The Planning Inspectorate

Appeal Decision

Site visit made on 14 August 2024

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 23 August 2024

Appeal Ref: APP/X5210/C/24/3340116
Flat 4, 39 Belsize Square, LONDON, NW3 4HL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Westgrove Management Limited against an enforcement notice issued by the Council of the London Borough of Camden.
- The notice was issued on 23 January 2024.
- The breach of planning control as alleged in the notice is Without planning permission: The change of use from one three-bedroom flat located on the second and third floors to two flats.
- The requirements of the notice are: 1. Cease the use of the second and third floors as two residential units; 2. Reinstate one residential unit as per the 'existing' drawings in "Existing & Proposed Floor Plans, Elevations & Site Location Plan" (2022/1601/P); and 3. Make good on any damage caused as a result of the works.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Decision

1. It is directed that the enforcement notice is varied by the deletion of requirement 3 and by the substitution of 12 months as the period for compliance.

2. Subject to these variations, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Application for costs

3. Applications for costs were made by the Council against the appellant and by the appellant against the Council. These are the subject of separate decisions.

Preliminary matter

4. The appeal was originally to proceed by the Public Inquiry procedure. However, at a Case Management Conference it was agreed that the written representations procedure was more appropriate.

Grounds (b), (c) and (d)

5. These grounds are, respectively, that the breach has not occurred, that it is not a breach of planning control, and that it is too late to take enforcement action, the relevant period being 4 years. The arguments put forward on all three grounds are essentially the same.

6. There is no dispute that the upper 2 floors of the property are now arranged and used as 2 flats, Flat 4, a 1-bedroom flat occupying the rear of the 2nd floor, and Flat 5, a 2-bedroom flat occupying the front of the 2nd floor and the 3rd floor within the roof space. Nor is it disputed that the 2 flats were used as such, lawfully, up until the early 1990's. However, there is substantial documentary evidence to indicate that the 2 flats were used as one flat between at least August 1994 until the purchase of the leasehold of a single flat, referred to as Flat 4, in 2021, which included what had been Flat 5, as is clear from a note on the Land Registry entry of the property title for Flat 4. This includes a note to the effect that "Only the second and third floors together with the first floor entrance and the staircase leading therefrom is included in the title." Furthermore, the Land Registry freehold title for the overall building issued on 22 April 2024, shows 5 leases for the property, the basement flat, the ground floor Flat 1, Flats 2 and 3 on the first floor and Flat 4 on the second and third floors, the latter dated August 1994.

7. Mrs M held the lease of the overall property (Flats 4 and 5) from August 1994 until the sale in 2021. The lease, which is for Flat 4, refers to the property as "Property formerly known as Flat 4 and Flat 5". It goes on to record that the Lessee "shall be permitted to assign sub-let charge or part with the possession of either that part of the property that comprises the Third Floor of the Building being the attic space in conjunction with the front part of the Second Floor of the building being formerly known as Flat 5 or the rear part of the Second Floor of the Building being formerly known as Flat 4." "The Property" is described in the lease as "All that self-contained residential flat situate on the second floor and the third floor (formerly the attic space) of the Building known as Flat 4…..". The annexed plans show the 2nd and 3rd floors.

8. Council tax records, which only go back to April 1996, show Mrs M liable for Flat 4, up until June 2021. The appellant was then liable for Council Tax for Flat 4 to April 2023, when a change of use to 2 flats was registered, the appellant being liable for both Flat 4 and Flat 5 from then.

9. Planning permission[1] was granted in September 1993 for "Erection of a dormer window to the front roofslope, a dormer window and terrace to the rear roofslope in association with works to create an additional habitable room for the 2nd floor flat, as shown on drawing no(s) 29/0733/01, 02-05B,

[1] Council Ref. PL/9201367/R3

06C." Drawing No. 2.91.0733-06C shows the property laid out as a single flat occupying the 2nd and 3rd (within the roofslope) floors. The address was Flat 4, but clearly involves works to the upper floor that is now part of Flat 5. At least in respect of the roof terrace and dormers, the permitted works appear to have been carried out. Drawing No. 2.91.0733-06C records the client as Mrs M. Subsequently planning permission[2] was refused in December 1993 for "Erection of a dormer window to the front roofslope, a dormer window and terrace to the rear roofslope in association with works of conversion to create an additional habitable room in the 2nd floor flat. as shown on drawing 3010/ -2 and 7." Again, the address was Flat 4.

10. On a planning application[3] for "Flat A", the lower ground Floor or basement flat, dated March 2018, Certificate B, which certifies that all other owners of any part of the building were notified, lists Flats 1 to 4 only, Mrs M being the owner of Flat 4.

11. The appellant made a planning application[4] on 12 April 2022 for a proposed change of use from one flat into two. The application form stated that the development had not yet taken place The agent representing the appellant, CSM Architects, prepared a Planning Statement and Heritage Statement which described the building as being "presently divided into five flats, one in the basement, one at ground floor level, two at first floor and one at second floor level, the subject of this application". The document states that Flat 4 was previously 2 flats.

12. All of this, in combination, is quite compelling evidence that current Flats 4 and 5 were in use as a single dwellinghouse from at least 1994 until 2021. The counter evidence provided by the appellant is the existence of 2 electricity meters, 2 gas meters, 2 bathrooms, 2 kitchens and separate heating systems, separate service charge and Royal Mail addresses. There are no details about how long the physical features may have been present, but in the absence of evidence to the contrary I consider it more likely than not that they date from prior to the ownership of Mrs M and would not be unusual in a property that resulted from an amalgamation of self-contained flats. Similarly, it is reasonably likely that the service charge and address are mere administrative carry-overs. The statement by CSM Architects is explained as having been made in error, but I find that implausible.

13. Much reliance is placed on a planning application made by a Ms H for "Erection of a railing and alterations of windows to doors to create a rear terrace at second floor level" in February 1995, which they say suggests that Mrs M may have sublet Flat 4. However, the application address was Flat 2, the rear flat on the first floor. The application plans do not appear to be available, but the application was actually to create the terrace with railings on top of the rear bay, which is the second floor when viewing the property from the rear. The bay does not extend up to the floors comprising the appeal development, and I could see on my site visit that the bay terrace with railings was on the floor below Flat 4, clearly part of Flat 2. Further, the Land Registry title for the freehold of the building notes "(09.01.1995) By a Deed dated 6 December 1994 made between (1) 39 Belsize Square Limited

[2] Council Ref. PL/9301238/
[3] Council Ref. 2018/0184/P
[4] Council Ref. 2022/1601/P

and (2) (Ms H) the plan therein was substituted for the plan in the Lease dated 18 February 1981 of First Floor Flat 2 referred to in the schedule annexed.", which is evidence that Ms H occupied the rear flat on the first floor, Flat 2, and not Flat 4 as contended.

14. Drawing all of that together, and bearing in mind that the burden of proof is on the appellant, I find, on the balance of probabilities, that Flats 4 and 5 were used as a single dwellinghouse continuously between 1995 and 2021. The appeal on ground (b) fails accordingly.

15. Turning to ground (c), it is argued that a lawful right had accrued to occupy the Second and Third Floors as two flats, based on their undisputed existence before Mrs M acquired both, and that the ability to exercise that right does not depend upon that right continuing to be exercised, relying upon the judgement in *Ocado*[5]. I doubt that *Ocado* has any relevance given section 55(3) of the 1990 Act, which provides that the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used.

16. The Council's answer to this question is that the change of use from 2 flats to one was material, and hence is now the lawful use due to immunity from enforcement through the passage of time. Had that change been a material change of use, and it usually is, it would have prevented reversion to the previous use without planning permission or enforcement action against the change6. But without further explanation I consider it to be mere assertion that the change was material. Of more relevance is that the actual use of the appeal property was as a single dwellinghouse for about 27 years. But in any case, it does not matter whether the change of use from 2 flats to one as a single dwellinghouse was material or not. The term "building" in the Act includes part of a building, and in this case that part comprising the former Flats 4 and 5 was in use as a single dwellinghouse prior to its conversion to 2 separate dwellinghouses, so that change, by virtue of sections 55(1), 55(3) and 57(1) of the 1990 Act, is a material change of use requiring planning permission.

17. The appeal on ground (c) cannot therefore succeed.

18. Turning to ground (d), the relevant period for immunity is 4 years. The argument on this ground appears to rely upon the use prior to 1994 and the application of *Ocado*, which I have already rejected. There is not evidence of 4 years use as 2 separate dwellinghouses since the previous use as a single dwellinghouse. The property was only acquired in 2021, and the institution of the use as separate dwellinghouses following works of conversion cannot have occurred more than 4 years ago. The appeal on ground (d) must also fail.

Ground (a) and the deemed planning application

19. This ground is that planning permission should be granted for the matters comprising the breach of planning control. There is a single issue between the parties, that is whether one or both of the flats should be car-free. A

[5] R (on the application of Ocado Retail Ltd) v Islington London Borough Council [2021] EWHC 1509 (Admin)
[6] TCPA Section 57(4)

planning application[7] for the 'Creation of an additional 2-bedroom flat on the 2nd and 3rd floors and alterations to fenestration to side elevation and side roofslope' is recommended for approval, this was subject to the provision of a section 106 agreement securing both of the flats, Flats 4 and 5, as car free. Policy T2 of the adopted Camden Local Plan 2017 (CLP) requires that all new developments, other than a number of exceptions which do not apply here, be car-free. The Appellant has not agreed to the provision of a s.106 agreement in those terms, and so planning permission has not been granted and the development is a breach of planning control.

20. In line with CLP Policy T1, which aims to promotes sustainable transport by prioritising walking, cycling and public transport in the borough, Policy T2 requires all new development in the borough to be car-free. The accompanying text justifies the policy on the basis that limiting the opportunities for parking in the borough can reduce car ownership and use and therefore lead to reductions in air pollution and congestion and improve the attractiveness of the area for local walking and cycling. The appeal site is located within a Controlled Parking Zone, and Policy T2 states that the Council will not issue on-street or on-site parking permits in connection with new developments, using legal agreements to ensure that future occupants are aware that they are not entitled to on-street parking permits.

21. Further guidance on the application of Policy T2 is set out in Camden Planning Guidance (CPG) on Transport, adopted as a Supplementary Planning Document (SPD) in January 2021. CPG Transport, which is a material consideration of substantial weight, states that all homes in new developments must be car-free, not just additional dwellings, though exceptions may be made where existing occupiers are to return to a property after it has been redeveloped, which is not the case here.

22. The Council consider the development to be a new development, which includes redevelopments,, hence its insistence on both flats being car free. The appellant's case is firstly that the Council has not put forward any evidence of on-street parking issues in the vicinity of the appeal site so as to justify the car-free requirement, but clearly the policy is not simply about parking stress. Explaining the car-free policy, CPG Transport advises that the car-free policy makes an important contribution towards the Council's strategic aims relating to transport, as well as wider responsibilities such as public health. These include reducing congestion, promoting sustainable transport, improving air quality, reducing carbon emissions and supporting healthy, active sustainable lifestyles, all legitimate planning purposes.

23. The appellant also claims that the policy is being mis-applied, and that at most only one flat need be car-free, given that there was an existing flat that would have been entitled to a parking permit. However, the development is a new development, and a straightforward reading of the policy is that it should be entirely car free. The advice in CPG Transport regarding the more relaxed approach to pre-existing occupiers returning to their property after redevelopment is a fair application of Policy T2, but it is absolutely clear that in the circumstances of the appeal development Policy T2 requires it to be car-free, and as CPG Transport makes clear, the car-free

[7] Council Ref: 2022/1601/P

requirement applies to redevelopment and/or conversions of existing sites with new occupiers. Although the appellant has provided a section 106 undertaking executed as a deed which undertakes to make one flat, Flat 4, car-free, if considered necessary, the failure to provide a legal agreement that would secure both flats comprised in the development as car-free places it in direct conflict with CLP Policy T2, and with the development plan read as a whole. There are not material considerations to indicate that planning permission should be granted for the development despite the conflict with the development plan, hence the appeal on ground (a) must be dismissed and planning permission refused on the deemed application.

Ground (f)

24. The purpose of the enforcement notice is clearly to remedy the breach of planning control, so under this ground the appellant must show that the steps required exceed what is necessary to remedy that breach. In this context neither the requirement to cease the use of the second and third floors as two residential units, nor the requirement to reinstate the property to its condition before the breach took place can be regarded as excessive. They reflect the wording of section 173(4)(a) of the Act. Requirement 3, which is to make good any damage caused by the works adds nothing to the requirement to reinstate the previous layout and so can be considered as excessive. I shall therefore vary the notice by deleting it, so the appeal on this ground succeeds to that limited extent.

Ground (g)

25. One Flat was occupied at the time of my site visit, and the requirements of the notice would probably entail the cessation of their tenancy, which apparently runs to July 2025. In view of the likely loss of the current occupants' home, which amounts to interference with their Human Rights, and that a planning application for the development remains undetermined, I consider that it is fair and reasonable to extent the compliance period to 1 year. The appeal on this ground succeeds accordingly.

Paul Dignan

INSPECTOR