The Planning Inspectorate

# Appeal Decision

Inquiry Held on 4 and 5 June 2019
Site visit made on 5 June 2019

**by Andy Harwood CMS MSc MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 12 July 2019**

**Appeal Ref: APP/X5210/C/18/3203085**
**Land at 1a Highgate Road, London NW5 1JY**

- 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 Jon Curtis of IDM Land Ltd against an enforcement notice issued by the Council of the London Borough of Camden.
- The enforcement notice was issued on 11 April 2018.
- The breach of planning control as alleged in the notice is the construction of a residential development providing 13 units.
- The requirement of the notice is to completely cease use of the building for residential purposes.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended (the Act). Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.

## Decision

1. The enforcement notice is quashed.

## The Enforcement Notice

2. At the inquiry, I raised concerns regarding the wording of the alleged breach and the requirement. Miss Phillips for the Council in legal submissions suggested that without an appeal under ground (b) it is not a matter for me in this appeal to question whether or not the breach has taken place as stated. Mr Cameron on behalf of his client confirmed that there was no intention to seek an appeal under ground (b) and that it would cause injustice to both parties if I were to consider the appeal on that basis. However, my concern is not whether the alleged breach "has occurred" but the validity of the notice.

3. Notwithstanding what grounds of appeal have been advanced, I have a duty to ensure that the notice is in order. If I consider that the notice is defective, I have broad powers under the provisions of S176(1)(a) to make corrections. I can only do so however where I am satisfied that this will not cause injustice to either the appellant or the Council. If the notice cannot be corrected, I must quash the notice.

*The site*

4. The appeal site is to the rear of the commercial and residential properties that face onto Highgate Road, and it includes a building which was in warehousing

(B8) use. To benefit from permitted development rights for a change of use of the building, the prior approval process under the provisions of Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) and in particular, Schedule 2, Part 3, Class P had been undertaken twice in 2016. First of all, a change of use to 11 residential units was agreed by the Council under these provisions. Subsequently a further prior approval was given for a change of use to 13 residential units.

5. Planning permission was then given in August 2016 for alterations to the roof of the building, a new rear window and new front door. In December 2016 various further alterations to the roof and elevations as well as new doors and windows were approved. In 2017 a further application was approved to substitute different plans than those approved in December 2016.

*The allegation and the requirement*

6. In 2018, the Council investigated the work that was being undertaken at the site. They considered that the operations undertaken were not in accordance with the permissions granted[1], the building was no longer the same one to which the prior approval schemes related and that the development permitted by the GPDO could no longer be relied upon.

7. Thus, the alleged breach of planning control includes "the construction of a residential development providing 13 units". It would be more accurate to refer to the construction of a 'building' which also ties in with how the requirement of the notice is worded. Counsel for both parties considered that the allegation could be so corrected without causing injustice, although the appellants qualified this with a number of caveats discussed below.

8. The notice also alleges "13 units" but it was issued before any residential use had taken place. The building contains internal walls subdividing it into 13 units, but it is a shell with no facilities to enable residential use and no use has occurred as a matter of fact. The Council and the appellant confirmed at the inquiry that the building had not been occupied and that it was not capable of residential occupation. It was clear to me when I visited the site that facilities do not exist within the building such that there are "dwellings" as described in the *Gravesham* case[2] which was referred to in the inquiry.

9. Section 172(1)(a) of the Act enables the issuing of an enforcement notice when there has been a breach of planning control. While it is clear why the Council considered that there had been a breach in respect of "construction", there has not been a change of use, and Section 172(1)(a) does not include a provision for an enforcement notice to be issued against prospective uses.

10. The requirement of the notice adds to the confusion. Nothing within the requirement relates to the operational development that is alleged to have taken place and the Council's intention is to allow the building to remain. The Council's planning witness confirmed the building works subject to the notice would be acceptable if the residential use as 13 units was prevented. The Council's intention was to under-enforce the breach of planning control, using the provisions set out under S173(11) which states that where:

(a) an enforcement notice in respect of any breach of planning control could

[1] Whether this was indeed the case was a matter to be considered under ground (c).
[2] Gravesham BC v SSE & O'Brien [1982] 47 P&CR 142; [1983] JPL 307

have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b) all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or as the case may be, the carrying out of the activities.

11. The appellant confirmed at the inquiry that their agreement to the allegation being corrected, so as to refer to "building", was dependant on the provisions of S173(11) applying. The construction of the building "as is" would have deemed planning permission under s173(11) when the notice is complied with.

12. The Council's purpose in issuing the notice with respect to S173(4) is to remedy any injury to amenity that would be caused if the building was used as 13 residential units when there would be no scope to ensure compliance with the planning obligations and conditions on previous permissions. Thus, the only requirement of the notice is to completely cease use of the building for residential purposes but that is not taking place. It is not possible to require a use that has not commenced and which could not have commenced, to cease.

**Conclusions**

13. I am satisfied that I can correct the notice to refer to a building thereby making the allegation more precise. This would not cause injustice to either party as it was implicit within the description and both parties have clearly understood that the notice refers to an alleged new building.

14. However, to correct the notice by deleting reference to residential use in the allegation and in the requirement would render the notice null. The notice would have no effect and this would cause injustice to the Council. To correct the notice by removing reference to the residential use and then adding a requirement related to the operational development that has taken place would be more onerous for the appellant and would thereby cause injustice to them.

15. For these reasons, I conclude that the enforcement notice does not specify with sufficient clarity or accuracy the alleged breach of planning control and the steps required for compliance. It is not open to me to correct the errors in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed.

16. In these circumstances, the appeal on the ground set out in section 174(2)(c) of the 1990 Act as amended does not fall to be considered. It was requested on behalf of appellant at the inquiry that the ground (c) appeal as made should be considered whether or not I consider the notice to be invalid. However, having found that the allegation cannot be corrected, it follows that I cannot address whether the allegation amounts to a breach of planning control.

*A Harwood*

INSPECTOR

## APPEARANCES

FOR THE APPELLANT:

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| Mr N Cameron QC | Solicitor instructed by Miss L Carneiro of IDM Ltd |

He called:

Miss L Carneiro MArch ARB OA of IDM Ltd

Mr K Rafferty BA(URP) MPIA of KR Planning

FOR THE LOCAL PLANNING AUTHORITY:

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| Miss L Phillips of Counsel | Instructed by the Solicitor to The Council for the London Borough of Camden |

She called:

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| Mr J Sheehy BA Masters in Regional and Urban Planning | Senior Planning Officer |

## DOCUMENTS SUBMITTED AT THE INQUIRY

1 Email 3/7/17 between parties.
2 Application plan '077-p' from 2017/3428/P (already in Council proofs)
3 Statement of Common Ground
4 Miller-Mead v Minister of Housing and Local Government, 1963
5 Gravesham BC v SSE & O'Brien [1982] 47 P&CR 142; [1983] JPL 307
6 Barnett v SSCLG & East Hants DC [2009] EWCA Civ 476;
7 Cotswold Grange Country Park LLP v SSCLG & Tewkesbury DC [2014] EWHC 1138 (Admin)