

Notice of Appeal

Appeal by Bristol Properties Limited

1 Hurdwick Place, London NW1 2JE

April 2023

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1. Introduction

- 1.1. This Notice of Appeal, setting out the grounds of appeal, is submitted on behalf of Bristol Properties Limited (“the Landowner”) against Enforcement Notice (“EN”) EN20/0676 issued by LB Camden Council on 16th February 2023, and which (absent an appeal) comes into effect on 14th April 2023.
- 1.2. The notice relates to the following breach of planning control:
- “Without planning permission:*
- 1. The change of use from restaurant at basement and ground floor and 4 residential units at the first, second and third floor to use of the basement, part ground floor, first, second, and third floors of the building as 10 residential units.*
 - 2. The erection of part single storey part two storey rear extension and single storey extension at lower ground floor level.*
 - 3. Installation of the balustrade to enable the use of the flat roof of the unauthorised extension at first floor level to create a terrace at second floor level.”*
- 1.3. The appeal is made under grounds (a), (f) and (g) of s.174(2) of the Act. In respect of ground (a) and ground (f), the Appellant promotes two Alternative Schemes, relying on the case law principles established within the *Ahmed* Judgment.
- 1.4. Title information is provided as Appendix 1 and 2, and the Site Location & Block Plan is provided as Appendix 3.

2. Planning History and Context

Planning History

- 2.1. The site's pre-existing lawful use was Class E use at the ground floor and basement, and four apartments in Class C3 residential use at the first, second and third floors – this arrangement having existed since at least 2008. This is confirmed by the tenant agreements provided as Appendix 4, and the confirmation of Council Tax entries for all four flats by the Valuation Office Agency¹.
- 2.2. In 2011, a planning application (ref: 2011/0417/P) was submitted for the *“Erection of 2 storey side extensions at second and third level, infill rear extension at First floor level to create two x 1 bedroom residential flats”*. The pre-existing drawing set is provided as Appendix 5, and the proposed drawing set is provided as Appendix 6. This application was withdrawn, however the pre-existing floorplans re-confirm the site's existing lawful use as Class E use and C3 residential use (albeit erroneously showing two (rather than four) apartments).
- 2.3. In 2013, a planning application (ref: 2013/0035/P) was submitted for the *“Erection of infill side extension at second and third floor level, rear extension at first floor level and installation of external walkway to rear at second floor level in connection with existing 2 x-2 bedroom flats and the creation of an additional 2-bedroom flat (Class C3)”*. This application was refused, and the Decision Notice is provided as Appendix 7 and the Delegated Report as Appendix 8. The pre-existing drawing set² is provided as Appendix 9 and the proposed floorplans, sections and elevations as Appendix 10.
- 2.4. In 2015, a planning application (ref: 2015/1630/P) was submitted, for the *“Erection of an infill side extension at second and third floor level and a rear part single part double storey rear extension between first and second floor level to provide 2 x studio flats, 1x 3bed self-contained flat and 1 x 2bedroom residential flats”*. This application was approved, and the decision notice is provided as Appendix 11, and the Delegated Report as Appendix 12. The pre-existing drawing set³ is provided as Appendix 13, the proposed drawings⁴ as Appendix 14 and the Daylight and Sunlight Report as Appendix 15.
- 2.5. In 2016, a planning application (ref: 2016/1334/P) was submitted for *“The conversion of the existing 3Bed self-contained flat into 2 x 1Bed self-contained units at basement level, associated with planning permission 2015/1630/P granted on 18/09/2015 for: Erection of an infill side extension at second and third floor level and a rear part single part double storey rear extension between first and second floor*

¹ Flat 1, 28.02.2008 (<https://www.tax.service.gov.uk/check-council-tax-band/property/band-details/6274221000/507664583>)

Flat 2 28.02.2008 (<https://www.tax.service.gov.uk/check-council-tax-band/property/band-details/6274224000/507664585>)

Flat 3 15.02.2008 (<https://www.tax.service.gov.uk/check-council-tax-band/property/band-details/6274393000/507664782>)

Flat 4 15.02.2008 (<https://www.tax.service.gov.uk/check-council-tax-band/property/band-details/6274395000/507664785>)

² Again erroneously showing two (rather than four) apartments

³ Again erroneously showing two (rather than four) apartments

⁴ Note that the Third Floor Plan erroneously shows the roof plan of the then existing part of the building (rather than the then existing internal layout)

level to provide 2 x studio flats, 1x 3bed self-contained flat and 1 x 2bedroom residential flats". This application was approved, and the Decision Notice is provided as Appendix 16, and the proposed floorplans provided as Appendix 17.

- 2.6. Condition discharge applications associated with the 2015 consent (ref: 2015/1630/P) were approved in 2017 (2017/6516/P) and 2018 (2018/0007/P).
- 2.7. In 2019, a planning application (ref: 2019/6251/P) was submitted for the *"Internal and external alterations associated with the conversion of ground floor 2Bed self-contained flat into 1x studio and 1 x 1Bed self-contained flats"*. This application was withdrawn. The pre-existing drawing set is provided as Appendix 18, and the proposed floorplan as Appendix 19.
- 2.8. The as-built development commenced in early 2019, and was completed in September 2020. The as-built development does share similarities with the 2016 and 2015 consents, however, there are some fundamental differences. A total of 10 residential units have been built on site (with the ground floor retained as a vacant commercial unit). Measured survey drawings of the as-built / existing site is provided as Appendix 20.
- 2.9. The first correspondence received by the Council regarding unlawful development at the site was on 26th August 2020. This email is provided as Appendix 21.
- 2.10. A planning application for a part-retrospective and part-prospective consent was submitted on 22nd June 2021 (ref: 2021/3053/P). The description of development was the *"Retention of ground floor restaurant and use of basement, first, second and third floors as 8 flats (Note: The basement, first, second and third floors have planning approval for 5 flats and they are currently in use as ten units). Replacement of existing windows at rear on first floor with obscure glass Oriel windows"*. The existing drawings are as per Appendix 20, and the proposed drawings are provided as Appendix 22. This application was withdrawn, owing to the Case Officer stating that the recommendation would be to refuse the application since the proposed residential units failed to meet national space standards, issues regarding accessibility to the cycle store and the removal of the existing traditional windows.
- 2.11. Following informal dialogue with Camden Council, a planning application was submitted on 15th December 2022 which is yet to be validated by the Council. The existing plans are as per Appendix 20, and proposed plans as Appendix 23. The relevant submission documents have also been provided as Appendices 24 – 26.

Enforcement Notice

- 2.12. A previous enforcement notice was issued and later withdrawn by the LPA prior to the effective date, following procedural errors having been brought to the LPA's attention by the Landowner.
- 2.13. The EN was issued on 16th February 2023 and is provided as Appendix 27. Absent an appeal, the effective date is 14th April 2023, and the compliance date is nine months later (i.e. 14th January 2024).

2.14. The enforcement notice alleges a breach of planning control:

“Without planning permission:

1. *The change of use from restaurant at basement and ground floor and 4 residential units at the first, second and third floor to use of the basement, part ground floor, first, second, and third floors of the building as 10 residential units.*
2. *The erection of part single storey part two storey rear extension and single storey extension at lower ground floor level.*
3. *Installation of the balustrade to enable the use of the flat roof of the unauthorised extension at first floor level to create a terrace at second floor level.”*

2.15. The enforcement notice has stated the following reasons for issuing the notice:

- a. The breaches occurred within the last four years.
- b. A substandard quality of accommodation for current and future occupiers, which is described as small, and with limited access to natural light and outlook.
- c. The single storey rear extension to the lower ground floor (basement) negatively impacts the quality of accommodation by reducing the size of the lightwell, and limiting outlook and daylight.
- d. The second floor roof terrace and balustrade is noted and by reason of its design, siting, size and proximity to habitable windows, detracts from the character and appearance of the host property and wider conservation area and negatively impacts neighbouring occupiers through overlooking and loss of privacy.
- e. The absence of a S106 legal agreement to secure the development as car free, contributing to parking stress and congestion.

2.16. The stated requirements of the EN are:

1. *“Cease the use of the basement, part ground floor, first, second and third floors as 10 residential units.*
2. *Return the use of the basement to Class E use, and use the first, second, and third floors as four residential flats shown on plans provided as Appendix A.*
3. *Remove the balustrade to the roof of the first floor extension, remove all associated debris from the site and make good on any damage caused”.*

3. Grounds of Appeal

- 3.1. The Appellant appeals against the EN: first that the EN should be quashed in full on the procedural bases of nullity or invalidity.
- 3.2. Second, should the Inspector disagree with both of the above procedural bases, that planning permission should be granted for at least one of the two 'Alternative Schemes' put forward – promoted under a combination of grounds (a) and (f). This approach has been enshrined in law via the *Ahmed* Judgment, and for the avoidance of doubt the as-built scheme is not defended by the Appellant under this ground.
- 3.3. Third, should the Inspector consider that the EN ought to stand, that the compliance period be amended from nine months to 18 months – i.e. under ground (g).
- 3.4. All of the grounds of appeal are in the alternative and without prejudice to the others.

Nullity and Invalidity

Nullity

- 3.5. Paragraph 3 of the EN alleges a breach of planning control by way of both a change of use (paragraph 3(1)) and operational development (paragraph 3(2)-(3)).
- 3.6. Paragraph 4(a) only cites a "4 years" period, despite the allegation of an unauthorised change of use.
- 3.7. Although paragraph 3(2) refers to two different extensions, paragraph 4(c) is inconsistent in that it refers to only one of these.
- 3.8. Paragraph 5(1) requires the cessation of use of part of the Property as 10 residential units, whereas the previous enforcement notice referred at paragraph 5(1) only to Flats 2-10.
- 3.9. Paragraph 5(2) requires a return to a specified mixed use, albeit that it is unorthodox and excessive for an enforcement notice to require a return to a particular use.
- 3.10. Paragraph 5(2) is inconsistent with paragraph 3(1), in that it does not refer to the ground floor whereas paragraph 3(1) does so and paragraph 5(2) refers to Class E whereas paragraph 3(1) refers to restaurant use.
- 3.11. Paragraph 5(2) is ambiguous, in that it (and paragraphs 3(1), 5(1)) refers only to use whilst also appearing to require operational development to return the Property to the Appendix A layout.
- 3.12. Insofar as paragraph 5(2) requires operational development, it is excessive and inconsistent with paragraphs 3(1)-(3) and 5(1) in that the alleged breach by way of operational development refers only

to two extensions and a balustrade whereas paragraph 5(2) requires operational development to return the Property to the Appendix A layout. Moreover, rendering the Property to the Appendix A layout entails demolition of the two⁵ extensions even though only one is referred to at paragraph 4(c) and none is referred to at paragraph 5(1). Paragraphs 4(c), 5(1) and 5(2) are thus inconsistent.

- 3.13. Paragraph 5(3) is inconsistent with paragraph 3(3), in that it refers to “the roof of the first floor extension” whereas paragraph 3(3) refers to “a terrace at second floor level”.
- 3.14. In the light of the above, the enforcement notice is hopelessly ambiguous and uncertain such that the Appellant cannot tell with reasonable certainty what steps it has to take to remedy the alleged breaches. It is therefore a nullity: see Sarodia v Redbridge LBC [2017] EWHC 2347 (Admin), applying Miller-Mead v MHLG [1963] 2 QB 196 and other authorities.

Invalidity

- 3.15. The Secretary of State’s appointed Inspector has power of correction and variation under section 176 Town and Country Planning Act 1990.
- 3.16. In this case, the power would need to be exercised to:
- (i) Make it clear in paragraph 3(1) that the change of use from restaurant / 4 residential units to 10 residential units involved operational development as well as (or instead of) a change of use;
 - (ii) Possibly amend paragraph 4(a) such that the alleged change of use relates to the 10 years immunity period and the alleged operational development relates to the 4 years immunity period;
 - (iii) Amend paragraph 4(c) to refer to both extensions, if both extensions were a reason for issuing the enforcement notice;
 - (iv) Amend paragraph 5(2) so that it refers expressly to a requirement to undertake operational development to render the layout of the Property to the layout shown on the Appendix A plans (as well as, or instead of, the use requirements); and
 - (v) Make paragraphs 3, 4 and 5 consistent.
- 3.17. However, these corrections and variations could not be done without causing injustice to the Appellant. It follows, in the alternative to the above nullity argument, that the enforcement notice is invalid.

Grounds (a) and (f)

⁵ Three if the side extension at second floor and third floor is included

- 3.18. Although the requirements of the EN lack clarity, the Appellant's best understanding is that the EN requires the site to be returned back to four residential units. The Appellant considers that this far exceeds what is necessary to remedy the breach of planning control/injury to amenity cited on the EN.

Ground (f)

- 3.19. With a specific focus on ground (f) initially, the EN requires at para 5(2) a return to the specified mixed use, and at para 5(2) operational development, insofar as it does so, in excess of the operational development alleged at para 3(2)-(3) (i.e. erection of two extensions/installation of balustrade).

Alternative Schemes

- 3.20. Moreover, the Appellant does not defend the as-built development on the basis that it is unacceptable in planning terms overall, notwithstanding that it has many similarities with the 2015 and 2016 planning permissions. Notwithstanding this, under ground (a) and (f) of s.174, Alternative Schemes can remedy the breach of planning control/injury to amenity cited on the EN, and therefore the Appellant wishes to progress two Alternative Schemes, for which planning permission is sought via this appeal.

- 3.21. The Inspector's legislative power to grant planning permission for one or more of these Alternative Schemes lies at s.177(1)(a), which states that he/she may "*grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates*" (emphasis added).

- 3.22. This is reiterated in s.174(2)(a) which outlines "*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...*".

- 3.23. Finally, s.174(2)(f) states "*that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach*".

- 3.24. This sub-section of the Act has been the subject of much case law. Most relevant here is the Court of Appeal's *Ahmed* Judgment⁶, which upheld the High Court's ruling that "*the Inspector overlooked an obvious alternative that could have remedied the breach of planning control that was the object of the notice – namely the possibility of varying the [notice], as requested by the appellant under ground (f), and at the same time granting retrospective planning consent under section 177, which provides a power to grant consent in respect of part of the matters that were the subject of the notice (namely that part of the building which could remain standing in accordance with the prior consent had it not lapsed). The Appellant was, at the time, deemed also to have made a planning application under ground (a). For the*

⁶ *Ahmed v SoSCLG & LB Hackney Council* [2014] EWCA Civ 566

purposes of that application, and treating the Appellant's submissions as a whole in accordance with the approach in Moore, it was in my judgment incumbent on the Inspector at least to consider whether to exercise his power to vary the notice and grant consent in accordance with the proposal made under ground (f). Having concluded that he lacked the power to vary the order under section 176 standing alone, recourse to section 177(1) and section 174(2)(a) was the obvious alternative course which could have overcome the planning difficulties, at less cost and disruption than total demolition. In failing to address his mind to this possibility, the Inspector in my judgment erred in law."

- 3.25. Therefore, the Appellant progresses two Alternative Schemes as per the below which successfully remedy the breach of planning control/injury to amenity outlined in the EN.

Alternative Scheme 1

- 3.26. The first alternative scheme would propose 7 residential flats, with no Class E floorspace, in the following mix and arrangement:

	1B1P / Studio	1B2P	2-Bed	3-Bed
Basement	1	1	0	0
Ground	0	0	1	0
First	1	0	1	0
Second	0	0	0	1
Third	0	0	0	1
Total	2	1	2	2

- 3.27. The proposed floorplans, sections and elevations are provided as Appendix 28.

Alternative Scheme 2

- 3.28. The second alternative scheme would deliver 6 residential apartments, and Class E floorspace at the ground floor. The following outlines the unit mix and arrangement:

	1B1P / Studio	1B2P	2-Bed	3-Bed
Basement	1	1	0	0
Ground	0	0	0	0
First	1	0	1	0
Second	0	0	0	1
Third	0	0	0	1
Total	2	1	1	2

- 3.29. The proposed floorplans, sections and elevations are provided as Appendix 29.

- 3.30. A full assessment of the two Alternative Schemes against the development plan will be provided within the Further Representations (if written representations procedure), Hearing Statement (if hearing procedure), or Inquiry Statement (if inquiry procedure), in accordance with 'Procedural Guide: Enforcement notice appeals – England (Updated 21st December 2022)'.

Ground (g)

- 3.31. The EN gives the Applicant a nine month compliance period to complete the necessary remedy, with the compliance deadline (absent an appeal) of the 14th January 2024. This nine month period does not give the Appellant sufficient time for the proposed remedy to be completed.
- 3.32. The existing tenants are managed by an intermediary landlord, Apex Housing Solutions ('Apex'). Notice was served for vacant possession in June 2022 (Appendix 30), however, to date, only four of the ten flats have been vacated. The Applicant has been informed that Apex have Council tenants occupying the residential units, who are not easy to evict owing to the lack of housing, although the precise status of these tenants is not yet understood, nor whether they have any status over and above regular tenants. The Applicant has sought to make direct contact with the tenants to seek vacant possession, however, due to GDPR, the details of the tenants cannot be shared with the Applicant and therefore contact cannot be made.
- 3.33. To fully vacate the site, which is required prior to any work taking place on site for health and safety reasons, is proving very complex and it is very unlikely that the Appellant will have vacant possession within nine months. The Applicant is aware that a possession order could be sought, however, this would also exceed the nine month compliance time.
- 3.34. Therefore, in order to obtain vacant possession, this could take up to a year, exceeding the nine month compliance period noted in the EN.
- 3.35. Moreover, in terms of the actions required for the remedy, this would also exceed the nine month compliance period, especially since this relies on a fully vacant site. Further to vacant possession, the necessary steps for the remedy would include appointing a lead contractor, settling any party wall issues that may arise, selecting and receiving construction materials and actual construction process. Furthermore, given the lack of clarity provided within EN, this would add further complexity for the Appellant to develop a strategy to move forward with.
- 3.36. Given the above and the sequence of events that would have to occur, it is likely that the construction phase of the remedy could take up to nine months to complete safely and to a high standard.
- 3.37. Therefore, a realistic compliance period for the Applicant is 18 months. Therefore, given the reasons set out above, under ground (g) of S174, the nine month "*period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed*".

4. Conclusion

- 4.1. This Statement of Case outlines the Appellant's appeal case against the enforcement notice EN20/0676 issued by LB Camden Council on 16th February 2023, and which, absent an appeal, comes into effect on 14th April 2023.
- 4.2. The EN is hopelessly ambiguous and uncertain, and lacks clarity as to whether the Council are enforcing against operational development, or a material change of use, or both. The Appellant (and other relevant parties) cannot therefore tell with reasonable certainty what steps it has to take to remedy the alleged breaches and therefore the EN is a nullity. Multiple corrections and variations would have to be made to the EN, which could not be achieved without causing injustice to an appellant and therefore the EN is in the alternative invalid.
- 4.3. The Appellant also appeals in respect of grounds (a) and ground (f). The remedies within the EN are considered excessive, and the breach of planning control/injury to amenity can be addressed via an alternative scheme. The Appellant promotes two Alternative Schemes, each of which being an adaptation of the as-built scheme (which is not defended). Relying on the case law principles established within the *Ahmed* Judgment, the Inspector is respectfully invited to grant planning permission for one of the Alternative Schemes, should the appeal not succeed under one of the above procedural grounds (nullity and invalidity).
- 4.4. Finally, ground (g) is promoted on the basis that Inspector decides that the EN should be upheld. In that instance, it is considered that the nine month "*period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed*". Given the complexity with the existing intermediary landlord, Apex, the Appellant is unlikely to achieve vacant possession for the next 9 months to a year. Moreover, the construction process required from the remedy would also require at least 9 months. A compliance period of 18 months is therefore required to fulfil the suggested remedy.

Appendix 1 – Official Title Plan

Appendix 2 – Official Copy of Register of Title

Appendix 3 – Site Location and Block Plan

Appendix 4 – Confirmed Tenant Agreements

Appendix 5 – Pre-existing Floorplans (2011/0417/P)

Appendix 6 – Proposed Floorplans (2011/0417/P)

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Appendix 20 – 2020 Measured Survey of Existing Building

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Appendix 23 – 2022 Proposed Floorplans

Appendix 24 – 2022 Design and Access Statement

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Appendix 26 – Fire Statement

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Appendix 28 – Alternative Scheme 1

Appendix 29 – Alternative Scheme 2

Appendix 30 – Vacant Possession Request Notice

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