



Appeal Decision

Inquiry held on 24 July 2013

by D C Pinner BSc (Hons) DipTP MRTPI

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

Decision date: 5 November 2013

Appeal Ref: APP/Z5060/C/10/2131588

78 Fanshawe Avenue, Barking, Essex IG11 8RG

- 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 Imtiaz Ahmed against an enforcement notice issued by the Council of the London Borough of Barking & Dagenham.
 - The notice was issued on 2 June 2010.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of a single family dwelling to two separate flats.
 - The requirements of the notice are to cease the use of the premises as flats, remove the fittings and alterations (internal ground floor entrance doors/frames) that have been installed, including the first floor kitchen, to achieve the current horizontal division and conversion of the dwelling to two separate and self-contained flats.
 - The period for compliance with the requirements is 4 weeks after the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) and (e) of the Town and Country Planning Act 1990 as amended.
 - Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.
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Decision

1. This decision supersedes that issued on 7 February 2011 which was quashed and remitted for redetermination by Order of the High Court dated 26 February 2013.
2. The appeal is allowed and the enforcement notice is quashed.

Procedural matters

3. There was some discussion at the inquiry regarding the status of the enforcement notice, given that others upon whom copies of it had been served had not appealed against it. Only one enforcement notice was issued and all or any of those people upon whom copies of it were served would have been entitled to appeal. In this case, only one recipient of a copy of the notice appealed, but the effect of that is to suspend the notice until the appeal is finally determined. The copies of the notice which were served on the various recipients are not notices in their own right and cannot come into effect independently of the issued notice. The enforcement action is therefore suspended pending the outcome of this appeal.
4. All evidence was given under affirmation.

Ground (e)

5. The previous Inspector's decision concluded that reasonable attempts had been made by the Council to ensure that all those with an interest in the property had been served with copies of the notice and that the appellant had not been substantially prejudiced by any failure in this regard as he had been able to make the appeal. At the inquiry, the appellant accepted this aspect of the previous Inspector's findings and did not pursue the appeal on ground (e).

Ground (d)

6. For the appeal on this ground to succeed, it would need to be demonstrated that the change of use had taken place by 2 June 2006 and had continued for four years thereafter.
7. The question of when a residential use can be regarded as having commenced has been considered by the courts on previous occasions. In *Impey v Secretary of State for the Environment (1984) 47 P & CR 157*, Donaldson LJ said at pp 160-161:

"Change of use to residential development can take place before the premises are used in the ordinary and accepted sense of the word, and [counsel] gives by way of example cases where operations are undertaken to convert premises for residential use and they are then put on the market as being available for letting. Nobody is using those premises in the ordinary connotation of the term, because they are empty, but there has plainly, on those facts, been a change of use.

The question arises as to how much earlier there can be a change of use. Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. It may well be that during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree."

8. This approach was confirmed by Lord Mance more recently, albeit in a different context in *Secretary of State for Communities and Local Government and another v Welwyn Hatfield Borough Council [2011] UKSC 15*.
9. Thus, it is not simply a matter of considering the date of first occupation, but of considering the matter in the round. In this respect, I consider that a number of factors are relevant, including the former use of the building; the actual physical state of the building at the relevant date (2 June 2006); the actual use of the building at the relevant date; the intended use, by reference to things such as marketing etc. rather than subjective intention; the chronology and the continuity of the use.
10. The date of first occupation of the ground floor flat is agreed as being 13 July 2006 when the appellant let it to tenants who have lived there ever since. The first floor flat was acquired by the appellant's sister and she took possession on 26 July 2006, letting it to tenants shortly afterwards. There is no dispute that the former use of the building was as a single family dwelling house and that use existed until the end of March 2006 when the house was

sold. It is also agreed that neither of the two flats was occupied at the relevant date.

11. The appellant explained that he had become aware of the property after seeing a list of flats in an estate agent's window in May 2006. The appeal property lies within an area in which he was interested and he arranged to view the property the same day. He recalls that when he viewed the property, the ground floor flat had a fully fitted kitchen, the bathroom was nearly completed and that carpets were being laid. The first floor flat had no kitchen fittings, although the tiling had been done, and the carpets had been laid.
12. The appellant decided to take up the offer of a 99 year lease on the ground floor flat. He visited the property again in May 2006, this time with his sister, who was interested in the first floor flat. He recalls that the ground floor flat had been finished and he had begun to do the paperwork for the mortgage. He does not recall whether the kitchen had been installed in the first floor flat by then.
13. The Council explained that they believed that the appellant and his sister had been the innocent victims of an elaborate deception. In particular, the estate agents had introduced them to the solicitors and to the mortgage lenders. The solicitors had not conducted a local authority search, which would have revealed the lack of planning permission for the use of the property as two flats. However, as the same solicitors had acted for the vendor when he purchased the property in March 2006, they knew that there was no planning permission for use as two flats because they had done a search then. The surveyor acting on behalf of the mortgage lender had been traced but was not prepared to discuss the case in any way. The Council suspected that his purported survey, if it had been done at all, was nothing more than a "drive-by" valuation and no internal inspection had been carried out. The surveyor's firm, the estate agency and the solicitors had all since gone out of business and the vendor was untraceable. Nevertheless, the fact that the appellant and his sister were victims was not relevant in planning law. The Council's view is that two separate estates were not created until the two separate leases were made and that the property did not begin to be used as two flats until they were both occupied, which would be no sooner than July 2006.
14. If the Council was correct on this, it would mean that they could not have enforced against the unauthorised use as two flats until they were both occupied. However, in my experience I know of other cases where enforcement action has been successfully taken where a local planning authority has been made aware of a change of use by the fact that works to subdivide a property have commenced, but before the flats were completed or occupied. It seems to me that this is a logical approach, otherwise a local planning authority that became aware at an early stage of an unauthorised subdivision would have to sit back, allow the works to be completed and the flats let before they could serve an enforcement notice requiring all that work to be undone. On the other hand, it would clearly be wrong that a developer could carry out works of subdivision and then sit on the property for four years before letting it as separate flats, thereby gaining immunity for enforcement.
15. It seems to me that, in this case, the house was acquired in late March 2006 and the new owner immediately began works to subdivide it into two flats. The flats were marketed a few weeks later such that in a little over 15 weeks the property had been converted, marketed, long leases sold, tenants found and at

least one of the flats occupied. This compressed timescale leads me to conclude that the property ceased to be a single dwelling soon after it was sold in late March 2006 and that it had become two flats by May 2006 when the appellant had seen them advertised, viewed the flats, decided to purchase one, arranged a mortgage and noted that on his second inspection in May 2006, his flat was completed. The Council, had they been made aware soon enough, could have enforced against the unauthorised change of use when the internal works had reached a stage when it would have been obvious that a subdivision was in progress. This would have been no later than May 2006 (when the appellant first saw the property) and possibly some weeks prior to that. There is no dispute regarding the continuity of the use as two flats. On that basis, I conclude that, taken in the round and as a matter of fact and degree, the change of use to two flats occurred before 2 June 2006 and that the appeal on ground (d) should therefore succeed.

David C Pinner
Inspector

