
Appeal Decision

Site visit made on 12 November 2020

by D A Hainsworth LL.B(Hons) FRSA Solicitor

an Inspector appointed by the Secretary of State

Decision date: 4 February 2021

Appeal Ref: APP/T5150/C/20/3245508

2 Bridge Road, London NW10 9BX

- The appeal is made by Westmark Ltd c/o Choice Homes under section 174 of the Town and Country Planning Act 1990 against an enforcement notice (ref: E/17/0593) issued by the Council of the London Borough of Brent on 16 December 2019.
 - The breach of planning control alleged in the notice is "the material change of use of the premises from two flats to a House in Multiple Occupation (HMO) and flats".
 - The requirements of the notice are as follows: -
 - "STEP 1 Cease the use of the premises as more than TWO flats.
 - STEP 2 Cease the use of the premises as a House in Multiple Occupation (HMO).
 - STEP 3 Remove all equipment, items, materials and debris associated with the unauthorised change of use from the premises.
 - STEP 4 Alter the layout so that it is in accordance with the Plans 'Proposed Ground and First Floors' attached to this notice."
 - The period for compliance with these requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a),(b),(c) and (f). Since the appeal has been brought on ground (a), an application for planning permission is deemed to have been made by section 177(5) in respect of the matters stated in the notice as constituting a breach of planning control.
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Application for costs

1. The Council's application for costs against the appellants is dealt with by a separate decision.

Appeal decision

2. The appeal is allowed and the enforcement notice is quashed.

Reasons for the appeal decision

Ground (b)

3. The purpose of an appeal on ground (b) is to maintain that the breach of planning control alleged in the enforcement notice has not occurred as a matter of fact.
 4. The Council state that there are six units of accommodation in the premises and communal accommodation as well, and that the premises appear to be in a mixed use as flats and shared HMO accommodation. They maintain that each unit contains bathroom, toilet and kitchen facilities as well as a bed and living/dining furniture and that at least two of the units have contained all the
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facilities required for day-to-day domestic existence, including cooking facilities, and at least two have been used as self-contained dwellings. They state that the remaining accommodation beyond the units appears to be shared and that there appears to be some fluidity in the use of the units and the use of the remaining accommodation as the inspector found in appeal decision APP/A5270/C/18/3193115.

5. The Council state that when they visited the premises on 26 November 2019 they found two of the units "used cooking facilities in their rooms, provided by the landlord, including an electric oven and hob and one used the communal cooking facilities (Appendix 8)". However, the images reproduced at Appendix 8 (and those at Appendix 7) just show a microwave in one unit and do not show any other cooking or heating appliances apart from kettles. No other images or documentary evidence produced by the Council in their representations clear up this inconsistency. The Council are making a distinction between units that are in HMO use and units they argue are flats because of the presence of portable cooking appliances. This is also what the appellants understand to be the case.
6. The appellants maintain that the premises are in use as HMO units and that, as a matter of fact, none of the units are flats. They state that all the units lack one of the basic facilities required for day-to-day private domestic existence. "There are no cooking facilities in the bedrooms, rather they have additional surface areas including sinks and fridges to be able to wash and store produce as required. There are also communal fridge freezers in the main kitchens. It is acknowledged that some of the rooms have their own microwaves, which the tenants have purchased themselves. However, whilst it is possible to warm pre-cooked food in the microwave, it is not possible to use them as the sole purpose for cooking food and one therefore cannot lead an independent life by virtue of the fact that they have a microwave in their room. Residents would need to use the full kitchen in the property as well in order to be able to cook food for themselves." "Whilst residents may have in the past purchased microwaves or kettles for individual use these are automatically placed back in the shared kitchens during regular site inspections. Residents are not permitted to have any sort of cooking or heating equipment in their rooms as all cooking is required to take place in the communal kitchens."
7. I inspected the premises on 12 November 2020. At this point in time, no portable appliances were on view in any of the units, apart from kettles. I found that the accommodation consisted of three units on the ground floor (Nos 1, 2 and 3) and three units on the upper floor (Nos 4, 5 and 6). All the units were occupied. Each unit had en-suite facilities comprising a toilet, a wash hand basin and a shower. A sink was provided in each room and a small amount of storage space. The units each had a fridge. All the units were small and the space remaining was taken up by beds and items of basic furniture. None of the units had conventional ovens (i.e. ovens which heat the chamber of the appliance, rather than just the food itself as in a microwave, and which usually have fixed hobs incorporated or associated with them); nor did any of the units have the power supply usually required for a conventional oven. None had washing machines. There were kitchens on each floor of the premises, which were centrally located and readily accessible by occupiers of the units. Both kitchens were equipped with a conventional oven and hob, a microwave, a

washing machine, a fridge/freezer, storage units and cupboards, and an extractor fan. The larger, ground-floor, kitchen also had a table and two chairs. The lobby area next to this kitchen had a rack for airing clothes.

8. The Council have drawn my attention to a large number of appeal decisions concerning flats and HMOs. There is no obviously consistent approach in these decisions other than, as the parties accept, that each appeal should be decided on its merits as a matter of fact and degree according to the circumstances found by the inspector.
9. I have drawn the parties' attention to an appeal decision issued on 4 November 2020, ref. APP/T5150/C/19/3241370, which has direct relevance to the current appeal. It was considered by the High Court on 10 December 2020 (Brent LBC v Secretary of State and Reiner [2020] EWHC 3620 (Admin)) in connection with the Council's application for permission to appeal against the inspector's decision. The Court's judgment has been circulated to the parties in the current appeal and they have been able to submit further representations, which I have taken into account.
10. APP/T5150/C/19/3241370 also involved an alleged change of use to a mixed use as flats and an HMO. The appeal succeeded on ground (b). The facts found by the inspector are similar to those I have found in the current appeal. He recorded in paragraphs 3 to 8 of his decision:

"3. ... Pinning down exactly what each room is actually used for is an important part of the appeal and I shall deal with this below, hence the allegation was never going to be able to describe the use of each room with any certainty.

4. ... In planning terms a self-contained flat is a separate dwelling whereas an HMO is a single dwelling in use by people sharing (or not having access to) at least one facility. *Gravesham* [*Gravesham BC v SSE* [1984] 47 P&CR 143] is the lead case on defining a dwelling from where springs the idea that a dwelling is a building that ordinarily affords the facilities required for day to day private domestic existence. The Housing Act 2004 at section 254 deal with HMOs and creates a number of tests, including that those who occupy the building must share one or more basic amenities (or their accommodation must lack one or more basic amenities). Basic amenities are defined as a toilet, personal washing facilities and cooking facilities.

5. A problem has arisen in many flat/HMO cases because the idea of 'basic amenities' has been confused with the *Gravesham* test of 'facilities required for day to day private existence'. The two are not necessarily the same. Thus a room in an HMO might well consist of a bed, table and chairs and a small ensuite bathroom. There is no doubt this lacks the basic facility for cooking. Add in a fridge under a worktop and storage cupboard and the room is still lacking cooking facilities. However, plug in a microwave and suddenly, it is often argued, you have a self-contained flat. That is clearly not the case ...

6. This is not to say that it is impossible to use them in a day to day sense, clearly, some people can happily survive on a microwave alone, but *Gravesham* is concerned with what would generally be considered by reasonable people to comprise the test for a dwelling, not the bare minimum that it is actually possible to survive on. Otherwise the confusion that has occurred in this case

sets in, where, if the plug-in hob is removed from the room, it turns from a flat to a room in an HMO, and back the next day. That is clearly a nonsense.

7. When I looked round the building on my site visit I saw the rooms were very small. Room 1 contained a sink, fridge and a hob plugged in. There was a microwave on the floor not plugged in because there was no-where for it to go. Room 2 sacrificed the small dining table to accommodate the microwave. Rooms 3, 4 and 5 had fridges, sinks, hobs and microwaves, but very little storage space for food. Room 6 had no fridge or microwave, and the hob was on the floor not plugged in. All the rooms had small ensuites but were cramped with little or no extra storage space, the residents having to choose between clothes, personal possession and food storage. Thus while most of the rooms did contain the basic amenities none could, by any stretch of the imagination, be said to provide "the facilities required for day to day private domestic existence". From the evidence provided by the appellant it appears this has been the case since they purchased the property

8. On that basis alone I would find the building had not been converted into a mixture of flats and an HMO. However, the building also contained two shared kitchens. One on the first floor did not seem to be used, but contained an oven with four ring hob with an extractor unit over, and a washing machine as well as a number of empty kitchen units. There was another kitchen in the loft which was clearly used, probably by the occupant of the adjacent room 6 who had no cooking facilities. The kitchen contained food and washing up and another large oven and hob as well as a fridge. There seemed nothing to stop this kitchen from being used by anyone in the building. In my view therefore the residents of the building did have the opportunity to share one or more basic amenities. No70 was thus clearly being used as a 6 bed HMO."

11. The High Court found that none of the grounds of the application were arguable. The judgment states at paragraph 8:

" ... the inspector did set himself the right test in para.3 in the sentence beginning "pinning down exactly which [*sic**] room is actually used for is an important part of the appeal." He set out in para.4 both the Gravesham test and the definition of an HMO and he understood the distinction between them, as is clear from the rest of the decision letter. In para.7 he looks at the suitability of use and in para.8 he is looking at the actual use to which the building is being put and to which each room is being put, in accordance with the test he set himself in para.3 ..." [** "which" is an error and should be replaced by "what each"*]

12. I have taken the same approach in the current appeal as the inspector took in that appeal.
13. I understand the term 'flat' for town-planning purposes to denote a part of a building that has the characteristics of a dwelling in its own right, that is to say the ability to afford to those who use it the facilities required for day-to-day private domestic existence. It would satisfy the Gravesham test if it would generally be considered by reasonable people to comprise such a dwelling.
14. Applying these principles to the current appeal, I consider that if any of the units are to be regarded as being flats, they should at the very least be large enough to function adequately as a combined living room, dining room and

bedroom area with their own toilet facilities and their own kitchen or kitchen area. All the units are too small to perform all these functions. They are all too cramped to provide the space required for a combination of living room, dining room and bedroom furniture. None of them contains a kitchen or a kitchen area as such because there is insufficient space to provide one. Cooking facilities are deficient in every unit because there are no conventional ovens and neither sufficient space nor the power supply to install them. Clothes washing is limited in every unit to washing by hand in a sink because there is insufficient space for a washing machine. The occupiers of all the units are as a result obliged to rely on the well-equipped shared kitchens on the ground and first floors to provide some of the facilities they require for day-to-day domestic existence that are lacking in the units and cannot be provided there because of the shortage of space. In my view, all the units have as a matter of fact and degree the characteristics of rooms in an HMO rather than those of flats.

15. The Council have supported their case by emphasising that all the units have been described as flats in various other contexts. I do not find their argument to be persuasive. The difficulty the Council have with this approach is that it means that units the Council accept are in HMO use would be re-categorised as flats, which would contradict the mixed-use allegation in the notice. The term 'flat', when used in a town-planning context, is not necessarily the same as the term 'flat' when used in other contexts, for example, in relation to valuation, tax and housing regulations; the Energy Performance Certificates only assess each unit's energy efficiency; and the convoluted benefit claim forms have clearly not been fully understood by the claimants. In general, the term 'flat' tends to be used rather loosely in tenancy agreements and elsewhere, partly because there is no standard way of describing accommodation in an HMO. The uninitiated when filling forms in cannot be expected to appreciate the niceties of the planning system when even planning professionals are unsure of their ground.
16. For the above reasons, I have concluded that the use of the premises has not changed to an HMO and flats, as alleged in the notice. The breach of planning control has not occurred and the appeal has succeeded on ground (b).

Grounds (a), (c) and (f)

17. As a result of the success of the appeal on ground (b), the enforcement notice has been quashed. Grounds (a), (c) and (f) and the deemed planning application no longer fall to be considered.

D.A.Hainsworth

INSPECTOR