Appeal Decision

Inquiry held on 24 February 2010
Site visit made on 23 February 2010

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

an Inspector appointed by the Secretary of State for Communities and Local Government

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Decision date:
9 March 2010

Appeal Ref: APP/X5210/X/09/2106980
85a Fitzjohn's Avenue, Lower Ground Floor Flat, London, NW3 6NY

- 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 Bankway Properties against the decision of the Council of the London Borough of Camden.
- The application Ref 2008/5467/P, is dated 17 November 2008 and it was refused by notice dated 12 January 2009.
- 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 'single dwellinghouse'.

Summary of Decision: The appeal is dismissed.

Applications for costs

1. At the Inquiry applications for costs were made by both the Appellant and the Council against each other. These applications are the subject of separate Decisions.

Procedural and preliminary matters

2. The application was made by Bankway Properties Limited of Ground Floor 30 City Road, London, EC1Y 2AB. The appeal was made by Bankway Properties of Clive House, Old Brewery Mews, Hampstead, London, NW3 1PZ. Mr Kent explained that the City Road address was the registered office of the company and the Clive House address was its trading address. The omission of the word 'Limited' from the appeal appears to be an error. I am therefore satisfied that the Applicant and the Appellant are one and the same.

3. As the appeal concerned the internal arrangements of the appeal premises I considered it appropriate to make my site visit before the Inquiry. The site visit was accordingly made on the day before the Inquiry opened. No matters arose during the course of the Inquiry that required me to make a further visit.

4. Oral evidence was given to the Inquiry by the witnesses after either making an affirmation or taking an oath.

5. The existing use for which the LDC was sought was 'single dwellinghouse'[1]. The Council registered the application as 'Use of the lower ground floor as a

[1] Part 8 of the application

self-contained residential flat (Class C3)' and it was agreed by the Parties at the Inquiry that if a LDC was to be granted it should be in those terms. I will determine the appeal on this basis.

6. The Appellant provided copies of the documents they relied on with the appeal. These documents are appended to Ms Arbery's proof and for ease of reference I will refer to those documents in this decision by giving them the appropriate reference in those appendices. The other documents appended by Ms Arbery and Mr Durrant to their proofs were all documents that had been prepared by, or on behalf of, or available to, the Appellant. I will refer to them giving them the appropriate appendices' reference.

The Appellant's case: Main points

7. The lawful use of the appeal property is a self- contained residential flat because it is separately registered for Council Tax purposes; it has all its own facilities necessary for separate occupation; it has its own utility connections and meters; for many years it has been separately registered by the London Rent Assessment Panel; and it is physically a self-contained unit of residential accommodation[2].

The Council's case: Main points

8. The Council's records demonstrate that the lower ground floor has not for at least the last four years been laid out or used as a self-contained flat. The lower ground floor has been used in conjunction with accommodation located on the upper ground floor of the property. It has been used by two persons who share bathroom and kitchen facilities, but who do not live as a single household and therefore it would be defined under planning legislation as an HMO[3].

Appraisal

9. The onus of proof in a LDC application is firmly on the Appellant and the test of the evidence is 'on the balance of probability'. In this case the Appellant therefore has to prove, on the balance of probability, that the lower ground floor flat was being used as a self-contained residential unit at the date the application was made and that it was being so used for a continuous period of at least four years before that date, that is, from or before 17 November 2004.

10. The Appellant submitted a number of documents as evidence in support of its case. Firstly, the lower ground floor flat is the subject of a 999 year lease which is registered at the Land Registry[4]. I note that neither of these documents describes the physical layout or composition of the lower ground floor flat. Secondly, the lower ground floor flat and the ground floor flat are separately registered for Council Tax purposes with an effective date of 1993[5]. Ms Arbery's unchallenged evidence was that for Council Tax purposes Houses in Multiple Occupation (HMO) are described as flats and that the register therefore does not demonstrate that the lower ground floor flat was/is a self-contained unit. Thirdly, Rent Registers for 1992, 1998, 2000 and 2002 refer to

[2] The Appellant's Grounds of Appeal
[3] The Council's Rule 6 Statement paragraph 4.5
[4] Appendix 5(b) Documents "B" and "C" to Ms Arbery's proof
[5] Appendix 5(b) Document "D" to Ms Arbery's proof

the lower ground floor flat as being self-contained comprising two rooms, kitchen, bathroom, and outside WC[6]. There was some dispute between the Parties whether the property had been physically inspected prior to these registers being compiled and the Council referred to a document entitled 'Fair Rents – the Roles of the Rent Officer and Rent Assessment Committee'[7] which states that the 'rent officer may make an inspection …' and 'the committee may choose to inspect the property' which indicates that an inspection is discretionary. I do not know the date on which this document came into force but on the last page there is a reference to 'FR/Applic/12/04 Updated 10/07' which suggests it came into effect later that the Rent Registers provided. In any event, I am concerned with the period from November 2004 and no Rent Register was provided for that period for the lower ground floor flat. Fourthly, the ground floor was referred to as 'Non self-contained rooms comprising two rooms, one kitchen, one shower room, one WC' on the Rent Register effective from 2005[8]. This indicates the possibility that the property was not inspected as the tenant of the property stated in his written representations to the Rent Assessment Committee in 2001 that 'his property was not self-contained in that the rooms he occupied, including the WC, were accessible only from the ground floor hallway. He stated that there was no shower room or bathroom'[9]. In a Rent Assessment Committee decision dated 13 November 2007 it is stated '[The tenant] had removed the shower room which had formed part of [the rear living room] as detailed in the Rent Officer's inspection sheet dated 2000 and included on the Rent Register entry'[10]. None of the documents submitted by the Appellant referred to in this paragraph provides evidence relating to the use of the lower ground floor flat.

11. Although not for planning purposes, an application was made by the Appellant's Managing Agent in April/May 2006 for a HMO licence for 85 Fitzjohn's Avenue[11]. In this document two of the flats are described as being 'not self-contained'. It is not disputed that three of the flats at No.85 are self contained and therefore the reference must be to the 'basement' and 'ground floor' as named in the application. I accept that this document was not produced for planning purposes and that definitions are different in Housing legislation from those in Planning legislation but that does not detract from the fact that the flats were referred to as 'not self-contained'.

12. Architects instructed by the Appellant wrote to the Council in a letter dated 24 November 2006 'The lower and upper ground floors are currently non-self contained flats. At present there is one tenant in each of the flats and whilst they each have their own reception room, bedroom and kitchen they currently share the bathroom adjoining the kitchen on the lower ground floor. The non-self contained units have existed on the lower and upper ground floors since 1971 and 1975 respectively'[12]. An application for a LDC pursuant to s.192 of the 1990 Act in respect of 85a Fitzjohn's Avenue was enclosed with the letter. The application is not entirely clear but it states at part 12 that 'the proposal alters the existing layout of the lower and upper ground floors so that they are

[6] Appendix 5(b) Documents "E" to Ms Arbery's proof
[7] Appendix 9 to Ms Arbery's proof
[8] Appendix 5 (b) Document "F" to Ms Arbery's proof
[9] Appendix 5 (b) Document "G" to Ms Arbery's proof
[10] Appendix 5 (b) Document "H" to Ms Arbery's proof
[11] Appendix 1 to Mr Durrant's proof
[12] Appendix 3 (a) to Ms Arbery's proof

self-contained flats. Creating self-contained flats eliminates the need to share facilities namely the lower ground floor bathroom'[13].

13. The plans[14] provided with the application showed on the lower ground floor a reception room; a bedroom with an en-suite shower room and WC; a fully equipped bathroom; a room with a sink with a room with a bath and basin leading from it; and an outside WC. The upper ground floor plan showed a kitchen/bedroom; a reception room; and a separate WC. In a letter dated 7 December 2006 the Architect clarified the tenants' use of the facilities as follows: 'Currently the tenants share the bathroom immediately adjacent to the entrance of the lower ground floor flat. The tenant of the lower ground floor flat has an en-suite bathroom with their bedroom and also makes use of the bathroom adjacent to the kitchen and reception room…It is proposed that once the flats are self-contained the lower ground floor flat will have exclusive use of the bathroom adjacent to the bedroom as well as the en-suite'[15]. Whilst the letter describes what is shown on the plan, neither the letter nor the plan reflect the physical layout seen by Ms Arbery and Mr Durrant when they visited the property on 23 January 2007[16] nor what I saw on my visit. There was/is no bathroom immediately adjacent to the entrance of the lower ground floor flat – there is large storage space/cupboard in this location - and there is no en-suite shower room.

14. The Appellant sought to explain this discrepancy as part of a blundering application. Be that as it may, the Architect acting on behalf of the Appellant refer throughout to the lower ground floor flat as being non self contained and the proposal was to make it self-contained. In addition, the Appellant's professional Managing Agent sought to obtain an HMO licence for the property in early 2006.

15. When Ms Arbery and Mr Durrant visited the site on 23 January 2007 they observed that the lower ground floor and ground floor appeared to provide non self-contained residential accommodation being used by two tenants; the tenants shared the WC accessed from the communal hallway at ground floor level; the tenants shared the kitchen facilities in the rear ground floor level room; and the tenants shared the bathroom facilities at lower ground floor. These observations are included in the agreed facts in the statement of common ground[17]. In her LDC report[18] where she describes the site visit Ms Arbery records that 'at [the lower ground floor] level is a utility area which has a sink and cupboards, but no cooking facilities ...there is a separate external WC which is accessed via a door from the lower ground floor'. Mr Durrant discounted the external WC because, pursuant to the Housing legislation with which he was concerned, he considered the two flats to be a HMO and there was a shared WC on the ground floor.

16. Mr Durrant visited the appeal property again in March 2007 for Housing Act purposes. He paid particular attention to the lower ground floor utility area adjacent to the bathroom. He made a thorough investigation but he could see

[13] Appendix 3 (b) to Ms Arbery's proof
[14] Appendix 3 (d) to Ms Arbery's proof
[15] Appendix 3 (c) to Ms Arbery's proof
[16] Appendix 11 to Ms Arbery's proof
[17] Document 4 Page 12
[18] Appendix 3 (e) to Ms Arbery's proof

no trace of a gas point to support the use of a cooker or a 30amp socket point for an electric cooker. It was his opinion that the facilities were not adequate for the preparation and cooking of food and he did not consider the area to be a kitchen[19]. Mr Durrant has visited on a number of occasions since then and he accompanied me on my visit and he told the Inquiry that nothing had changed in the utility area since his original visit.

17. It may well be that the utility area could have a microwave oven, or similar appliance, plugged in that does not need a 30amp socket but the fact is that there is no such appliance. The utility area on my visit contained, among other things, a sink, a deep-freeze, fridges, a food mixer and a kettle. It appeared to me to be somewhere where food was stored and possibly hot drinks were made. Any food preparation would, in my view, be extremely limited by the lack of useable worktops and cooking or heating food would not be possible.

18. I also noted on my visit that there were boards leaning against the door leading to the outside WC. The door was locked and bolted and some effort was required to open it. The WC was relatively modern in appearance but there was no handbasin. In the absence of evidence from the tenant I cannot speculate whether the outside WC is used or not.

19. The Appellant did not produce any evidence relating to the tenancy agreements for the lower ground floor and ground floor. I therefore do not know what each comprises. Nor did the Appellant know when the tenancies commenced but it was surmised from a perusal of the Rent Registers that the lower ground floor tenancy began in February 1971 and the ground floor tenancy in January 1975. In an email dated 21 May 2009[20] solicitors acting for the tenants advised the Appellant that they had a civil partnership; that they had two tenancies which are separate; and that any sharing of the accommodation/facilities has been as a result of the lack of a bathroom in the ground floor rooms. The solicitors took the view that, for the purposes of the Housing Act 2004 the tenants are a household[21]. Although I do not know when the tenants entered into a Civil Partnership, it is a matter of fact that the Civil Partnership Act 2004 came into effect in December 2005 and therefore it must have been sometime after that date.

20. An appeal made under s.195 of the 1990 Act is confined to a review of the Council's decision. For the appeal to be successful, I have to be satisfied that the Council's refusal was not well founded. In it's reason for refusal the Council says that it 'is not satisfied, on the balance of probability, that the lawful use of the lower ground floor is as a self-contained flat'[22].

21. The criteria for determining whether the use of particular premises should be classified within Class C3 include both the manner of the use and the physical condition of the premises. Premises can properly be regarded as being used as a single dwellinghouse where they are a single, self-contained unit of occupation which can be regarded as being a separate planning unit distinct from any other part of the building containing them[23]. I have to consider that

[19] Mr Durrant's proof paragraph 4
[20] Appendix 13 to Ms Arbery's proof
[21] Appendix 14 to Ms Arbery's proof
[22] Appendix 5 (e) to Ms Arbery's proof
[23] Circular 03/2005 Changes of Use of Buildings and Land - paragraph 71

actual use, not the possible use (as suggested by the Appellant) nor the reasons for that use (the Appellants say that the tenants choose to use the accommodation in this way). It seems to me, from what I have read, heard and seen, as a matter of fact and degree, that the lower ground floor is not being used as a self-contained residential unit. The lower ground floor has no inside WC and kitchen; these facilities are located on the ground floor and there is no dispute that the tenant of the lower ground floor uses them. Contrarily there are no bathroom/washing facilities on the ground floor; these facilities are located on the lower ground floor and there is no dispute that the tenant of the ground floor uses those facilities.

22. I have taken into account the many matters raised by the Appellant including the following. Firstly, paragraph 70 of Circular 03/2005 which refers to dwellinghouses as buildings that afford the facilities required for day to day private domestic existence; in my opinion because there are no cooking facilities and there is only an outside WC, the lower ground floor does not afford those facilities and it is not a dwellinghouse. Secondly, the Council's approach to the two flats as an HMO. It seems to me that, in respect of the lower ground floor and the ground floor, there has been some overlapping between Housing and Planning legislation which at times has been confused and confusing. I, however, have formed my view on the basis of the evidence presented to the Inquiry and Planning legislation and guidance. Thirdly, the lower ground floor and the ground floor are the subject of separate tenancies and if, for example, the tenant of the ground floor vacated his tenancy the tenant of the lower ground floor would have no right to use the facilities on the ground floor. I appreciate that that could be case but I have to consider the situation at 17 November 2008 and for the previous four years and, whilst there are two separate tenancies the use of the lower ground floor was not, and appears still not to be, as a self-contained residential unit.

Conclusions

23. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the lower ground floor as a self-contained residential flat (Class C3) 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.

Decision

24. I dismiss the appeal.

Gloria McFarlane

Inspector

APPEARANCES

FOR THE APPELLANT

Mr M Edwards	Counsel, instructed by Mackrell Turner Garrett, Solicitors
He called	
Mr T Kent	Solicitor, Mackrell Turner Garrett

FOR THE LOCAL PLANNING AUTHORITY

Mr G Atkinson	Counsel, instructed by the Borough Solicitor, London Borough of Camden
He called	
Mr D Durrant MCIEH	Environmental Health Officer, London Borough of Camden
Ms B Arbery BSc(Hons) MPhil MRTPI	Principal Planning Officer, Major Developments Team, London Borough of Camden

DOCUMENTS SUBMITTED AT THE INQUIRY

Document 1 -	Copy of the Council's letter of notification and list of persons notified
Document 2 -	Closing Submissions on behalf of the Council, submitted by Mr Atkinson
Document 3 -	*Cottrell v SSE and Tonbridge and Malling DC*, submitted by Mr Atkinson
Document 4 -	Statement of Common Ground