The Planning Inspectorate

Appeal Decision

Site visit made on 15 January 2018

by Pete Drew BSc (Hons) DipTP (Dist) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 January 2018

Appeal A Ref APP/T5150/C/17/3181484
247 Neasden Lane, London, NW10 1QG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Zulfiqar Khan against an enforcement notice issued by the Council of the London Borough of Brent.
- The notice was issued on 21 July 2017.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the ground floor area behind the shop to a studio residential accommodation ("the unauthorised change of use").
- The requirements of the notice are: STEP 1 Cease the use of the ground floor area behind the shop as residential accommodation. STEP 2 Remove all kitchens and cooking facilities from the premises and remove all associated items, debris and materials arising from this removal from the premises. STEP 3 Remove all bathrooms and bathroom facilities from the premises and remove all associated items, debris and materials arising from this removal from the premises. STEP 4 Remove all partition walls facilitating the unauthorised change of use from the premises and remove all associated items, debris and materials arising from this removal from the premises, so that the layout of the premises is returned back to its former condition before the unauthorised change of use took place.
- The period for compliance with these requirements is 3 months.
- The appeal is proceeding on the ground set out in section 174(2) (d) of the Act.

Appeal B Ref: APP/T5150/X/17/3170153
247 Neasden Lane, London, NW10 1QG

- The appeal is made under section 195 of the Act against a refusal to grant a certificate of lawful use or development [LDC].
- The appeal is made by Mr Zulfiqar Khan against the decision of the Council of the London Borough of Brent.
- The application Ref 16/3628, dated 17 August 2016, was refused by notice dated 26 October 2016.
- The application was made under section 191(1)(a) of the Act.
- The use for which an LDC is sought is: "*Application for a Certificate of Lawfulness for the existing use of the ground floor rear of the property as a self-contained flat…*" [Source: section 8 of the application form].

Formal Decision

1. Appeal A is allowed and the enforcement notice is quashed.
2. Appeal B is allowed and attached to this decision is an LDC that describes the use which is considered to be lawful. A plan that identifies the land, edged in red, is attached to the LDC.

Procedural matters

3. I have been appointed to deal with 3 appeals at these premises but, as was suggested at the inspection, the third appeal [Ref APP/T5150/W/17/3184504] will be the subject of a separate decision for 2 reasons. First it relates to the maisonette, at No 247A, rather than the rear ground floor flat that is subject of these appeals. The respective areas of the property are physically and functionally separate. Second, from the information before me, the section 78 documentation appears to be somewhat incomplete at the present time; I do not even have a copy of the Council's questionnaire and associated documents such as a delegated report, to underpin the Council's arguments[1]. Since it might take a significant but unknown time period for the required information to be provided it is appropriate to proceed to issue separate decisions, so as not to further delay Appeals A and B, one of which, Appeal B, is already old.

Both Appeals: *Approach*

4. The Planning Practice Guidance ["the Guidance"] says that an Applicant is responsible for providing sufficient information to support an application for an LDC, which is also equivalent to ground (d) in an enforcement appeal. It says: "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability*"[2]. This test applies equally to an Inspector at appeal stage.

5. There are 2 key dates in these appeals. The notice is dated 21 July 2017 and so the material date for the purpose of ground (d) in appeal A is 4-years prior to the date of issue, namely 21 July 2013. On this basis the onus of proof falls on the Appellant to demonstrate that the use alleged in the notice began prior to the material date and continued, such that: "…*at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice*" [as per section E. (d) of the appeal form]. The second date is even earlier and runs 4-years back from the date on which the application, now the subject of Appeal B, was lodged, namely 17 August 2012.

Reasons

6. The material dates at issue in the respective appeals might be different but for the reasons discussed below I consider that it makes no material difference in this case because the Appellant claims that the use started on 1 July 2010[3]. As this is well before either material date, as defined, if the Appellant can make out his case then both appeals should succeed. Accordingly I propose to start by considering the evidence in relation to the building work, said to have been completed by 14 April 2010, as per the invoice from "*Perfect Builders*".

7. The Council says that the company "*Perfect Builders*" was incorporated on 18 October 2013 and dissolved on 11 August 2015 [Company No 08739102]. However there is nothing on the face of the invoice provided to suggest that the company "*Perfect Builders*" that produced the invoice at issue was trading as a limited company. The Council has given me no evidence to link that invoice with the limited company and there might well be more than one builder in London who aspires to be perfect and uses that moniker. So, the

[1] There should be no inference of any criticism from this statement, but as far as I can see it is not available.
[2] Source of quote: paragraph ID: 17c-006-20140306.
[3] See answer to question 10 of the LDC application form.

obvious explanation for the Council's suggestion that the limited company does not appear to have existed at the time the invoice was produced is that it has conflated an entirely different limited company with what may or may not have been a limited company trading as "*Perfect Builders*" that did this work.

8. My view in this matter is confirmed by the Appellant's final comments, attached to which is a VAT number validation certificate for the VAT number shown on the invoice dated "14/04/2010", which is held by the same person who's name appears on the invoice and who appears to be trading as "*Perfect Builders*"[4]. The final comments confirm the company "*Perfect Builders*" were sole traders and not registered with Companies House. Taken in the round I consider that this explanation is far more convincing than that put forward by the Council.

9. In saying this I acknowledge that the Appellant's appeal statement only serves to further confuse the matter in my view, by suggesting that: "*Builders invoice from 'Perfect Builders' (previously referred to as H&E PVT Limited in error. This was the applicants company)*…". The invoice does indeed refer to that limited company but that is under a title "*Client*". So whilst the Council says that a quick search for "*H&E PVT Limited*" on Companies House records reveals that the Appellant is not registered to have any interest in the company, I cannot see how this undermines the legitimacy of the document. The bottom line is that the limited company was the client who was invoiced by "*Perfect Builders*" for the sum of £12,000 for works, including kitchen and toilet, to a studio flat.

10. Notwithstanding the above, the Council's appeal statement goes considerably further than the delegated report and suggests that the company's address is "*247 Neasden Lane, London NW10 1QG (Behind the shop)*". This is, of course, the appeal site. However because the invoice is highly unconventional in its layout[5] it is less than clear as to whether that address signifies the address from which the company "*Perfect Builders*" was operating or whether it is the address at which the work was done. I accept it is possible to interpret it the way that the Council has done but to make that point stick I consider that more corroborative evidence would be required. In its absence I accept the entirely innocent explanation in the Appellant's final comments that the address refers to the site where the works were carried out and not the builder's office.

11. The Council's appeal statement says the word "*Refurbishment*" would suggest that there was an existing flat before the works started, which it says is at odds with the Appellant's version of events that a flat was created in 2010. The word means renovate and redecorate and, to the extent that this appears to have been the re-use of an existing building, as opposed to a new-build, it might be said to be appropriate. In my view the confusion perhaps arises from the word "*of*", because it should perhaps have been "*refurbishment to one studio flat*" or, more accurately, "*refurbishment to provide one studio flat*". However I am ultimately drawn to the conclusion that this claim is based on semantics. I am unconvinced that this argument serves to undermine the validity of the invoice.

12. Finally, in relation to the submitted invoice, the Council's appeal statement says that it does not confirm if or when works were carried out or completed. However the Council acknowledges in the same paragraph that the invoice is dated April 2010 and so that argument is not made out either. In my experience, unless it is marked interim invoice, or similar, a builder would only raise an invoice once the building operations were substantially completed.

[4] As at "2017/02/22", which is presumably 22 February 2017, the date stated on the VAT number validation.
[5] Which might explain the comments of the Appellant's Agent in this regard in the appeal statement.

The date on the invoice matches that set out in the Appellant's statutory declaration as to when the flat was completed. The flat might not have been occupied until 1 July 2010 but, allowing for marketing and/or a new tenant giving notice at their existing flat, that sequence of events is entirely plausible.

13. For all of the above reasons I entirely reject the Council's suggestion that the invoice should be given very little weight [delegated report] or cannot be given any significant weight [appeal statement]. In my view, particularly having regard to the VAT validation evidence, it is appropriate to attach significant weight to the builder's invoice dated April 2010. Taken together with the sworn evidence I am satisfied on the balance of probability that the space was converted to a residential flat in 2010, well before the material date[s].

14. In terms of occupancy I have been provided with a series of assured shorthold tenancy agreements dated 1 July 2010, 1 July 2011, 15 July 2012, 15 July 2013, 15 July 2014, 15 July 2015 and 1 July 2016. Whilst I acknowledge the Council's point that tenancy agreements are not proof of occupation, they are consistent with the Appellant's case. My view that it is appropriate to attach them significant weight is confirmed by the Appellant's statutory declaration that unambiguously says the premises have: "*…been in use as a self-contained flat and has been occupied on a continuous basis since 1 July 2010*". Amir Khan, the leasehold occupier of the ground floor commercial unit at No 247, provides a statutory declaration in almost identical terms to the Appellant.

15. I acknowledge that the first tenant has not provided a statutory declaration, but the Appellant's explanation that he vacated the flat years ago such that it has not been possible to contact him to obtain this is entirely logical. However the statutory declaration provided by Lenuta Tite, the second tenant, whose name is found on the tenancies dated 15 July 2012, 15 July 2013, 15 July 2014 and 15 July 2015, not only confirms the Appellant's version of events but resolves the Council's concern by saying: "*At the time when I first occupied the property it was already a studio flat and being used as such*". It is appropriate to attach all of the submitted statutory declarations substantial weight because they appear to have been properly declared and witnessed, such that there would be serious consequences if they were shown to be false.

16. In light of the above I fundamentally disagree with the Council's claim that no evidence has been provided to prove occupancy or continued use throughout the period at issue. The sworn evidence in itself might, in some circumstances, be good enough but taken with the documentary evidence the case is clearly made out here. So whilst Ms Tite says her tenancy finished on 31 May 2016 and the new tenancy, which was not provided as part of the LDC application, is dated 1 July 2016, this is no reason to doubt the Appellant's sworn statement as to continuity. I would regard a gap of one month to be normal between tenancies, allowing for factors such as marketing, refurbishment and notice being given by the new tenant in relation to their existing rental property.

17. The Council's assertion that the use ceased on 31 May 2016 is therefore not credible and if the Council had any such concern at the time that it dealt with the LDC application, that not being evident from the delegated report, it could and in my view should have asked for sight of the current tenancy. However, the delegated report says that a site visit was carried out on 7 October 2016 at which time the Officer found it was: "*…currently being used as a studio flat*"[6]. Noting as well that the Appellant's statutory declaration unambiguously says

[6] Source of quote: under title "Site Visit" in the delegated report on application No 16/3628, subject of Appeal B.

the use continued as at 11 August 2016, a matter of days before the application was submitted, I consider this argument to be entirely specious.

18. The Council's appeal statement challenges Amir Khan's statutory declaration, but this claim is conspicuous by its absence in the delegated report. Whilst the Council says it has difficulty in understanding how Amir Khan could know about the flat when it is not accessible from his commercial premises, I again find the Appellant's explanation to be convincing. First it is said there is some transfer of noise. Second there is a common landlord and no doubt conversations take place beyond the business transaction that might well have encompassed such a significant change. Third, in that context, it is said Amir Khan has enquired with the landlord about the flat's availability for one of his employees. It is said that the current tenant of the flat works in the shop. For all of these reasons I consider that the Council's concern on this point is unsubstantiated speculation.

19. I acknowledge that no utility bills have been submitted but this too has been covered up front by the Appellant's statutory declaration. It says: "*All of the utilities for the self-contained flat were linked to the main commercial unit at 247 Neasden Lane and as such, did not have its own independent electricity, gas or water meters*". I note that the first tenancy agreement dated 1 July 2010 unambiguously says that the rent includes "…*all bills*" and this term is repeated on those dated 1 July 2011, 15 July 2012, 15 July 2013, 15 July 2014 and 15 July 2015. I only have a partial copy of the most recent tenancy but given the evidence that the flat's tenant works in the shop there is a link there. For these reasons I reject the claim that the tenancy agreements contain no reference to utility payments as, applying the balance of probability, the term "…*all bills*" is likely to be a reference to utilities such as electric, gas and water.

20. The position on Council Tax is not however addressed by the various statutory declarations. The Appellant's appeal statement says Council Tax was included within the monthly rental, but as the Council say the premises are not even registered for Council Tax that claim appears to be wrong. The early tenancies appear to be silent in this matter, but that dated 1 July 2016 clearly places the responsibility for payment of any Council Tax on the tenant [see 4.(2)(a)]. That confirms my view that the Appellant's Agent's claim is simply wrong. The inevitable conclusion to which I am drawn is that no Council Tax has been paid. Whilst that is likely to breach the relevant legislation, in the face of the weight of evidence outlined above, the absence of Council Tax records is a factor to which I attach only limited weight.

21. The Council says it has interrogated the electoral register but, if I understand its evidence correctly, the Council is saying: "…*there are <u>no records of anybody registered</u> to be residing at 247 Neasden Lane or the land to the ground floor rear of 247 Neasden Lane*"[7] [*<u>my emphasis</u>*]. I inspected the maisonette in connection with the other concurrent appeal that I am appointed to deal with and so it appears entirely illogical that there is no electoral registration record at all. The maisonette appears to have legitimately existed for many years and so its residents appear to have made a conscious choice not to register. It must follow that nothing can be read into the absence of a record for the flat.

22. The Council has drawn attention to a putative planning application that was made, but never registered, in respect of No 247 on 5 March 2012. The plan submitted with that application shows a floor area approximately 5 m x 15 m [as per the annotation on that plan] with areas for internet café, phone shop,

[7] Source of quote: paragraph 3.1.8 of the Council's statement.

phone workshop and proposed minicab office variously identified within that area. The application form confirms that the existing use of those premises was as an internet café, but the key information on the form is that in section 25, which confirms that notice was exclusively being given to Amir Khan. This is unambiguous confirmation that the premise concerned was restricted to the ground floor commercial unit. Amir Khan's statutory declaration tells us that he has a 10-year tenancy from May 2010 to May 2020 and the copy of that tenancy, which has also been provided, stipulates the use to be as an internet cafe/mobile shop. On the balance of probability the 2012 application related to the commercial unit at the front of No 247 and not to the rear of the premises.

23. My view is confirmed by the Appellant's final comments. It is said: first, that the submitted plans are amateurish; second that the shop is shown with a rectangular layout without the rear part, which has a narrower footprint; and third that there is no reason why the rear of the unit would be shown when it did not form part of the planning unit and is not accessible from the main shop. I agree: the reference to the 2012 application, which is conspicuous by its absence in the delegated report, does not contradict the Appellant's evidence.

Other matters

24. The Council seeks to rely on the case law of *Welwyn Hatfield Borough Council v SSCLG and another* [2011] UKSC 15. In that case the Supreme Court held that the time limits under section 171B of the Act did not apply in cases of positive deception designed to avoid enforcement action. However the sole basis for the claim is said to be the Agent's appeal statement insofar as it says: "*As the flat was created without planning consent, no individual electric, gas or water meters were installed*". The sentence at issue could have been expressed more eloquently, but I fail to see how this in itself would comprise positive deception in matters integral to the planning process.

25. The appeal statement is dated 3 August 2017, but almost a year earlier the Appellant's statutory declaration had openly said that the utilities were linked to the main commercial unit. Moreover the sequence of events appears to be clear from section 2 of the Council's appeal statement, which outlines that the LDC application was submitted in response to an enforcement investigation. Significantly the first contact from the now Appellant is said to have been a telephone call on 26 April 2016 in which he said the flat had been there for six years. That is not the action of someone who is trying to deceive the Local Planning Authority. The application was then made promptly and the Appellant appears to have been entirely open about what had already taken place. I can detect no positive and deliberately misleading false statements at that stage.

26. The Appellant's final comments make some useful points here. First it is said that the Council is being unfair; I express no view. Second it is said the flat is only accessible from the rear access road and the only alterations required to create the flat was the installation of an access door and window to the flank passage, which is not visible from the public domain. That might be true but, whilst not a point made by the Council, that might have been done by design to avoid detection. Third, relevant to the manner in which the Council makes its case, it is said that even if separate utility meters had been installed they would have been in the side access yard, behind the gate, which would not have been seen in public views and so would not have brought the existence of the flat to light. Having regard to my site inspection and the photograph of the passage ["05/04/2016" at "15:17" hours] I find it impossible to disagree. Even if they had been installed elsewhere they might not have led to its discovery.

27. The Council's investigation commenced following a complaint which could have been made at any stage but, fortuitously for the Appellant, was made almost six years after the crucial works took place. During that period it would appear that there have been some elements of deception. I have already noted the design. The failure to register for Council Tax could also be said to fall in this category. The absence of separate utility meters might have been deliberate. However many enforcement cases that I deal with have a degree of deception of this magnitude. In *Welwyn*, confirmed in subsequent case law, it was held that this legal principle should be confined to the most egregious cases. In my view this case does not reach that threshold. I therefore decline to find that the Appellant should be denied the right to rely on the statutory provisions.

Summary

28. In my view this is a clear cut case and if the balance of probability threshold is set at 51 % I would assess this case with 80-90% certainty, close to the much higher standard of beyond reasonable doubt which, of course, is not engaged. The focus of the Council's delegated report should have been on the ample evidence that was submitted but instead, in my view, it goes off on a complete tangent by inferring that the builders invoice was fabricated[8]. The point does not even appear to have been raised with the Applicant prior to the report's preparation. This is rather dangerous territory for a Council and it appears to me that the valiant attempt to bolster the Council's arguments at appeal stage, including the relatively late issue of the enforcement notice, could all have been avoided if more care had been taken in the determination of the application.

29. In short I am in no doubt that the policy tests in the Guidance have been met and that there was no good reason to refuse the LDC application. It follows that I am satisfied there is a sound basis to allow both of these appeals because the limited contrary evidence, such as lack of entries on the electoral register and the absence of Council Tax records, does not make the Appellant's version of events less than probable when the evidence is viewed fairly and in the round.

Appeal A: Conclusion

30. For the reasons given, and having regard to all other matters raised, I conclude that the appeal should be allowed and I shall quash the enforcement notice.

Appeal B: Conclusion

31. For the reasons given, and having regard to all other matters raised, I conclude that the Council's refusal to grant an LDC for *the existing use of the ground floor rear of the property as a self-contained flat* at 247 Neasden Lane, London, NW10 1QG was not well founded. Appeal B will succeed and I shall exercise the powers transferred to me in section 195 (2) of the Act.

Pete Drew
INSPECTOR

[8] I cannot say so for sure but this reads as if it was a random internet search that resulted in the Council latching onto the dates upon which a limited company with a similar name existed. There appears to be no substance to it and the Council might therefore wish to consider the appropriateness of such an approach in future.

The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 17 August 2016 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Act, for the following reason:

1. The use commenced more than 4 years before the date of the application and has continued.

Signed

Pete Drew

Inspector

Date: 18 January 2018
Reference: APP/T5150/X/17/3170153

First Schedule

Existing use of the ground floor rear of the property as a self-contained flat.

Second Schedule

247 Neasden Lane, London, NW10 1QG

NOTES

This certificate is issued solely for the purpose of Section 191 of the Act.

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan, which can also be identified on drawing No 247NL/01 that accompanied the appeal submission. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the Local Planning Authority.

The Planning Inspectorate

Plan

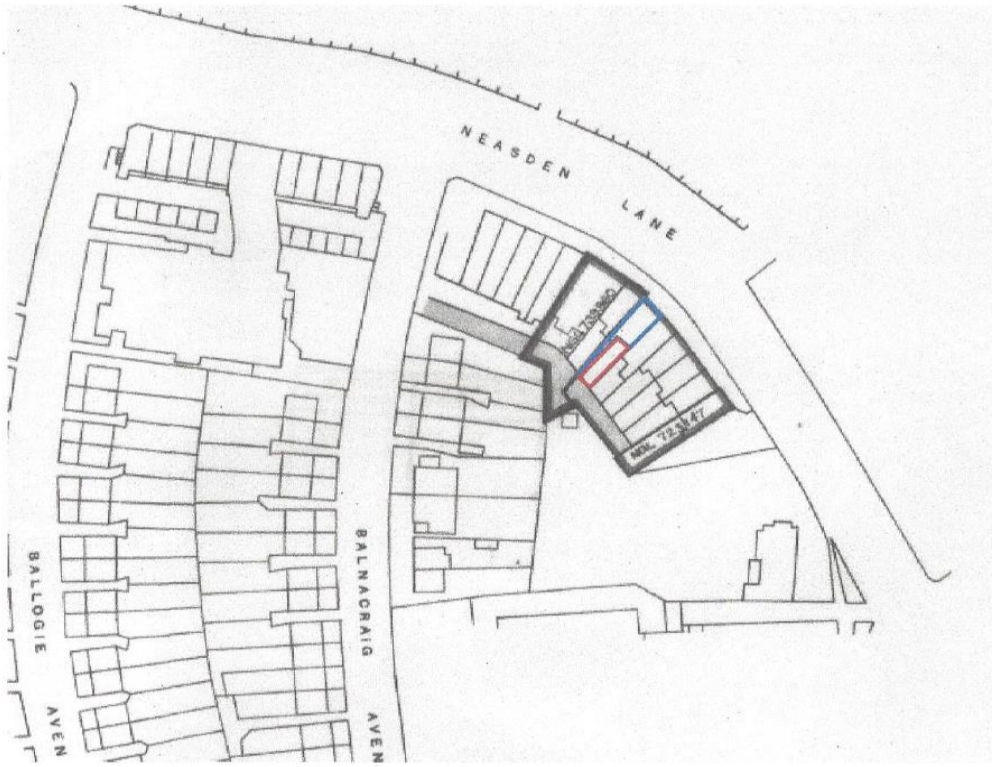
This is the plan referred to in the Lawful Development Certificate dated: 18 January 2018

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

Land at: 247 Neasden Lane, London, NW10 1QG

Appeal B Reference: APP/T5150/X/17/3170153

Scale: Do not scale as original plan has been scanned which might cause variations.



SITE PLAN

The Planning Inspectorate

Appeal Decision

Site visit made on 10 September 2013

by C A Thompson DiplArch DipTP Reg Arch RIBA MRTPI IHBC

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

Decision date: 30 September 2013

Appeal Ref: APP/U5360/X/12/2185060, Flat 6, 50 Upper Clapton Road, LONDON E5 9JP

- The appeal is under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is by Mr Howard Turkel against the decision of the Council of the London Borough of Hackney.
- The application Ref 2012/2402, dated 20/7/2012, was refused by notice dated 17/9/2012.
- The application was made under section 191(1)(a) of Act.
- The LDC is sought for the use of the Flat 6 (at first floor level) as a separate self contained flat.

Decision

1. The appeal is allowed and attached to this decision is an LDC describing the use of the Flat 6 (at first floor level), as a separate self contained flat, which is considered to be lawful.

Procedural Matters

2. The address on the appeal form refers to the whole property at 50 Upper Clapton Road. But the evidence before me, including the original planning application and supporting documentation, makes it clear that an LDC is being sought just for Flat 6. My visit was an unaccompanied one so I was not able to view the flat's internal layout and fittings. But there is nothing before me to indicate that this unit is not, or was not, fitted-out for residential use. For the avoidance of doubt I have determined the appeal taking into account both these not-unreasonable assumptions.

My Reasoning

3. An LDC is just a snap-shot in time. It is concerned simply with whether what is applied for would be lawful at the date when the application was made. Such matters as planning policy, or the impact of the scheme on the environment, are not relevant. My decision is concerned solely with an interpretation of planning law.

4. Although it is for the appellant to prove what he asserts the evidential test involves just what is the most likely explanation of the facts; that is on the balance of probabilities. In other words is what is alleged more probable than less probable? Mathematically, this could mean that, if it is found that any separate residential use for Flat 6 is 51% more likely to have been maintained for the requisite period then the appropriate test would have been satisfied and

the appellant would have proved his case. In such circumstances the appeal would have to be allowed unconditionally and an LDC issued.

5. For the residential use of a building to avoid the chance of enforcement action the breach of planning control has to have subsisted for 4 years (section 171B(2) of the Act). So in this instance the residential use of Flat 6 should have existed, and carried on continuously, since 20/7/2008 (the relevant date).

6. There is a Statutory Declaration (SD) from the appellant. In it Mr Turkel states that, from his personal knowledge, the appeal unit has been used as a separate self contained, rented and occupied, flat and that the use has subsisted continuously, and without interruption, for at least the past 4 years (as of the date of his SD which is 13/7/2012 (some 7 days before the relevant date)). Another, from one of the flat's longer term tenants, E Okruch, confirms occupation of Flat 6 from 14 December 2008, continuously and without interruption, as a self contained residential unit (up to and including 9 July 2102 the date of the SD).

7. SDs carry the risk of imprisonment and /or a significant fine, if the person involved knowingly makes a false statement, so they are unlikely to be undertaken lightly and as a consequence carry considerable weight. Section 194 of the Act, extends section 5 of the Perjury Act 1911, by making the withholding of any material information an offence as well.

8. There are other facts supporting the appeal. Firstly, there are signed Tenancy Agreements for the appeal premises (TGs) for E Okruch: (14/12/2008 (for 1 year less I day), and; 14/12/2009 (12 months) (jointly with J Fryszak): 13/1/12 (6 months), and; 19/7/2012 (12 months) (the last two solely in the name E Okruch). Another TG, in the name of I Wojda, is included for 27/5/2008 (6 months) and concerns the first part of the claimed 4 years occupancy. A letter from Greatglen Estates Ltd dated 18/7/2012 states that from 22 November to 13 December, 2008, the appeal flat was being substantially painted and decorated in preparation for the next tenants (presumably E Okruch and J Fryszak) who appear to have followed-on from I Wojda. Invoices for collected rents, although not complete, show some residential use over part of the relevant period.

9. Secondly, there is information from Statutory Service Undertakers. A letter from Thames Water, dated 5/7/2012, states that it has provided clean and waste water services for the appeal flat, continuously, since 2007. A Statement from EDF, correctly referring to the appeal flat at N^{o} 50, lists some top-up payments from June 2010 to July 2012; and indicates that the flat has a separate electricity supply. Some Powerkey Payment receipts (for Meter S93A00283 which I am told is for the appeal flat) confirm electricity use during parts of 2011 and 2012. Although not-unequivocal, because it just refers to Flat 6 (in the right street and with the correct post code but with no house number) is another letter from EDF, dated 17/7/2012, which states that at least 4 years electricity supply has been made to the premises.

10. Thirdly, a Council Tax search shows that the appeal flat has been registered for Council Tax (reference number 836802226 Band A) with effect from 1/12/2005. Council Tax Bills are included for the periods 13/1/12 – 31/3/12 and 1/4/2012 – 31/3/2013. Additionally there are some Council Tax Bill Adjustment Notices for 1/4/2009 – 7/9/2009 and 1/4/2011 -12/1/2012. The

Council's Election Registration Officer confirms that on 1 December, 2008, 2009, 2010 and 2011, the appeal flat was recorded on the relevant registers.

11. Even accepting that the records are not always complete the evidence, taken in its totality and bearing in mind the penalties associated with not telling the truth in SDs, is to my mind compelling. It indicates to me that, as a matter of fact and degree on the balance of probabilities, there has been a residential use of Flat 6, for the necessary relevant 4 year period. I shall allow the appeal unless other material considerations indicate otherwise.

12. Apart from alleging that the appellant has not achieved the necessary level of proof in making his case, the only substantive contrary point made by the Council is a reference (in its officer report) about there being a time, during part of the relevant period, when the flat was not tenanted due to redecoration works. But whether, or not, the flat has been occupied for every day within the requisite 4 year period is not the determinative matter. In legal terms there can be a continuous residential use even if there are some gaps in actual physical occupation by a tenant.

13. The correct approach to the consideration of such matters is set out in *Basingstoke and Dean Borough Council v SSfCLG and Sir Thomas Stockdale [2009] EWHC 1012 (Admin)*. Here Mr Justice Collins referred to *North Devon District Council v SSE and others [1998] 2 PLR 46* where Mr Lockhart-Mummery QC, sitting as a Deputy Judge, concluded that …*continuous physical occupation is not required for there to be occupation in breach*…

14. In *Thurrock* Schiemann LJ made the point that …*the concept of abandonment was not one which was appropriate in asking whether there had been a continuing breach*… and that the Inspector should have asked himself …*whether enforcement action could have been taken throughout the….clearly defined…period*. In *Swale BC v FSS and Roger Lee [2005] EWCA Civ 1568* Keen LJ similarly had no doubt that the same question should have been asked, concluding ...*that this is a quite different question from whether the use had been abandoned*… Although he recognised that …*it would be a question of fact and degree whether it could properly be said that the unlawful use was continuing*…

15. Because I have found, from the information provided for me (see my paragraph 11 above), that the flat has probably been used for residential purposes over the relevant period and that it is likely that the use would have accompanied the normal residential facilities (see my paragraph 2 above), then it is probable that anyone inspecting it at this time would have noted the residential use. The gap in occupation noted by the Council does not therefore impact on my findings.

Conclusion and Decision

16. Because I have found that the appellant has proved his case, on the balance of probabilities, the appeal should be allowed.

Colin A Thompson

The Planning Inspectorate

Plan

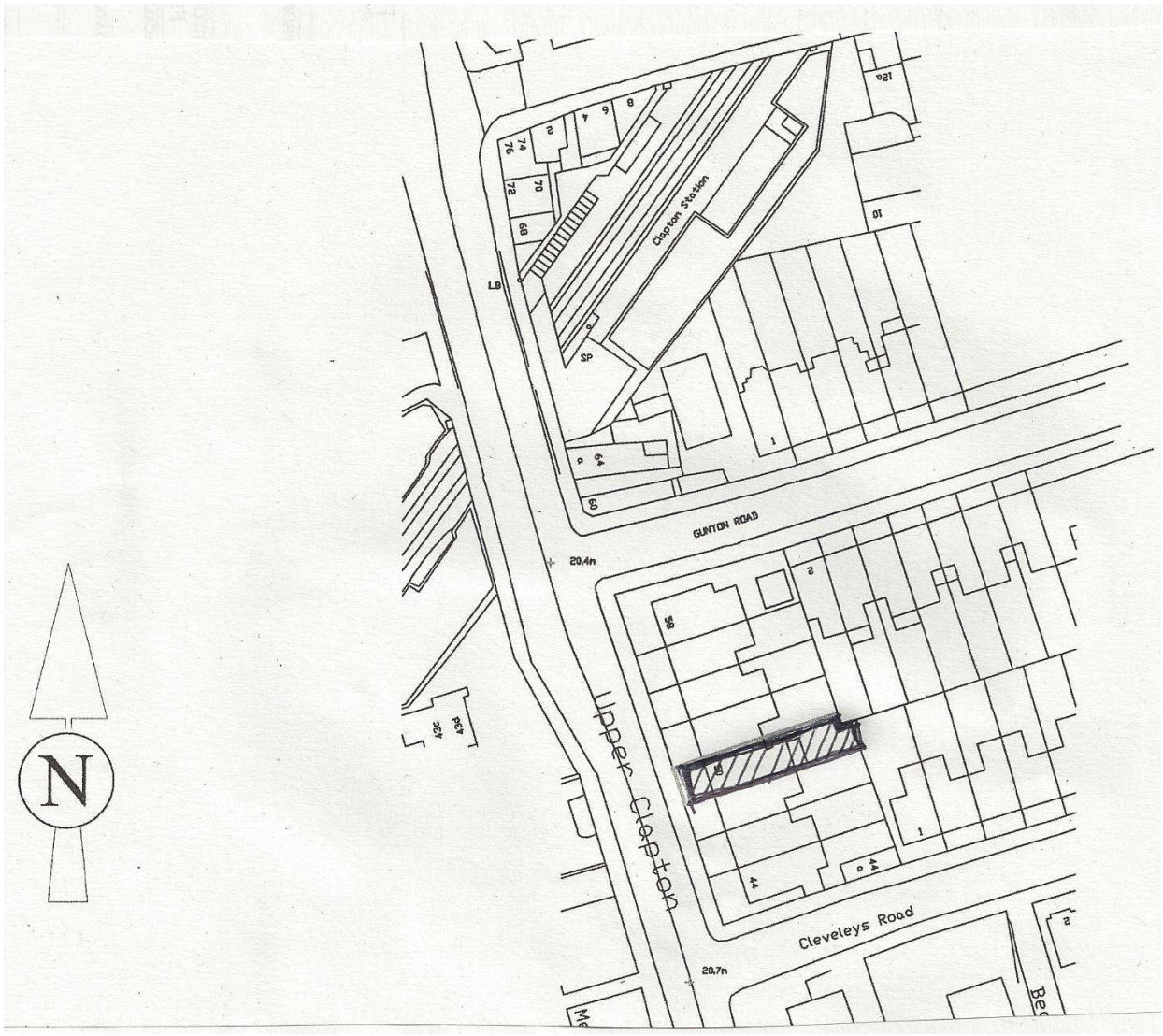
This is the plan referred to in the Lawful Development Certificate dated: 30.09.2013

by C A Thompson DiplArch DipTP Reg Arch RIBA MRTPI IHBC

Land at: Flat 6, 50 Upper Clapton Road, LONDON E5 9JP

Reference: APP/U5360/X/12/2185060

Scale: Approximately 1: 1000



The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 20/7/2012 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The residential use has subsisted for 4 years.

Signed

Colin A Thompson
Inspector

Date 30.09.2013
Reference: APP/X/12/2185060

First Schedule

The use of the Flat 6 (at first floor level) as a separate self contained flat

Second Schedule

Land at Flat 6, 50 Upper Clapton Road, LONDON E5 9JP

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Appeal Decision

Hearing held on 23 October 2007

by Michael R Lowe BSc (Hons)

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

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Decision date:
22 November 2007

Appeal Ref: APP/M0655/A/06/2033546
108 Farnworth Road, Penketh, Warrington WA5 2TT

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
- The appeal is made by Mr W Regan against the decision of Warrington Borough Council.
- The application Ref 2006/08915, dated 25 August 2006, was refused by notice dated 8 November 2006.
- The development proposed is the erection of a single-storey dwelling of similar size, height, siting and general appearance to that which existed previously until September 2004.
- The application was made in outline with all matters of detail reserved.

Decision

1. I allow the appeal, and grant outline planning permission for a single-storey dwelling of similar size, height, siting and general appearance to that which existed previously until September 2004 at 108 Farnworth Road, Penketh, Warrington WA5 2TT in accordance with the terms of the application, Ref 2006/08915, dated 25 August 2006, and the plans submitted therewith, subject to the following conditions:

   1) Details of the access, appearance, landscaping, layout, and scale, (hereafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority before any development begins and the development shall be carried out as approved.

   2) Application for approval of the reserved matters shall be made to the local planning authority before the expiration of three years from the date of this permission.

   3) The development hereby permitted shall begin before the expiration of two years from the date of this approval or the last of the reserved matters to be approved.

   4) No development shall take place until details of the existing and finished floor levels of the new building hereby approved shall be submitted in writing to the local planning authority and shall be carried out as approved.

Main Issues

2. I consider the main issues to be (i) whether residential use of the appeal site has been abandoned and, if it has, whether there are any other considerations which clearly outweigh the harm that would arise from inappropriate development in the Green Belt, and (ii) if it is decided that residential use has not been abandoned, whether the replacement dwelling would lead to a significant oversupply of housing.

Reasons

3. The appeal site is located within a designated Green Belt on the western edge of Penketh, Warrington and is at the end of a row of dwellings along Farnworth Road, the A5080. At my site visit I observed that the dwelling had been substantially, but not wholly, demolished. The site comprised a rectangular plot, with the foundations and brick chimney stack visible.

4. Government guidance on Green Belts is currently provided by PPG2[1], which advises that new buildings in the Green Belt will be inappropriate and, by definition, harmful to the Green Belt. Exceptions set out in paragraph 3.4. include the replacement of existing dwellings and (at para 3.6) adds that such replacements should not result in disproportionate additions over and above the size of the original building.

5. The appellant argues that residential use of the site has not been abandoned. The case of Hughes v Secretary of State[2] established that the test is the view to be taken by a reasonable man with knowledge of all the relevant circumstances. In this particular case it is not disputed that the appellant lived in the property until about July 2003 and that the bungalow was substantially demolished in September 2004, following arson attacks, vandalism and concern over the safety of the asbestos cladding and asbestos tiled roof.

6. In my view this relatively short period of time is insufficient to suggest that the residential use of the site has been abandoned. If further justification were required for this view, I have also had regard to the appellant's submission that, at the time the building was substantially demolished, he was in a traumatised state of mind following his divorce and an accident in which he was left 80% disabled and paralysed from the waist down. In April 2000 the appellant sought and obtained outline planning permission for a replacement dwelling and, again in 2006, sought permission, unsuccessfully, for a replacement larger dwelling. These factors demonstrate to me that the appellant clearly had no intention of abandoning the residential use of the site and that the circumstances in which the demolition occurred were entirely understandable.

7. On the first issue I therefore conclude that the residential use of the site has not been abandoned. It follows that the application for outline planning permission should be treated as a replacement dwelling and that, as the proposal is for a dwelling of similar size, there is no conflict with the policies of PPG2. The Warrington Unitary Development Plan (UDP 2006) policy GN1 is similar to the policy of PPG2 and provides for replacement dwellings which do not harm the visual amenities of the Green Belt or the character of the countryside. There is no evidence to suggest that these provisos are not met and I do not consider that the proposed replacement dwelling would harm the character and appearance of the countryside and the Green Belt.

8. Turning to the second main issue of housing supply, Policies HO1 and HO2 of the UDP seek to manage the housing land supply and avoid development that would add unnecessarily to the surplus of available housing. Having regard to the Council's Supplementary Planning Document (SPD), Managing the Housing

[1] Planning Policy Guidance 2: Green Belts. Published January 1995 (Amended March 2001).
[2] Court of Appeal, Hughes v SSETR & South Holland DC Ref. QBCOF 1999/0471/C. January 2000.

Supply (2007), I share the appellant's view that policies HO1 & HO2 do not apply to replacement dwellings. However, the SPD also states that where a dwelling has been demolished prior to gaining consent for a new dwelling, Policy HO1 will be applied in all circumstances.

9. The SPD is not a Development Plan Document and I do not consider that the circumstances in which the previous dwelling was substantially demolished should lead to the refusal of planning permission on the strict application of the SPD. In any event the absence of harm resulting from the proposal would, in my view, outweigh any conflict with policies that seek to restrict housing supply, having regard to the minimal impact upon housing supply and the circumstances in which the dwelling came to be substantially demolished.

10. For the reasons given above and having regard to all other matters raised, I conclude the appeal should be allowed.

11. The Council has suggested conditions for use if the appeal is allowed, and I have considered these in relation to Government guidance in Circular 11/95. In addition to the statutory time limit and reserved matters conditions applicable to outline applications, I have included a further condition to require details of the floor levels to be submitted and approved in the interests the openness of the Green Belt. I have not included the Council's suggested condition relating to the supply of sample materials, as this can be dealt with under the reserved matters.

Michael R Lowe

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Jason Lewis	Warrington Borough Council
Garry Legg	Warrington Borough Council

FOR THE APPELLANT:

William Regan	38 Woodland Avenue, Widnes, Cheshire WA8 7DS
Philip Moren	11 Bishop's Walk, Llangollen, North Wales LL20 8BR
Roy Godwin	9 Great Ashfield, Widnes, Cheshire WA8 4SA

DOCUMENT

Document 1 Warrington Borough Council, SPD Managing The Housing Supply, July 2007