The Planning Inspectorate

Appeal Decision

by Anthony J Wharton BArch RIBA RIASI

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

Decision date: 29 July 2020

Appeal Ref: APP/X5210/C/19/3243714
33 Colonnade, London WC1N 1JA

- 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 Ifan Evans against an enforcement notice issued by the Council of the London Borough of Camden,
- The enforcement notice, numbered EN18/0258, was issued on 19 November 2019.
- The breach of planning control as alleged in the notice is as follows:
  'Use as 'temporary sleeping accommodation' (as defined by Section 25 of the Greater London Council (General Powers) Act 1973 and as set out in the 'Explanatory Note below) for more than 90 nights in the same calendar year in breach of Section 25A(2)(a) and (b) of the Greater London Council (General Powers) Act 1973'.
- The requirements of the notice are as follows:
  'Discontinue the use of the premises as 'temporary sleeping accommodation' as defined by Section 25 of the Greater London Council (General Powers) Act 1973 except to the extent allowed by Section 25A (1) of the Act which permits the use subject to conditions, namely conditions set out at Section 25(2)(a) and (b) which limit use as 'temporary sleeping accommodation' to a maximum of 90 nights in any calendar year'.
- The period for compliance with the requirements is ONE (1) month.
- The appeal is proceeding on grounds (d) and (g) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. 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 as amended have lapsed.

Decision

1. The appeal succeeds to a limited degree on ground (g) only. Otherwise the appeal is dismissed. See formal decision below.

Matters of clarification

2. Further to the case officer's letters to the parties, I consider that this appeal can be determined without the need for a physical site visit. This is because I have been able to reach a decision based on the initial submissions, supplemented by additional information being supplied. The appellant and the Council have agreed to the appeal proceeding on this basis and I am satisfied that, in dealing with it in this manner, no injustice is caused.

Background information and relevant policies

3. The appeal property is a two-bedroomed flat, located on the first floor of a two-storey, terraced, mews building on the south side of Colonnade which is a street located to the east of Russell Square in Bloomsbury. The rest of the Colonnade is predominantly in residential use with some small office and light industrial uses at

ground floor level. The surrounding area is in mixed use including hotel, retail education, museum and leisure uses.

4. The development plan includes the London Plan (LP) and the Camden Local Plan (CLP). In relation to their reasons for issuing the enforcement notice, the Council refers to the following CLP policies; Policy H1 (Maximising Housing Supply); H3 (Protecting Existing Homes); H6 (Housing Choice and Mix) and A1 (Managing the impact of development) These accord with the relevant policies within the National Planning Policy Framework (NPPF). However, there is no appeal on ground (a); that planning permission ought to be granted for the use being carried out and so the merits of the case do not fall to be considered.

5. There is no dispute that the flat has been used as *'temporary sleeping accommodation',* as defined by the Greater London (General Powers) Act 1973. This comprises sleeping accommodation which is occupied by the same person for fewer than 90 consecutive nights and which is provided (with or without services) for a consideration, arising either by way of trade for money or money's worth, or by reason of the employment of the occupant, whether or not the relationship of landlord or tenant is thereby created.

6. The evidence indicates that, in the past, the flat has been used to house overseas students and has also been let for holiday use. The use against which the LPA has taken enforcement action, is for short term holiday lets (*'temporary sleeping accommodation'*) which have been advertised on hotel-type accommodation websites. These lets can range from a 1 night stay to over a month but no details of the pattern of usage have been provided. The Council contends that there has been a breach of section 25A(2)(a) and (b) of the 1973 Act, which restricts the use, of a Class C3 property as *'temporary sleeping accommodation'* to a maximum of 90 nights in a single calendar year. The notice was issued following a complaint to the Council that the flat had been used for short-term holiday lets.

7. A planning contravention notice (PCN) was served in June 2018 but the LPA has confirmed that no response was received. A letter was sent in March 2019 reminding the appellant of the Council's suspicion that the flat was being used unlawfully (in their view) for Short Term Letting (STL) purposes. At the same time the Council outlined how the occupation of the property needed to comply with the Deregulation Act 2015. In October 2019, further investigations by the Council indicated that STLs (for holiday visitor use) were still being carried out. On 1 November 2019 the Council confirmed that an enforcement notice would be issued if this type of STL did not cease within 7 days. The notice was then served on 19 November 2019.

The appeal on ground (d)

Introduction

8. To be successful on this ground it must be shown that the LPA was precluded from taking enforcement action, for what is alleged in the notice: *'Use as 'temporary sleeping accommodation' (as defined by Section 25 of the Greater London Council (General Powers) Act 1973 and as set out in the 'Explanatory Note below) for more than 90 nights in the same calendar year in breach of Section 25A(2)(a) and (b) of the Greater London Council (General Powers) Act 1973'.* An appeal on this ground is made on the basis that the alleged breach of control is immune from enforcement action because it has subsisted for the 10 year period laid down by section 171B.

9. Normally, ground (d) appeals, involving an alleged material change of use, require a comparison to be made between the use at the date the notice was issued and the use as it existed 10 years before that date. This is how the Council has set out its

case. However, in instances such as this, it is also necessary to go further back in history to determine when the relevant breach took place and to work forward in order to establish the relevant 10 year period.

10. As indicated on behalf of the appellant, the section 171B(3) test explicitly refers to enforcement action not being able to be taken after the end of the period of 10 years *'beginning'* with the date of the breach and not *'ending'* with the date of the issue of the notice. In reaching a decision on whether or not a LPA could take enforcement action relating to such a breach, a decision-maker must consider the relevant *'planning unit';* its *'primary use'* over the relevant periods and whether the allegation amounts to a material change of use.

11. There is no issue regarding what constitutes the *'planning unit'* in this case. It is the whole of the premises at No 33 Colonnade. This is a flat which provides all of the necessary facilities for use as a *'dwelling house'* in Class C3 of the Use Classes Order. The submissions (plans) indicate a living/dining area; an alcove-type kitchen (including sink, kitchen storage, worktops, a washing machine and a worktop microwave oven), a bathroom and two bedrooms. Various holiday/hotel website advertisements for short-term holiday lets of the property confirm that this is the case. This is not disputed by the appellant.

The gist of the case for the appellant

12. It is contended that the flat has been used for short-term letting purposes (STLs) for a period well in excess of 10 years and that the first time this had occurred, in breach of the lawful Class C3 residential use, was in 1999 following the issue of a lease dated 20 August 1998. It is stated that such a use has persisted for 20 years. Reference is made to the lease being granted to *'Acorn Management Services'* (AMS) and identifying the use as being for *'The provision of accommodation for overseas students and the provision of property management and procurement services principally in the educational sector or any other use to which the landlord consents'.*

13. It is further stated that Clause 6.2 of the lease indicated that the terms of any subletting related to ASTs (Assured Shorthold Tenancies), holiday letting or student letting. A second lease, dated 2006 also defined the use of the flat and the terms of its sub-letting as set out in the previous lease. A letter dated 16 December 2019 from *'Acorn of London and Acorn Management Services'* confirms the details of the two leases and that the flat had been advertised on *'Acorn's* website and through arrangements with universities. It is indicated that the temporary letting services included maintenance, cleaning, laundry and other services.

14. From 2016 the property has been let to *'Maida Vale Home'* (MVH) on a business lease which restricted the definition of use to holiday let only. Again it is clear from website advertisements that this is the case. There is no indication that there have been any student lets linked to any educational establishment since MVH took on the lease in 2016. Nor is there any indication that the property was let on anything more than a temporary basis as sleeping accommodation.

15. In response to the Council's statement it is argued on behalf of the appellant that the LPA case is confused and unclear on a number of key issues . These relate to the nature of the alleged breach and the relevant period required for immunity (from a change of use of the flat) to have taken effect. Reference is made to the Council's terminology, including that of a *'sui generis short-term lets'* which, it is argued is not what is set out in the allegation of the enforcement notice. The Council's contention, that the use of the flat for overseas students and holiday lets at different times would have required specific planning permission in their own right, is not accepted.

16. It is argued that the LPA positions as set out in the notice and in the appeal statement cannot both be correct. It is argued either, that both uses fall within the same use as '*temporary sleeping accommodation'* and that the allegation as set out is correct or that holiday accommodation is a distinct planning use, different to other types of '*temporary sleeping accommodation'.* If the latter is the case it is contended that the enforcement notice should have specified a particular type of '*temporary sleeping accommodation'.*

17. With regard to the relevant period of time, reference is made to the correct wording of section 171B of the Act and that '*no enforcement action can be taken after the end of the period of 10 years beginning with the date of the breach'.* On that basis it is argued that the relevant ten year period is from 1988/1989 to 2008/2009. It is stressed that the LPA has not produced any evidence to contradict the appellant's evidence relating to the commencement of the breach and that the LPA's approach is, in any case flawed.

18. It is indicated that the evidence supplied in support of the appellant's appeal under this ground demonstrates that, on the balance of probabilities, the flat at No 33 has been used for '*temporary sleeping accommodation'* from 1988/1989 up to the point that the enforcement notice was issued on 19 November 2019. This period is well in excess of 10 years; the appellant's evidence is entirely accurate and the LPA has provided no evidence to dispute the appellant's case. It is contended, therefore, that the appeal should be allowed on ground (d).

The gist of the case for the Council

19. The Council does not accept that the appellant has demonstrated that what is alleged in the notice has taken place continuously for a 10 year period from November 2009 until November 2019. It is stressed that the onus is on an appellant to submit sufficient evidence to demonstrate their case. It is also indicated that such evidence should be comprehensive, consistent and that it should '*cover the entire period without gaps'.* The Council accepts that if it disagrees with the appellant's version of events there is a need to provide evidence of its own to support its case.

20. The Council argues that the leases and the letter provided as evidence fail to support the claim that the flat operated for 10 years continuously in '*Sui Generis Short Term Let'* use prior to the service of the enforcement notice. It is contended that the provision of accommodation for overseas students is a different type of use to Short Term Holiday Lets and that planning permission would have been required for a change of use between these two uses.

21. It is stressed that the 1998 lease sets out the three categories of subtenant who may occupy the premises without notice to the Landlord being necessary. These are an AST tenancy within the provisions of the Housing Act 1988; a holiday letting within paragraph 9 of Part 1 of Schedule 1 of the Act and a student letting within paragraph 8 of Part 1 of Schedule 1 of the Act.

22. With regard to the provisions of the sub-tenancies, the Council indicates that the 1988 Housing Act sets a minimum of 6 months for ASTs. If any ASTs had been entered into, the continuous use for Short Term Letting would have ceased and the 10 year period would have reverted to zero. The Council stresses that there is no evidence that ASTs were entered into during the lease periods.

23. The Council indicates that any use as a student letting would mean that the holiday letting use could not be considered to be continuous. It is indicated that the appellant has not submitted any evidence either about the length of student lettings during the relevant periods or how the flat was let in relation to any holiday use.

24. The Council also indicates that the lease is incomplete; is unsigned and undated other than the first line which refers to 1998. It is argued hat the lease does not relate to the relevant period and does not demonstrate the use for *'Sui Generis Short Term Lets'.* With regard to the letter from *'Acorn'* it is stressed that this was written in December 2019 after the notice was issued; that it is not contemporaneous with the relevant period and that it is descriptive rather than being evidential. It is argued that the appellant has not provided any contemporaneous records to demonstrate their case nor any evidential material such as logs of stay; names of occupiers; invoices; receipts or photographs.

25. The Council indicates that there are no records of any planning applications being submitted for retention of a STL use and that no Certificate of Lawfulness application had been submitted. It is stated that officer experience is that, in order to operate a holiday letting business in central London, an operator would need to acquire planning permission. It is also noted that, other than the complaint which had led to the enforcement action being taken, there had been no complaints about the use of the flat for STLs which suggests longer term lets either as ASTs or student letting arrangements.

My assessment

26. Prior to the 2015 Deregulation Act, in order to let a Class C3 dwelling as *'temporary sleeping accommodation'* planning permission would have been required. Section 25A (1) of the Greater London Council (General Powers) Act 1973 then permitted such a use subject to conditions (25(2)(a) and (b)) which limited the use as *'temporary sleeping accommodation'* to a maximum of 90 nights in any calendar year'. In planning terms the word *'temporary'* is used to distinguish the use of accommodation from a permanent residential Class C3 use. There is no dispute that the *'temporary sleeping accommodation'* in this case comprised holiday use lets. However, the sub-letting conditions as set out in the lease do not constitute the lawful planning uses of the property.

27. As referred to above, to be successful on this ground it must be shown that the LPA was precluded from taking enforcement action, for what is alleged in the notice. Thus, it must be demonstrated that the use of the flat as *'temporary sleeping accommodation'* (for more than 90 nights in the same calendar year) has subsisted for the 10 year period laid down by section 171B. It is also necessary to show that this use subsisted continuously for a 10 year period irrespective of whether or not the breach occurred 10 or more years before the issue of the notice.

28. The appellant's case relies on the dates and details of the various leases referred to above; the letter of December 2019 and the contention that there is no material difference between a *'holiday letting'* or a *student letting'.* It is argued that both types of letting comprise *'temporary'* lettings for use of the flat as short term sleeping accommodation.

29. I accept that, irrespective of whether overseas students or holiday visitors are temporarily using the accommodation overnight, the use can still be described as *'temporary sleeping accommodation'.* However, it does not follow automatically that a *'student let'* is the same as a *'holiday let'.*

30. The leases refer to the uses being in accordance with various sections of the 1988 Housing Act. These are different for *'Holiday Letting'* and for use by *'Students'.* The former is defined in the Act as *'A tenancy, the purpose of which is to confer on the tenant the right to occupy the dwelling house for a holiday. The rental needs to be actively let for at least 105 days of that tax year for periods of shorter than 31 days at a time'.* With regard to students, this is defined as *'a tenancy which is granted to a*

person who is pursuing or intends to pursue a course of study by a specified educational establishment'.

31. For the purposes of the Act, therefore, the definitions of usage are different. In my view it is also the case that the character of the different types of lettings is also materially different. In the case of a *'holiday let'* the maximum period of letting would be 31 days or 1 month and the minimum would be a 1 night stay. In the case of a *'student let'* it is most likely that, in order to pursue a course of study, the period of letting would be for much longer than a single night.

32. In my experience a typical *'student let'* would relate to a period of a term or an academic year. Even if the flat was not let to students on the basis of an AST, I do not consider that overseas students would have used the flat on the same basis as a holidaymaker, visiting London for a short vacation and for as little as one or two nights in some cases. The patterns of usage would be significantly different, including the different comings and goings and general numbers of tenants and/or visitors. The usage would be noticeably different in my view.

33. I do not accept, therefore, the contention that a *'holiday let'* and a *'student let'* usage of the flat are the same. Even though both involve *'sleeping accommodation'*, the former would be more recognisably and acceptably perceived as being more *'temporary'* than the latter. I agree with the Council that switching between the two types of letting uses would have constituted a material change in the character of usage of the flat to the extent that planning permission would have been required.

34. However, even if the two types of letting were to be considered the same, the onus is still upon the appellant to demonstrate, on the balance of probabilities that the use as *'temporary sleeping accommodation'* had continued for a period of ten years from the date that it commenced. I do not consider that this has been shown to be the case.

35. The main lease clearly related to the provision of managed accommodation for overseas students. If such use had commenced at the start of the lease it is not unreasonable to have expected the management company to have retained records of how it had been let to overseas students. There is no evidence whatsoever relating to who might have occupied the flat at any particular time and for how long on each occasion. It is likely that since 2016, when the holiday letting company (MVH) signed a business lease, there might be records.

36. However, for the lease periods entered into by AMS, no evidence has been submitted to show a 10 year, or more, period of *'temporary sleeping accommodation'* at the flat. I acknowledge that there is also no evidence that it reverted to a Class C3 residential use over the same period but use as a student flat would have been more akin to any other residential use as opposed to it being used simply for holiday accommodation.

37. In conclusion I do not consider that the appeal should succeed on ground (d). If a Lawful Development Certificate application had been made, it is my view that the evidence submitted under ground (d) is neither precise nor unambiguous enough to demonstrate the necessary 10 year continuous period of occupation as either *'holiday' or 'student temporary sleeping accommodation'.*

The appeal on ground (g)

38. For the reasons set out in the statement, it is argued on behalf of the appellant that a period of 6 months is considered to be a reasonable compliance period. At the time of writing the statement it was indicated that the flat was currently vacant and that more than one month would be required in order for the work to be undertaken.

The Council considers that 1 month is sufficient since the requirement is simply to cease the use as being carried out.

39. It is not clear what the current situation is regarding the works. However, in the current circumstances surrounding issues relating to Covid-19, I consider it appropriate to allow a 6 month period and shall vary the notice accordingly.

Other Matters

40. In reaching my decision, I have taken into account all of the matters raised by the parties. These include the initial submissions and statements; details of the leases; the letter from AMS; the appellant's response to the Council's statement; the photographs and advertisement images and all other submissions. However, none of these carries sufficient weight to alter my conclusions on the grounds as pleaded and nor is any other matter of such significance so as to change my decision that the appeal should fail.

Formal Notice

41. The appeal succeeds to a limited degree on ground (g) only. I direct that the enforcement notice be varied by deleting the word and figure '**ONE (1)'** before the word **'month'** in part 5 of the notice (WHAT YOU ARE REQUIRED TO DO) and by substituting, therefor, the word and figure **'SIX (6)**.

42. Otherwise the appeal is dismissed and the enforcement notice is upheld as varied above.

Anthony J Wharton

Inspector