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## Appeal Decision

Site visit made on 13 August 2019

**by Roy Merrett Bsc(Hons) DipTP MRTPI**

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

**Decision date: 28 October 2019**

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**Appeal Ref: APP/T5150/C/18/3214621**

**Flats 1-6, 120 Crest Road, London NW2 7SL**

- 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 Y Feferkorn, 120 Crest Estates, against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 9 October 2018.
- The breach of planning control as alleged in the notice is Without planning permission the material change of use of the premises to flats.
- The requirements of the notice are STEP 1 Cease the use of the premises as flats; STEP 2 Remove all kitchens and cooking facilities, except ONE, and remove all bathrooms, except TWO, from the premises; STEP 3 Remove all other fixtures, fittings and other paraphernalia associated with the unauthorised use from the premises; STEP 4 Restore the internal configuration to the original layout before the unauthorised change of use took place. For the avoidance of doubt, this should include bedrooms on the first floor and a kitchen, dining room and lounge on the ground floor.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (b) and (g) of the Town and Country Planning Act 1990 as amended.

**Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a variation.**

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### Applications for costs

1. An application for costs was made by Mr Y Feferkorn, 120 Crest Estates (the appellant), against the Council of the London Borough of Brent. A counter application for costs was made by the Council against the appellant. These applications are the subject of separate decisions.

### The appeal on ground (b)

2. The appeal on ground (b) is that the matter alleged in the Notice has not occurred. The relevant date is that of the issue of the notice. The Council has alleged the use of the premises as independent flats, whereas the appellant's position is that the premises are in use as a House in Multiple Occupation (HMO) with shared facilities. The burden of proof rests with the appellant, with the standard of proof being the balance of probability.
3. Section 254 of the Housing Act 2004 sets out the criteria to be met if a building or a part of a building is an HMO. The criteria include that it must consist of one or more units of living accommodation not consisting of a self-contained flat or flats and that two or more of the households who occupy the living

accommodation share one or more basic amenities, or the living accommodation is lacking in one or more basic amenities. "Basic amenities" is defined as a toilet, personal washing facilities or cooking facilities.

4. The property is a two-storey terraced building. It essentially comprises six bedrooms, all with lockable doors, an en-suite toilet and washing facilities and a small kitchenette, including a sink and fridge. There is a communal kitchen on the ground floor.
5. In view of these factors, the decision turns on whether it can be said that at the time the notice was issued, it was more likely than not that cooking was taking place within the individual units, such that they should be regarded as independent self-contained flats.
6. The Council's claim is that when it has previously undertaken visits to the property, evidence of cooking in rooms was found. It has provided photographs which on separate visits record a microwave oven on a work surface in one room and a portable stove and small convection grill / oven which appear to be in storage in other rooms. It also refers to the presence of unwashed plates and cooking utensils in sinks and hot food in pans within rooms outside the communal kitchen area.
7. The Council has also provided evidence of tenancy agreements for two of the units which refer to those units as 'studio flats' and previous housing benefit claims from some of the occupiers of the property, describing their kitchen facilities as not being shared with other tenants, such that they would qualify for more financial assistance, based on exclusive access to facilities.
8. The appellant claims that the shared kitchen provides the sole means of cooking for residents and that although a microwave oven was previously detected by the Council in one of the rooms, this would not constitute a basic amenity. The appellant also says that the housing benefit claims previously made by occupiers, referring to sole use of facilities were erroneous; also that the description of accommodation as 'studio flats' was inaccurate and would be corrected in future.
9. I have considered the statutory declarations provided by individuals connected to the management of the property. The declarations claim personal knowledge of the use and management of 120 Crest Road since December 2016; that no cooking is permitted outside the communal kitchen area; at no time has cooking been authorised within tenants' rooms and that the property is monitored periodically for compliance. The declarations go on to say that any tenant found to be cooking in their bedroom would be warned and would potentially face eviction. However, despite this, the statements do not exclude the possibility of cooking in rooms.
10. The three housing benefit application records, provided as evidence by the Council, indicate that the tenants in those cases claimed the highest level of benefit, based on exclusive, rather than shared, access to basic amenities; also that such benefits were arranged to be paid directly to the landlord, as property owner, as rental payment.
11. In terms of the suggestion that these applications were completed erroneously, it seems to me unlikely that several different tenants would make the same mistake, and even less likely when considering they would have been under the

- threat of prosecution from the Council for making an untruthful declaration. Furthermore, as the payment was being made directly to the landlord, there would be no financial incentive to the tenant to provide erroneous information.
12. Although the claims provided relate to two of the flats only, within its statement the Council has said that there have been similar claims from the remaining flats until the Notice was issued<sup>1</sup>. The Council has also referred to the appellant profiting for several years from the receipt of housing benefit at the self-contained rate for each of the 6 units<sup>2</sup>. Whilst it would appear that the claims were not checked by the Council, in terms of follow up visits to the property, it is significant that neither of these statements have been specifically disputed by the appellant. Although not directly showing that cooking was taking place in individual rooms, I find this to be compelling evidence in support of this proposition and that the units were being used as self-contained flats around the time that the notice was issued.
  13. In terms of the suggestion that tenancy agreements mis-described the accommodation, I concur with the comments of the Inspector<sup>3</sup> that it would be odd to use the term 'studio flat' if the property was an HMO. As part of its evidence the appellant has provided copies of statements, signed by tenants, acknowledging that cooking is not permitted in individual rooms and is confined to the communal kitchen. Whilst I have no reason to doubt the veracity of these documents, from the evidence before me, the appellant has not sought to introduce this control through the body of the tenancy agreement itself. This is surprising when, from the example of the agreement provided by the Council, the appellant seeks to set out detailed restrictions over the use of and conduct within the accommodation. I consider that if reference is omitted from the tenancy agreement, this calls into question the conviction behind the enforcement of purported cooking restrictions, notwithstanding the appellant's claim that the property is periodically monitored for compliance. This adds further weight against the HMO use of the property.
  14. It was apparent from my visit that despite the storage of food and cooking utensils, no cooking facilities were evident in any of the individual rooms. Whilst the Council previously detected a microwave oven, this appears to relate to only one of the rooms. In any event I am not persuaded that the presence of such an item would allow for sufficient convenience and flexibility on a day to day basis, such that occupiers would not need to resort to additional cooking facilities. The presence of food in cooking utensils and cooking items waiting to be cleaned does not, in my view, in itself indicate that it is more likely food is being prepared in individual rooms rather than prepared in the communal kitchen, before being transferred to individual rooms for consumption. The storage of portable cooking facilities in a room does not necessarily equate to the facility being used in that particular property.
  15. Furthermore, I am not persuaded that the dates upon which the Council's photographic evidence is based, in 2016 and 2017, can be said to be sufficiently contemporaneous to lend any significant support to the allegation.
  16. Although the Council has referred to tenants commenting that they considered their accommodation and other units to be flats and a tenant referring to

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<sup>1</sup> See para 2.4 – Council statement

<sup>2</sup> See para 5.3 – Council statement

<sup>3</sup> See Appeal Ref APP/T5150/C/15/3137960

cooking facilities in the flat, neither the flats which the residents in question were living in, nor the basis on which other units were considered to be flats has been identified.

17. However, notwithstanding the above findings regarding the strength of the site visit evidence, I am mindful of the potential difficulty, due to access constraints and prior warning requirements, of detecting first-hand evidence of cooking patterns. The photographic evidence provided gives only a very limited insight into day to day cooking tendencies of tenants and it does not overcome the concerns that I have raised above regarding the significance of other evidence.
18. The appellant has submitted various planning appeal decisions in support of their case. However it seems to me that there are factors which distinguish the circumstances of those appeals from the current one, which do not therefore lead me to the conclusion that it should automatically follow that this appeal should be allowed. Besides which, I must decide the current appeal based on the specific evidence before me.
19. Drawing the above considerations together, I find that the statutory declarations provided by the appellant are not sufficiently unambiguous, in the light of undisputed evidence and information provided by the Council in relation to housing benefit claims and payments and the content of tenancy agreements. In this context, and despite the relative weakness of various site inspection evidence, I am not persuaded that the appellant has satisfactorily discharged the burden of proof, namely that it is more likely than not that occupiers of the property were generally reliant on shared use of the communal kitchen area and that the alleged breach had not occurred.
20. The ground (b) appeal therefore fails.

### **The appeal on ground (g)**

21. The ground of appeal is that the time given to comply with the requirements is too short. The appellant has requested a six-month compliance period, raising the concern that several of the tenants have been placed at the property by the Council, as they would otherwise be homeless and that it is likely to take considerable time to find alternative accommodation.
22. I have not been provided with any documentary evidence setting out the tenancy arrangements currently in place, however I am mindful that the enforcement notice which will be upheld will interfere with the tenants' rights under Article 8 of the Human Rights Act 1998, which states that everyone has a right to respect for private and family life, their home and correspondence. This is a qualified right, whereby interference may be justified in the public interest, but the concept of proportionality is crucial.
23. I conclude, taking into account the Council's reasons for issuing the notice, that a period of five months would be appropriate to allow for compliance with the notice. This would allow tenants more time to seek alternative accommodation and would not result in a disproportionate burden.
24. To this limited extent the ground (g) appeal therefore succeeds.

### **Conclusion**

25. For the reasons given above I conclude that the ground (b) appeal should not succeed. I shall uphold the notice with a variation.

### **Formal Decision**

26. It is directed that the enforcement notice be varied by deleting the words "3 months" in Schedule 5 and substituting the words "5 months" instead.

27. Subject to this variation the appeal is dismissed and the enforcement notice is upheld.

*Roy Merrett*

INSPECTOR