The Planning Inspectorate

Appeal Decisions

Hearing Held on 16 April 2019
Site visit made on 16 April 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 June 2019

Appeal A Ref: APP/X5210/C/18/3209863
Land at 275 Eversholt Street, London NW1 1BA

- 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 Mr Leo Kaufman of Redcourt Ltd against an enforcement notice issued by the Council of the London Borough of Camden.
- The enforcement notice, numbered EN18/0386, was issued on 16 July 2018.
- The breach of planning control as alleged in the notice is, without planning permission, the unauthorised use of a self-contained flat at basement level.
- The requirements of the notice are:
  1) Cease the use of the residential flat (use class C3) and remove the kitchen.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2) (f) of the Town and Country Planning Act 1990 as amended.

Appeal B Ref: APP/X5210/W/18/3217324
Basement Flat, 275 Eversholt Street, London NW1 1BA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
- The appeal is made by Mr Leo Kaufman of Redcourt Ltd against the Council of the London Borough of Camden.
- The application Ref 2018/3316/P, is dated 11 July 2018.
- The development proposed is described as the continued use of one bedroom flat which was previously an illegal Sui Generis brothel.

Summary Decisions: Appeal A is dismissed and the enforcement notice is upheld as corrected and varied. Appeal B is allowed and planning permission is granted subject to a s106 agreement and the condition set out in the Formal Decision below

Applications for costs

1. At the Hearing an application for costs was made by Mr Leo Kaufman of Redcourt Ltd against the Council of the London Borough of Camden. An application for costs was also made by the Council of the London Borough of Camden against Mr Leo Kaufman of Redcourt Ltd. These applications are the subject of separate Decisions.

Procedural Matters

2. The breach of planning control as alleged in the enforcement notice is, without planning permission, the unauthorised use of a self-contained flat at basement level. Three points flow from this.

3. Firstly, 'use' is not of itself development as defined in Section 55(1) of the Town and Country Planning Act 1990 (the 1990 Act). The definition used in the 1990 Act is the making of any material change in the use of any buildings or other land. I shall therefore correct the notice to allege 'a material change of use….'

4. Secondly, the notice alleges the use 'of' a self-contained flat at basement level whereas it should properly refer to a material change of use 'to' a self-contained flat at basement level.

5. Thirdly, the enforcement notice is concerned with a breach of planning control rather than other areas of legislation. As such, the word 'unauthorised' is not appropriate in this context and I shall delete it. The notice correctly alleges 'without planning permission' and therefore the word 'unauthorised' is superfluous in any event.

6. The requirements at paragraph 5(1) of the notice include to cease the use of the residential flat (use class C3). There is, therefore, a slight inconsistency in the wording between the breach of planning control alleged in paragraph 3 of the notice and the requirements to comply with it at paragraph 5(1).

7. It is important that an enforcement notice is internally consistent. In this case, whilst there is no confusion about the meaning of the breach of planning control alleged, I prefer the wording used in the allegation at paragraph 3 of the notice as being generally the more accurate. There are, however, some aspects of the wording of the requirements at paragraph 5(1) that should also be included to make the alleged breach of planning control even clearer. In addition, in my view the term 'lower ground floor' used in the amended description of the planning application (see below) is more accurate than the term 'basement level' used in paragraph 3 of the notice, and I propose adopt that term in correcting and varying the notice.

8. I will therefore correct the allegation in the notice in light of the above, and will vary the notice to correlate precisely with the corrected allegation. Notwithstanding the defects identified above, it is clear that the appellant has understood the meaning of the notice and has been able to lodge an appeal against it on appropriate grounds. I am therefore satisfied that I can correct and vary the notice in all these respects without causing injustice.

9. The appeal against the enforcement notice was initially made on grounds (f) and (g). However, the appeal on ground (g) was withdrawn at the Hearing due to a change in circumstances.

10. Part of the discussion at the Hearing concerned the appellant's failure to locate the whereabouts of the freeholder of the land and whether the appellant had made reasonable attempts to locate the freeholder in order that he might then be a signatory to the legal agreement to secure car-free housing (see below). This then raises the spectre as to whether the enforcement notice was correctly served and whether the appellant's position in relation to the whereabouts of the freeholder could have be perceived as constituting an appeal on ground (e): namely that copies of the enforcement were not served as required by Section 172 of the 1990 Act. In summary, Section 172 of the 1990 Act requires that the enforcement notice shall be served on the owner and on the occupier of the land to which it relates, and on any other person having an interest in the land.

11. Although alive to the issue, the prospect of an appeal ground (e) was not seriously pursued by the appellant. Furthermore, the Council was able to produce screen shots from the Royal Mail website to show that the letter to the freeholder containing a copy of the enforcement notice was delivered on 20 July 2018, albeit it appears not to have been signed for by the freeholder himself. I shall return to the significance of this letter in relation to the main issue below, but for present purposes it seems to me that the notice was successfully delivered to the last known address of the freeholder. As such, I am satisfied that the Council had made a reasonable attempt to serve the notice on the owner of the land. Moreover, the appellant cannot reasonably sustain an appeal on ground (e) when, at the same time, it is being claimed that the freeholder is an absent entity. It is clear that the appellant himself has not been prejudiced, and I have proceeded on the basis that an appeal on ground (e), had one been formally made, would not have succeeded.

12. In relation to the appeal under section 78 of the 1990 Act, I understand that the description of the development stated on the planning application form was altered by the Council at the point of validation to 'Change of use of lower ground floor from Sauna (Sui Generis) to a one bedroom flat (Class C3) (Retrospective)'. In my view, the latter is a more accurate description and with a minor variation to include the word 'material' I shall adopt it in my Decision.

13. The address to which the planning application relates is stated on the application form as being '*Basement Flat* 275 Eversholt Street' (my emphasis). Because the application is more properly described as proposing a material change of use from a sauna to residential, albeit made retrospectively, the reference to 'Basement Flat' is not correct: the latter would represent the use should planning permission be granted, not beforehand. Given that I propose to change the description of the development applied for to include reference to the lower ground floor, I shall simply delete the words 'Basement Flat' from the application address. I also note that the appeal form describes the address as '275A Eversholt Street', but I am satisfied that this relates to the same property as the planning application.

14. Where, as in this case, appeals made under section 78 and section 174 are conjoined, it is the convention to take the appeal under section 174 as the lead appeal. However, given that the section 174 appeal is made only on ground (f), I propose to consider the section 78 appeal (Appeal B) in the first instance.

Appeal B: the Section 78 appeal

15. The Council has confirmed that, had it been in a position so to do, it would have refused planning permission for one reason only, specifically that in the absence of a legal agreement for the car-free housing, the proposed development would be likely to contribute unacceptably to parking stress and congestion in the surrounding area. The appellant had submitted a draft legal agreement to the Council prior to lodging the appeal against non-determination of the application but, for various reasons, progression of that legal agreement had stalled. Subsequent to the Hearing, a completed and signed agreement under Section 106 of the 1990 Act, dated 24 May 2019, has been submitted. I am satisfied that this legal agreement has been properly completed and is valid. The main issue arising from this appeal is therefore whether, with that legal agreement now in place, the development makes adequate provision for car parking or, to put it another way, for car-free housing.

16. The appeal site is located close to Mornington Crescent Underground station and close to several bus stops. As well serving central London, the bus routes available from these bus stops provide access to main line rail services at Kings Cross, St Pancras and Euston stations, as well as the London Overground services from Camden Town. The site has Public Transport Accessibility Level (PTAL) of 6(b), which is regarded as being 'excellent' and is the highest possible PTAL rating.

17. The appeal site is within a Controlled Parking Zone (CPZ), and there are several other CPZs in relatively close proximity to the site. The Council has produced statistics that show the ratio of parking permits issued to residents parking spaces available was 134 permits issued to 52 spaces available in the Mornington Crescent CPZ alone. That to my mind indicates that parking in the vicinity of the appeal site is under stress.

18. I therefore consider that car-free housing would be appropriate in this location, and that a legal agreement that requires car free housing would be necessary to make the development acceptable in planning terms, having regard to Policies T1 and T2 of the Camden Local Plan, as well as Policy 6.13 of The London Plan. These policies confirm, amongst other things, that the Council will require all new developments in the borough to be car-free, and that the Council will use legal agreements to ensure that future occupiers are aware that they are not entitled to on-street parking permits.

19. The appellant does not dispute the necessity for a legal agreement to secure car-free housing. The main considerations before me, therefore, are whether the legal agreement that has now been submitted (that dated 24 May 2019) would adequately secure car-free housing and whether the appellants have made reasonable attempts to locate the freeholder of the land. It is convenient to consider the latter in the first instance.

Appellant's attempts to locate the freeholder of the land

20. The appellant explains that the freeholder of the land is an absent entity, and that all efforts to contact the freeholder were to no avail. In a letter dated 7 January 2019, a firm of solicitors instructed by Redcourt Ltd certified that the latter has written to the freeholder at his last known address, both by first class post and by special delivery, but without success. The solicitors also certify that the Electoral Register Office has confirmed that there is no one by that name at the last known address of the freeholder and that, when a representative of Redcourt Ltd visited that last known address for the freeholder, no one there had heard of him. In that context, the solicitors point out that the land registry entry that shows the freeholder being registered at that address were completed some twenty-nine years ago.

21. Following the Hearing, the appellant has provided a letter from a tracing agent which confirms that their in-house investigators searched various databases, including credit applications, Birth, Death and Marriage Certificates, and marketing data, but have been unable to source a current address for the freeholder of the land. The Council has not formally indicated that this letter satisfies its requirements in terms of demonstrating an absent freeholder but the Council has indicated in correspondence with the appellant that this evidence is sufficient to show that the freeholder cannot be located at this time.

22. Finally, I need to return briefly to the ostensibly successful delivery of the enforcement notice to the last known address of the freeholder which, on the face of it, would appear to indicate that the freeholder is still residing at that address. However, the name of the person who signed for the letter does not appear to be that of the freeholder. I have no indication as to who might have actually signed for the letter, and why they signed for a letter that was not addressed to them. Therefore, having regard to all the other evidence provided by the appellant, which points strongly to the freeholder no longer residing at that address, I shall treat this as an anomaly that is of no real significance.

23. Having regard to the above and all that I heard on this matter at the Hearing, I am satisfied that the appellant has made reasonable attempts to locate the freeholder of the land.

Whether the legal-agreement would adequately secure car-free housing

24. I understand that the completed legal agreement dated 24 May 2019 is the standard legal agreement used by the Council to secure car-free housing. I do have reservations about some aspects of the legal agreement, in particular the provision a 4.1.2, which initially appears counter-intuitive and requires careful reading. Nevertheless, when read in conjunction the preceding provision at 4.1.1, I accept that the legal agreement would prevent occupation by new residents coming into the property as well as by any residents that may already have access to a Residents Parking Permit. I am therefore satisfied that the legal agreement would adequately secure car-free parking, as required by Policy T2 of the Local Plan.

25. Given that the objective of the legal agreement is to secure car-free housing in accordance with a specific policy in an adopted development plan, I am satisfied that the legal agreement is necessary to make the development acceptable in planning terms. I am also satisfied that the legal agreement is directly, fairly and reasonably related to the development to be permitted, and as such accords with all the relevant tests for such agreements.

Other Considerations

26. The appeal property is within the Camden Town Conservation Area, and is located below existing retail premises fronting onto a busy road with a constant pedestrian footfall. No external alterations are necessary or proposed to facilitate the use. Neither would the number of pedestrian movements associated with a residential use of the lower ground have a significant effect on the volume of pedestrian traffic passing the premises. I am therefore satisfied that the proposed residential use of the lower ground floor would preserve the character and appearance of the Camden Town Conservation Area.

Conditions

27. The only condition favoured by the Council was that the accommodation should be provided in accordance with the submitted drawings. I consider that such a condition is necessary in order to ensure that the flat provides adequate living conditions for future occupiers, including in terms of the minimum space standards required by Policy 3.5 of The London Plan and as set out in the attendant Table 3.3.

28. There was some discussion at the Hearing as to whether a car-free development could be secured through the imposition of a suitably worded condition. In that context, my attention was drawn to an appeal decision relating to a property in the neighbouring London Borough of Islington (APP/V5570/W/17/3177966), in which the Inspector had imposed a condition requiring that, with certain exceptions, the development shall not be occupied by a person who has a permit to park a motor vehicle in a Residents' Parking Bay.

29. I am mindful that the Planning Practice Guidance advises that, where it may be possible to overcome a planning objection to a development equally well by imposing a condition on the planning permission or by entering into a planning obligation, then the former should be used. However, I am equally mindful that Policy T2 of the Local Plan explicitly states that the Council will use legal agreements to ensure that future occupants are aware that they are not entitled to on-street parking permits. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. In my view, that approach extends to situations such this where the Council has a specific policy in place in its development plan that requires the provision of car-free housing to be secured in a particular way. Consequently, notwithstanding the general advice set out in the Planning Practice Guidance, in the particular circumstances of this case the legal agreement that has been completed is to be preferred.

Conclusion on Appeal B: the Section 78 appeal

30. Subject to that condition and to the section 106 agreement dated 24 May 2019, I consider that the proposed development is acceptable in all respects and that planning permission should be granted.

Appeal A: the appeal on ground (f)

31. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach. In this case, the requirements of notice, as I propose to vary it, are cease the use of the lower ground floor as a self-contained flat and remove the kitchen. The purpose of the notice must therefore be to remedy the breach of planning control that has taken place.

32. The appellants' case on this ground of appeal is that the removal of the kitchen is excessive, given that the kitchen could be used for private ancillary purposes associated with non-residential use of the premises. However, taken together with the bathroom/toilet and the living/sleeping areas, the kitchen completes all the facilities required for day-to-day living. As such, with the kitchen still in situ, the premises would still have the characteristics of a dwellinghouse. Consequently, not removing the kitchen would fail to secure the remedy of the breach of planning control that has taken place and would therefore not

achieve the purpose of the notice. For that reason, the steps required are not excessive and the appeal on ground (f) must fail.

Conclusion

33. For the reasons given above, I conclude that Appeal A should not succeed and I will uphold the enforcement notice with a correction and a variation.

34. However, because I will grant retrospective planning permission under Appeal B for the same development as that alleged in the enforcement notice, the requirements of the notice enforcement notice will cease to have effect provided that the terms of the legal agreement dated 24 May 2019 are satisfied and the condition imposed upon that permission is complied with.

Formal Decisions

Appeal A Ref: APP/X5210/C/18/3209863

35. It is directed that the notice be corrected by:

- deleting the breach of planning control alleged in paragraph 3 of the notice in its entirety, and replacing it with '**Without planning permission**, the material change of use of the lower ground floor to a self-contained one-bedroom flat'.

36. It is directed that the notice be varied by:

- deleting the requirement at paragraph 5.1 of the notice in its entirety, and replacing it with 'Cease the use of the lower ground floor as a self-contained flat and remove the kitchen'.

37. Subject to that correction and variation, the appeal is dismissed and the enforcement notice is upheld.

Appeal B Ref: APP/X5210/W/18/3217324

38. The appeal is allowed and planning permission is granted for the material change of use of the lower ground floor from Sauna (Sui Generis) to a one bedroom flat (Class C3) at 275 Eversholt Street, London NW1 1BA, subject to the legal agreement dated 24 May 2019 and the following condition:

1) The development hereby permitted shall only be occupied in accordance with the layout shown on Drawing No ES.275.EX_PR dated August 2014.

Paul Freer
INSPECTOR

APPEARANCES

For the appellant:

Mr Leo Kaufman	Appellant
Mrs Amanda Olley	Summit Planning Associates

For the Local Planning Authority:

Mr Raymond Yeung	Case Officer
Mr Josh Lawlor	Case Officer
Mr Steve Cardno	Transport Officer
Miss Laura Neale	Planning Lawyer
Mrs Jennifer Lunn	Solicitor

Documents submitted at the Hearing

1. Copy of Policy 6.13 'Parking' of The London Plan.
2. Copy of Policy 3.5 'Quality and Design of Housing Developments' of The London Plan and the attendant Table 3.3 relating to Minimum space standards for new dwellings.
3. Copy of Policy D2 'Heritage' of the London Plan
4. Extract from Camden Planning Guidance: Developer Contributions relating to Planning Obligations
5. Chapter 9 of the National Planning Policy Framework 'Promoting sustainable transport'
6. Data relating to the number of parking permits issued in Eversholt Street and Mornington Crescent, February 2019.
7. Appeal decision APP/V5570/W/17/3177966 dated 14 February 2018 in relation to 124 Tufnell Park Road, Islington, London N7 0DU.
8. Screen shots from Royal Mail delivery website for 20 July 2018.
9. Letter dated 7 January 2019 from Bude Nathan Iwanier LLP Solicitors.