building simply because some part of the building has been erected without planning permission, and disagreed. It held:

…if unlawful works have been carried out, such as the cladding referred to by Mr Pike in his example, it would be open to the dwelling owner (or some other person) to apply for planning permission to retain the extension with cladding, or to carry out works to remove the cladding, or to obtain planning permission for the flue. Once planning permission had been granted, or the cladding had been removed, permitted development rights would, once again, apply.

54. The important point is that if steps are taken to ensure that any unlawful building operations involved in the construction of any part of the building are made lawful (by obtaining planning permission for them, or reversing them) permitted development rights will then (but not until then) apply once more. In other words, once the "unlawful" status of any existing works has been remedied, future development has the potential to qualify as permitted development. This is not at all the same as saying that any putative works of "Permitted Development" carried out while (to use the example in Evans) the cladding or the flue were unlawful would, at the point when they became lawful, retrospectively acquire Permitted Development status.

55. Applying this to the present case, the building operations involved in the demolition of the first-floor extension and re-modelling of the ground-floor extension were (and to date remain) unauthorised development. That being the case, Article 3(5)(a) would still have been engaged even if these works had resulted in the building conforming precisely with the details shown in the layout plan of the 2015 Approval.

56. Further, even if I were to grant planning permission for the development which is the subject of Appeal C – which would mean that there was no longer any part of the building of which it could be said that the building operations involved in its construction were unlawful – that would not have the effect of implementing the permission that crystallised with the 2015 Approval, and nor would it retrospectively legitimise the unauthorised material change of use that took place in 2016. It would simply mean that Permitted Development rights could subsequently apply; that is, any future development proposals that would benefit from permission granted by Article 3(1) and Schedule 2 of the GPDO would no longer have that permission disapplied by Article 3(5)(a).

Conclusion as to the lawfulness of the change of use from office to residential

57. For the reasons set out above, I have found that the material change of use which took place between mid-February 2016 and 18 June 2016 did not implement the planning permission which crystallised with the grant of the 2015 Approval. The subsequent works to the unauthorised extension did not bring about the implementation of the crystallised permission, and there has been no other act of development which could have implemented it. I conclude that the material change of use of the premises from office to residential took place without the benefit of planning permission, and was unlawful.

58. I accept the Appellant's point that the use of the building as it currently stands for 16 one-bedroom flats is no different in principle to that approved in 2015: and it is fair to note that the inclusion of Class O in the GPDO establishes the in-principle permissibility of converting an existing office building to residential use. But however desirable it may be to achieve a pragmatic resolution of the differences between the parties, it is not open to me to disregard the implications of the sequence of events that have taken place in this case. As the Court of Appeal has established, practicality cannot displace the legal effect of the GPDO.[11]

59. I now turn to the implications of my conclusion on this point for each of the three appeals before me. Since the outcome of Appeal B (the appeal against the Council's refusal to grant a LDC for four of the apartments) will bear on my

[11] *Murrell & Murrell v SoS CLG & Broadland DC* [2010] EWHC 1045 (Admin)

consideration of some of the grounds pleaded in respect of Appeal A (the appeal against the Enforcement Notice), I shall determine Appeal B first, followed by Appeal A and then Appeal C.

APPEAL B

60. The application that is the subject of this appeal was for a LDC confirming the lawful residential use of apartments 1 and 2 on the ground floor, and 9 and 10 on the first floor. It is common ground that these four flats, which lie at the front of the building on each floor, were not part of the area in which the unauthorised extension works took place, and their configuration does not differ in any material way from the layout plan which informed the 2015 Approval.

61. The Appellant contends that any non-compliance with the submitted layout plans cannot affect the lawfulness of those flats which were constructed in full accordance with the plans.

62. S.191(2) of the 1990 Act explains that a use is lawful if no enforcement action may then be taken in respect of it; whether because it did not involve development, or require planning permission, or because the time for enforcement action has expired, or for any other reason.[12]

63. Here, there is no dispute that the change to residential use involved development for which planning permission (granted in principle by operation of the GPDO) was required. For the reasons set out above, I have found that the planning permission which crystallised when the 2015 Prior Approval notice was issued has not been implemented, and that having taken place without the benefit of planning permission, the change of the building's use from office to residential was unlawful. There is no argument that the time for taking enforcement action has expired, or that enforcement action may not be taken for any other reason.

64. In summary, the fact that the layout of these particular flats accords with that shown in the details approved by the 2015 Approval does not make them lawful, because their development did not implement, and so did not benefit from, the planning permission which crystallised when the 2015 Approval was granted. I find that the existing residential use of these four flats is not lawful, and the appeal should fail.

65. I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of former B1(a) office space to form 4 apartments at nos. 1, 2, 9 and 10 was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

APPEAL A

The appeal on ground (c)

66. This ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control. For the reasons set out above, I have concluded

[12] S.191(2)(b) imposes the additional requirement that the use does not contravene any of the requirements of any enforcement notice then in force. The LDC application pre-dated the issue of the Enforcement Notice that is the subject of Appeal A by more than a year, so it is clear that there is no breach of this requirement.

that the matters alleged in the notice have taken place without the benefit of planning permission, and are unlawful.

67. It follows that there has been a breach of planning control, and the appeal on ground (c) must fail.

The appeal on grounds (a) and (f)

68. Ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted; and ground (f) is that the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control.

69. The Appellant's case on these grounds is limited to the situation in which some of the 16 flats were found to be lawful (either through the partial success of Appeal A on ground (c), or the success of Appeal B) but others were not. In those circumstances, the Appellant contends (and the Council accepts) that the resulting mixed use of the building as part office, part residential would be problematic and it would be preferable to resolve this by granting planning permission for such of the residential units as I had not already found to be lawful.

70. However, since I have concluded that the existing residential use of all of the flats is unlawful, that rationale does not apply. It is common ground that since the 2015 Approval was granted the Council has introduced an Article 4 Direction which removes Permitted Development rights for the conversion of office buildings to residential use within the Borough, and the Appellant very fairly acknowledges that if the appeal building were currently in use as an office, there are policies in the Development Plan which would seek to prevent its residential conversion.

71. In these circumstances, I share the parties' view that there is no justification for granting planning permission for the matters stated in the notice, and consider that no lesser requirement than the cessation of the residential use of the premises, and the removal of the fixtures and fittings that facilitated that use, would suffice to remedy the breach of planning control.

72. I conclude that the appeal on grounds (a) and (f) should fail.

The appeal on ground (g)

73. The ground of appeal is that the period specified for compliance with the requirements of the notice falls short of what should reasonably be allowed. The burden of proof lies with the Appellant. In this case, the Appellant contends that the six month period specified by the notice would be insufficient time for tenancies to be extinguished, for the occupiers to find alternative accommodation, and for the required remedial works to be carried out and on that basis, a period of twelve months should instead be provided.

74. The Appellant has explained that 13 of the 16 flats are let on short fixed term tenancies, while the remaining three have been sold on 125 year leases. I accept the Appellant's point that it would not be possible to carry out the work set out in Step 2 of the requirements (that is, the removal of the fixtures and fittings associated with the unauthorised change of use) while residents were in occupation. However, no copies of or extracts from any of the tenancy or

leasehold agreements have been provided, such as would show the period of notice that would be required to achieve vacant possession of the flats.

75. In answer to my question at the inquiry, Mr Allen accepted that the 12 month period requested by the Appellant could be sub-divided to reflect the sequential nature of the two requirements, with 6 months to comply with the first (cessation of the residential use) and six months to comply with the second.

76. Mr Wicks' evidence to the inquiry was that he could complete the works set out in the second requirement within a matter of days. I do not doubt that, but am mindful that the Appellant may be disinclined to engage his services. However, I do not see any reason why the removal of the fixtures and fittings associated with the unauthorised change to residential use should take as long as 6 months. The work would not be complicated, and would not require the services of a specialist contractor.

77. I am mindful that upholding the enforcement notice will deprive the current occupiers of their homes, and they must be given a reasonable period in which to look for alternative accommodation. It is also important, in the public interest, that the requirements of the notice should be carried out without undue delay to overcome the harm identified by the Council in its reasons for issuing the notice. In my judgment, a period of six months to cease the residential use of the land, followed by a further two months to remove the relevant fixtures and fittings, would strike the appropriate balance between private and public interests. I shall vary the notice to that end.

78. To this limited extent, the appeal on ground (g) succeeds.

Conclusions in respect of Appeal A

79. For the reasons set out above, I conclude that the appeal fails on grounds (c), (a) and (f) but succeeds on ground (g). I shall vary the enforcement notice accordingly, prior to upholding it.

APPEAL C

80. The application which is the subject of this appeal sought retrospective planning permission for "external alterations to a building". The application form contained questions as to the current use of the site, to which the answer provided was "residential"; whether the proposal included the gain or loss of residential units, to which the answer given was "no"; and whether the proposal involved the loss, gain or change of use of non-residential floorspace, to which the answer given was "no". The application form also requested a description of the activities and processes which would be carried out on the site, to which the response given was "residential alterations."

81. The application was supported by a "Planning & Design Statement", which explained that the external alterations for which permission was sought involved a slight increase in the size of some windows and a reduction in size of the window of Flat 5, alterations to the fire exit doors on both floors and to the fire escape landing, and alteration to brickwork on parts of the ground floor. These were described as relatively minor changes "…to either improve the quality of the consented apartments and/or improve their overall safety." In the interests of clarity it is worth noting here that planning permission was also being sought for the ground-floor extension in its entirety, since (being a recreation of a previous ground-floor extension that was demolished in late

2015 / early 2016) the building operations involved in its construction were unauthorised.

82. The plans submitted with the application included "as built" floor plans and elevations, showing the development for which planning permission was retrospectively sought. This development was annotated and particularised on the plans; for example, details shown on drg no. 1032-21A (as-built elevations) are marked up as "new fire exit door to flat 15" and "existing double doors partly bricked up to form new fire exit from flat 7".

83. It is clear from all this that the application was made on the basis that the residential conversion of the premises had already been lawfully carried out, and permission was simply required for the external alterations to the building. The Council's position is that if that had indeed been the case, it would have approved the application: it is common ground that the works at issue have no adverse impact on the amenity or appearance of the site, and the Council confirmed at the inquiry that if the residential use of the building was found to be lawful, it would not object to the grant of permission for these external alterations.

84. However, in the light of my findings in respect of Appeals A and B above, the context for my determination of Appeal C is that the change of use of the premises from office to residential did not benefit from the planning permission which crystallised with the 2015 Approval, and was unlawful. That being the case, I share the Council's concern about the implications of the manner in which the development for which permission is sought has been described in the application and shown on the submitted plans.

85. S.75 of the 1990 Act provides that (2) where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used and (3) if no purpose is specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed. S.336(1) defines "erection" as including extension, alteration and re-erection and "building" as including any part of a building.

86. In this case, the answers given on the application form make it clear that the alterations are intended to serve residential purposes, and they are annotated on the submitted plans as serving specifically identified residential units. The "as-built" plans show the building sub-divided into 16 residential units, and the ground-floor extension is shown as forming a significant part of the floorspace of Unit 3. To grant permission for the development in the terms currently sought could, in my opinion, be argued to convey implicit permission for its residential use. As the Council points out, the limited internal floorspace provided by Unit 3 conflicts with the aims of Policy 3.5 of the London Plan and Policies DMP18 and DMP19 of the Brent Development Management Policies DPD (2016), and this indicates that such permission should be refused.

87. I have given some thought to the Appellant's suggestion that a condition could be used to ensure there was no doubt about the permitted use of the premises. However, no proposed condition was suggested at the Inquiry, and it is not clear to me how any such condition could be phrased to reflect the current circumstances of the site without prejudice to any existing lawful, or potential future, use.

88. In any event, bearing in mind the Appellant's contention that the external alterations here proposed could be just as relevant to the use of the building as an office, it seems to me that a simpler and more appropriate solution would be to re-submit the application on that basis. If the alterations have no design-based or functional tie to the residential use of the premises, it should be a straightforward matter to amend the application and plans to make it clear that they were not intended as "residential alterations", and the re-submitted application could then be determined on that basis. The availability of this alternative is a material consideration of some weight.

89. In summary, I find that granting planning permission for external alterations in the terms currently sought could potentially be interpreted as implicit permission for their residential use. This would conflict with relevant policies of the adopted Development Plan, and no material considerations have been identified that would be of sufficient import to outweigh that conflict. I therefore conclude that the appeal should be dismissed.

FORMAL DECISIONS

Appeal A

90. The appeal is allowed on ground (g), and it is directed that the enforcement notice be varied by:

    At Schedule 5, beneath the heading "Time for Compliance", the deletion of the words "6 months after this notice takes effect" and the substitution of the words "STEP 1: six months after this notice takes effect; and STEP 2: eight months after this notice takes effect."

    Subject to this variation the enforcement notice is upheld.

Appeal B

91. The appeal is dismissed.

Appeal C

92. The appeal is dismissed.

Jessica Graham

INSPECTOR

APPEARANCES

FOR THE APPELLANT	Mr R Turney, of Counsel Instructed by Allen Planning Ltd
He called:	
Mr A Allen MRTPI	Planning Consultant, Allen Planning Ltd
FOR THE COUNCIL	Mr E Robb, of Counsel Instructed by Mr T Roit, Head of Enforcement
He called:	
Mr N Wicks BTP, Dip Law, MRTPI	Director, Enforcement Services Ltd

DOCUMENTS SUBMITTED AT THE INQUIRY

1 Copies of the Council's letters of notification to interested parties for each of the three appeals
2 Copies of drg. nos. MH.EX.01 and MH.EX.02 (from SOCG3) marked up in red by the Appellant to show the development that existed after the premises were converted to apartments and before the unauthorised two-storey extension was demolished.
3 Copy of the Enforcement Officer's Delegated Report on the notice that is the subject of Appeal A
4 Closing submissions on behalf of the Council
5 Closing submissions on behalf of the Appellant