The Planning Inspectorate

Appeal Decision

Inquiry held on 10 and 11 September 2024

Site visit made on 11 September 2024

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04th October 2024

Appeal Ref: APP/X5210/C/24/3341183
Land at: 267 Eversholt Street, London NW1 1BA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Yardspin Limited against an enforcement notice issued by the Council of the London Borough of Camden.
- The notice, reference EN23/0394, was issued on 9 February 2024.
- The breach of planning control as alleged in the notice is Without planning permission: Material change of use of the Property from mixed use consisting of 3 flats (Use Class C3 residential use) and 1 commercial unit (Class E) unit to 15 units of temporary sleeping accommodation (Use Class C1 Hotels) on the ground, first, second, third, fourth and fifth floors, with ancillary concierge/office space on the ground floor.
- The requirements of the notice are:
    1. Cease the use of the Property as temporary sleeping accommodation.
    2. Cease the occupation of the ground floor shop as a concierge service.
    3. From the basement, remove all sets of bathing facilities, toilets, basins, kitchens and cooking facilities.
    4. From the ground floor, remove all but one set of toilets and basins, and all sets of bathing facilities, kitchens and cooking facilities.
    5. From the first floor, remove all but one set of bathing facilities, toilets, basins, kitchens and cooking facilities.
    6. From the second floor remove all but one set of bathing facilities, toilets, basins, kitchens and cooking facilities.
    7. From the third, fourth and fifth floors, remove all but one set of bathing facilities, toilets, basins, kitchens and cooking facilities.
    8. Restore the Property to its previous lawful state, incorporating a Class E commercial premises on the basement and ground floor, and three residential flats in the C3 use on each of the first, second, and third floors with the fourth and fifth floor being integrated into the flat on the third floor.
    9. Remove from the Property all constituent materials resulting from the above-mentioned works.
- The period for compliance with the requirements is three (3) months.
- The appeal was made 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 was brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and a variation.

Preliminary Matters

1. The appeal against the enforcement notice was due to be heard with two appeals under section 195 of the Act against the Council's failure to give notice of their decision within the appropriate period on applications for a certificate of lawful use or development[1]. All three appeals related to 267 Eversholt Street. The first LDC application sought a certificate for an existing use as five flats on ground floor and basement level, known as flats 1, 12, 13, 14 and 15. The second LDC application sought a certificate for an existing use as ten flats on the upper floors including the loft known as flats 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

2. Once the Inquiry had opened the appellant confirmed the two LDC appeals were withdrawn. The appellant also withdrew grounds (d) and (a) of the enforcement notice appeal. Accordingly, no further action was taken on the LDC appeals and no evidence was heard in respect of grounds (d) and (a).

3. At the inquiry the oral evidence by the appellant's witness and the Council's witness was given under solemn affirmation.

4. The Council made an application for costs against the appellant in respect of the LDC appeals and the enforcement appeal. The costs applications are dealt with in a separate Decision.

The enforcement notice

5. The Council requested corrections to the wording of the notice.

6. The proposed wording of the alleged breach of planning control is: Without planning permission: Material change of use of the Property from 3 flats (Use Class C3 residential use) and 1 commercial unit (Class E) to 15 units of temporary sleeping accommodation (Use Class C1 Hotels) on the ground, first, second, third, fourth and fifth floors, with ancillary concierge/office space on the ground floor.

7. The proposed corrections to the requirements are:

   i. to combine steps 1 and 2 to read: Cease the use of the Property as temporary sleeping accommodation with ancillary concierge/office space.

   ii. to replace the word 'state' in requirement 8 by the word 'condition'.

8. The appellant did not object to these corrections. The appellant's proposed description of "15 C3 residential flats" relates to the use the appellant says existed on 9 February 2024, the date the notice was issued. I will return to this matter in the ground (b) appeal.

[1] Appeal references APP/X5210/X/23/3325618 and APP/X5210/X/23/3325801

9. On an appeal under section 174 of the Act any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a), where the correction will not cause injustice to the appellant or local planning authority. The proposed corrections are minor and do not alter the essential content of the alleged breach or requirements. No injustice would be caused in correcting the notice as proposed and agreed at the inquiry. A few additional minor errors will be corrected to ensure consistency in description and to make clear step 8 is confined to the removal of facilitating works and does not require the restoration of the uses.

Reasons

Appeal on ground (b)

10. The appellant's case centred on the factual accuracy of the use of the Property as at 9 February 2024, the date the notice was issued. The appellant, relying primarily on the Foxton's evidence, submitted all 15 units were in use as self-contained C3 residential flats on that date. The Council's description of the use as temporary sleeping accommodation (C1 hotel use) was said to be incorrect.

11. The Council confirmed in closing submissions the appellant's focus on the use on the issue date was incorrect. The Council further submitted that the appellant, if to succeed on their case, must demonstrate there was an identifiable material change of use between 16 May 2023 and 9 February 2024. The appellant failed to do so.

12. The appellant is not saying that the alleged use as temporary sleeping accommodation did not in fact happen. Rather, the appellant accepted a breach of planning control had occurred but the breach taking place when the notice was issued was wrongly described. A key aspect of the appellant's case is reliance on 9 February 2024 as the relevant date.

Main issue

13. Section 174(2) of the Act sets out the grounds on which an appeal against an enforcement notice may be brought. Ground (b) is, in respect of any breach of planning control which may be constituted by the matters stated in the notice, that those matters have not occurred.

14. The wording is in the past tense, not the present tense. There is no reference to the matters occurring on the date the notice was issued. By comparison, a distinction is drawn with ground (c), which is worded in the present tense "that those matters, (if they occurred) do not constitute a breach of planning control."

15. A comparison also may be made with the wording in section 191(4) which states "lawfulness at the time of the application". The relevant date is specifically identified – no such language is used to reference the date of issue of an enforcement notice in respect of an appeal on ground (b). In other words the statute would be clear if the notice had to be factually accurate in stating the alleged breach on the date of issue.

16. The Act does include provisions to control the timing of when a notice may be issued. A notice cannot be issued in advance of a breach occurring. This is

seen through section 172(1) where a local planning authority may issue a notice where it appears to them there has been a breach of planning control. The local planning authority also must be satisfied that it is expedient to issue a notice having regard to the provisions of the development plan and to any other material considerations (s172(1)). In addition, section 171B imposes time limits for taking enforcement action. Following amendments to the 1990 Act development becomes immune from enforcement if no action is taken within ten years for material changes of use, which includes a change of use to a single dwellinghouse, where the material change of use took place on or after 25 April 2024. These provisions address the concerns over 'historical' breaches expressed by the appellant.

17. In practical terms, once a breach has been detected a period of time may be expected to elapse before an enforcement notice is issued to carry out legal and administrative tasks. Circumstances and conditions may change so that on the date of issue the activity may have ceased or the works may have been removed. That would not necessarily negate the need to issue a notice, for example to prevent a resumption of the unauthorised use.

18. For all these reasons I disagree with the appellant that the use of the property on 9 February 2024 is the determining factor. I agree with the Council's approach and the question to ask in the ground (b) appeal is whether the appellant has shown on the balance of probabilities that the matters stated in the notice have not occurred, namely a material change of use of the Property to 15 units of temporary sleeping accommodation (Class C1 Hotels) with ancillary concierge/office space on the ground floor. In this case consideration of the ground (b) appeal does not require a finding of fact on the use of the Property on 9 February 2024. That being so, it is not necessary to conclude on the Foxton's and related evidence presented at the inquiry directed at the 9 February 2024 date.

The Evidence

19. The appellant did not dispute the lawful use of the property as three flats on the upper floors with commercial premises on the ground floor and basement. The Council provided plans of the internal layout, taken from planning applications made in 2015 and 2016, of the residential accommodation on the first, second, third floors and loft and the shop with associated space on the ground floor and at basement level.

20. Works to subdivide the property and create the 15 units probably took place in 2016. As confirmed on the site visit the 15 units are accommodated across the basement, rear ground, first, second, third and fourth floors and loft.

21. The appellant by withdrawing the ground (d) appeal and the LDC appeals in effect withdrew a substantial volume of evidence on the use of the property from 2017. The Council's first internal inspection of the property took place on 16 May 2023. The use at that time is indicated by the set of photographs and at the inquiry the Council's witness confirmed his findings and conclusions.

22. The comprehensive photographic record taken on 16 May illustrates the internal appearance. The factors providing most support for the use as temporary sleeping accommodation were the lack of clothing and personal possessions within the units, the limited and uniform range of domestic items

(toaster, iron, plates and so on) and the lack of food within the fridges and cupboards. Of less weight is the uniform décor and furnishings, which would be consistent with tenanted furnished or part furnished accommodation as well as hotel type accommodation.

23. By contrast, at the time of the appeal site visit in the occupied units personal possessions and clothing were very evident in the wardrobes and cupboards, in storage boxes and on shelves and within the shower units. There were additional small items that the tenants probably provided, such as a clothes drier, a step stool, a mop and a humidifier or in one unit items for a baby such as a small chair and a floor mat. The fridges contained varying amounts of food and drinks and other food was kept in storage jars and racks. The occupied units had a very lived in appearance. A standard range of furnishings and fittings were present in all units (occupied and vacant), including the stools, breakfast bar, wall mounted television, sofa and cushions, bed and wardrobe and fitted kitchen appliances such as a hob, cooker, washing machine and a sink.

24. The second main source of evidence produced by the Council is the on-line material of advertising and marketing and reviews of the accommodation as short stay transient accommodation. The marketing by Citymax dated to 2023, for example, included reference to local sights and transport availability, on-line reservation, check in check out time and dates and a cancellation policy, all consistent with temporary sleeping accommodation in Class C1 use. Citymax was shown to be the trading name of Ayaz Management Limited, the current lessee of the Property. In earlier marketing of 267 Eversholt Street by SMJ Group Ltd, the lessee from May 2017 to 2022, descriptions and phrases were used such as hotel, warm hospitality, make your stay in London unforgettable, promises a relaxing and wonderful visit.

25. The reviews covered a period from 31 March 2020 to 10 May 2023, the majority being for dates within 2022, 2023. They include comments that fit with the location and layout of number 267 such as the proximity to the underground station and hearing the noise from the tube. One review accurately described the stone steps down from the street and access through the basement to the rear (unit 13). The lets were for short periods, again consistent with a Class C1 use.

26. Flat 12 is the one unit where the Council's evidence was less consistent. On the 16 May 2023 site visit the Council stated Flat 12 appeared to be in residential use because there were more personal possessions, food stocks and other items such as cleaning materials. However, the Council also found that 15 units were advertised for short term letting. The appellant's Foxton's based evidence does not provide a letting history for Flat 12 pre-dating May 2023. The probability is that Flat 12 was available and used for temporary sleeping accommodation, together with the other 14 units, for periods of time.

27. As to the front area of the ground floor, the appellant accepted the lawful use is Class E commercial use but disputed the commercial use became ancillary to the residential units. The property has been in the single ownership of the appellant since January 2015 and has been leased as a single entity first to SMJ Group Ltd and then to Citimax/ Ayaz Management Ltd. The commercial space was physically separated from the units as a

result of the conversion works in 2016 but remains in the same building envelope. By all accounts the lessees have had day to day management responsibility for the 15 units and the ground floor appeared to be the first port of call for occupiers of the units. The space at the back of the office was used for storage of domestic items related to temporary sleeping accommodation. To that extent the building functioned as a single entity.

28. The appellant's evidence to challenge that of the Council was very limited. Statutory declarations from the former and current lessee company were submitted but they were directed primarily to the marketing, management and use of the non-commercial space in the property. Their reliability is in doubt as they were produced, at least in part, to support the withdrawn LDC appeals. Citymax probably do manage a number of other properties and have various activities in the property sector but their use of number 267 has not been substantiated with evidence.

29. The application of the *Burdle* criteria fails to show the unit of office accommodation was occupied for substantially different and unrelated purposes as a separate planning unit. The appellant has failed to discharge the burden of proof.

30. A number of other peripheral matters were raised. The Council tax information as first reported appeared to reflect the lawful position. The updated Council tax information, following an inspection by the Valuation Office Agency (VOA) on 8 February 2024, identified 15 flat units. The backdated dates were on the basis of ASTs but there are no details on the ASTs on which the VOA relied. This evidence provides little assistance on the main issue in the ground (b) appeal. I note the appellant's planning witness would not make assumptions on the actual or the lawful use of a property based on Council tax records.

31. The type and presence/absence of doorbells is open to varying valid interpretations and this evidence is of little help or significance in this case. Having the same pictures within the units could occur whether the units were in use as furnished flats or temporary sleeping accommodation. Anecdotal comments by neighbours on comings and goings were vague and have no weight.

32. My observations on the appeal site visit confirmed all the units have facilities required for day-to-day private domestic existence – a shower, basin and toilet, cooking facilities and a place to sleep (the *Gravesham* test). The facilities appear to have been the same at the time of the Council's site visit, as shown and explained through the photographic and oral evidence. Based on that criterion alone they may be considered a dwellinghouse. In my view there is also sufficient space to live, even though space standards may be less than desirable. However, consideration of the actual use is very relevant. The presence of these facilities is consistent with the use of the 15 units as temporary sleeping accommodation, no longer a use as a dwellinghouse for private domestic existence.

33. The Foxtons evidence related to the period from July 2023 and in particular sought to demonstrate the letting position and use of the 15 units as of 9 February 2024. The evidence is compatible with the use of the 15 units as temporary sleeping accommodation prior to July 2023.

Conclusions

34. The onus is on the appellant in the ground (b) appeal. The appellant's evidence and focus were directed at the use of the property on 9 February 2024, the date the notice was issued, rather than towards the occurrence or not of the use described in the notice. Consideration of the relevant evidence leads me to conclude on the balance of probability the matters constituting the alleged breach of planning control have occurred. The appeal on ground (b) fails.

Appeal on ground (c)

35. This ground of appeal was not withdrawn but is on a narrow point related to the commercial use on the ground floor. I have concluded under ground (b) the ancillary concierge/office space on the ground floor is appropriately described. The material change of use amounted to development for which no planning permission was granted. A breach of planning control occurred. The appeal on ground (c) fails.

Appeal on ground (f)

36. The issue is whether the requirements are excessive to achieve the purpose of the notice.

37. The appellant argued the requirement to cease the use of the property as temporary sleeping accommodation is excessive because it takes no account of the rights pursuant to section 25A of the Greater London Council (General Powers) Act 1973.

38. The Council set out the principles established by case law: that an enforcement notice cannot take away legally permitted rights, any enforcement notice must be construed so as to retain any such legally permitted rights and when the legally permitted rights are contained in statute it is not necessary to refer to them in the enforcement notice.

39. When these principles are applied to the enforcement notice, the effect of section 25A is a legally permitted right contained in a statute. It follows that no reference needs to be made to the right in the requirements of the notice.

40. The second matter raised was related to facilities in lawful units, a matter which falls away with the withdrawal of the ground (d) and LDC appeals.

41. The appeal on ground (f) fails.

Appeal on ground (g)

42. The issue is whether the three month period of compliance is reasonable.

43. The appellant requested a period of twelve months, to take account of the time to secure vacancy of the flats and to arrange and carry out the required works. The Council acknowledged that 6 months would be reasonable if there were tenants in the building who were entitled to two months notice.

44. The evidence shows flats are occupied currently on assured shorthold tenancies. People would lose their homes and would need to find alternative accommodation, although they should be aware of the two month notice

period to terminate their tenancy. Contractors would need to be appointed and arrangements put in place to carry out the required physical alterations to the Property. The appellant has not provided a schedule or programme of reinstatement works. However, the probability is the internal works would be extensive including building operations, electrical and plumbing works. On the other side of the balance, the National Planning Policy Framework states effective enforcement is important to maintain public confidence in the planning system. The units do not provide a high standard of permanent accommodation to meet dwelling priorities in the Borough.

45. In conclusion, the period of compliance will be extended to nine (9) months. To this extent the appeal on ground (g) succeeds.

DECISION

46. It is directed that the enforcement notice is corrected:

- In paragraph 3 by the deletion of the text and the substitution of the wording: Without planning permission, a material change of use of the Property from 3 flats (Class C3 residential use) and 1 commercial unit (Class E Commercial, Business and Service) to use as 15 units of temporary sleeping accommodation (Class C1 Hotels) on the ground, first, second, third, fourth and fifth floors and basement level, with ancillary concierge/office space on the ground floor.

- In paragraph 5 by the deletion of requirements 1 and 2 the substitution of a single requirement: 1. Cease the use of the Property as temporary sleeping accommodation with ancillary concierge/office use.

- In requirement 8 delete the text and substitute the wording: Restore the Property to its previous lawful condition, incorporating a Class E commercial premises on the basement and ground floor, and three residential flats for Class C3 use on each of the first, second, and third floors with the fourth and fifth floor being integrated into the flat on the third floor.

- Renumber requirements 3 to 9 as requirements 2 to 8.

47. It is directed that the enforcement notice is varied in paragraph 5 by the deletion of Three (3) month and the substitution of Nine (9) months as the time for compliance.

48. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Diane Lewis

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Ed Grant	Barrister instructed by Christine Hereward, Hereward & Co, Solicitors
He called	
Jamal Hussain	Letting Manager, Foxtons

FOR THE LOCAL PLANNING AUTHORITY:

Matthew Henderson	Counsel instructed by Egle Gineikiene, Planning lawyer at the London Borough of Camden
He called	
Ramesh Depala MArch BA(Hons)	Senior Planning Officer, London Borough of Camden

DOCUMENTS submitted at the inquiry

1 Opening statement on behalf of the appellant

2 Email dated 10 September 2024 withdrawing LDC appeals and grounds of appeal

3 Note on Council tax

4 List of corrections

5 Closing submissions on behalf of the Council and bundle of authorities

6 Closing submissions on behalf of the appellant