

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/20/3245517
84 Ilex Road, London NW10 9NU

- The appeal is made by Leib Levison under section 174 of the Town and Country Planning Act 1990 against an enforcement notice (ref: E/19/0181) 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 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 flats and/or a House in Multiple Occupation (HMO), and its occupation by more than ONE household.
 - STEP 2 Remove all internal partitions, items, materials and debris associated with the unauthorised change of use, including the removal of all kitchens, en-suite bathrooms/shower rooms and toilets.
 - STEP 3 Restore the internal configuration to the original layout before the unauthorised change of use took place. For the avoidance of doubt, this should include a kitchen, dining room and lounge on the ground floor, bedrooms on the upper floors, a bathroom on the first floor, and a WC on the ground floor."
 - The period for compliance with these requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b),(c),(f) and (g). Since the prescribed fee has not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to be made by section 177(5) have both lapsed.
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Decision

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

Reasons for the decision

Ground (b)

2. 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.
 3. The appellant's case under ground (b) is, in summary, as follows. The premises are in use as an HMO and not in the mixed use as an HMO and flats that is alleged in the notice. This has been the case since 2015 when the change from a single dwelling to an HMO was made as permitted development. The Council served a planning contravention notice in May 2019 alleging a change of use to
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six flats, not to a mixed use, and the appellant replied then that the premises were an HMO and gave a detailed response. The Council changed the allegation to a mixed use later in the year when they issued the notice. It is not clear from the notice which parts of the premises are alleged to be in HMO use and which are alleged to be flats, and the notice is therefore uncertain. The HMO has a fully-equipped shared kitchen. The rooms do not provide cooking facilities. The introduction of a portable plug-in device such as a microwave into a room by its occupier does not turn the room into a flat.

4. The appellant's case is supported by statutory declarations which were made on 2 November 2020 by the occupiers of three of the rooms.

The occupier of Room 1 states that he moved in in 2017 and that when he moved in each of the six rooms consisted of a bedroom with a fridge and an en-suite bathroom. There were no cooking appliances in the rooms. There was a communal kitchen on the ground floor. He never cooked in his room as it was made clear that cooking is only allowed in the communal kitchen. All tenants only cooked in the kitchen.

The occupier of Room 2 states that he moved in in 2017. He was told when he moved in that cooking was only allowed in the communal kitchen and not in the rooms. No cookers were provided in the rooms and he never cooked in his room, but at some point he purchased a microwave that he used in his room to warm food that had previously been cooked.

The occupier of Room 3 states that he moved in in 2016. There were absolutely no cooking facilities in the room and all the tenants were told that no cooking was allowed except in the communal kitchen. Tenants did not cook in their rooms. Sometime later a few tenants acquired a microwave and used them in their rooms, but only for warming up food. For example, he used a microwave to warm up some milk in the morning for breakfast and for warming up "ready food" bought at the supermarket. Any cooking is still only carried out in the communal kitchen. It would be nearly impossible to use a microwave for day-to-day cooking.

5. Based on their inspection of the premises on 26 November 2019, the Council have summarised their case as follows:

"The property consists of 6 units of accommodation and communal accommodation. Each unit is contained behind a single lockable door, numbered 1-6, containing, bathroom, toilet and kitchen facilities as well as a bed and living/dining furniture. At least 1 of the units have contained all the facilities required for day to day domestic existence, including cooking facilities and at least 1 has been used as a self-contained dwelling. There appears to be some fluidity in the use of the units and the use of the remaining communal accommodation, as the Inspector found at paragraph 14 of 3193115. The appeal premises appear to be a single planning unit and are best described as being in mixed use as flats and shared HMO accommodation." [The reference is to appeal decision APP/A5270/C/18/3193115.]

6. Apart from the introduction of the microwaves, the evidence available to me does not show that there have been any changes in the way the premises have been laid out, equipped and used in the period between the change of use from a single dwelling and my inspection of the premises on 12 November 2020. 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.

7. I found on my inspection 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 except No 6 were occupied. Each unit had en-suite facilities comprising a toilet, a wash hand basin and a shower. A sink unit was provided in each unit and a small amount of storage space. The occupied units each had a fridge. All the units were small and the space remaining in the occupied units was taken up by beds and items of basic furniture. Nos 2 and 3 had microwaves. No portable cooking facilities such as mini-ovens or plug-in hobs were observed. 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. A kitchen, which was readily accessible by occupiers of all the units, was provided in a central location on the ground floor near to the entrance to the premises. The kitchen was well-equipped, having a range of cooking facilities, clothes-washing facilities, storage units and cupboards.
8. The parties 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. The Council consider that the facts in the current appeal are more consistent with cases where inspectors have found flat use, including the exclusive use of basic amenities and other indicators of independent living. The appellant's analysis is that the facts support his contention that the premises are in use as an HMO and not in a mixed use as an HMO and flats.
9. As far as I am aware, the only appeal decision referred to that has been considered by the High Court is the decision in APP/T5150/C/19/3241370, which came before the Court on 10 December 2020 (Brent LBC v Secretary of State and Reiner [2020] EWHC 3620 (Admin)). This was an 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 kitchen on the ground floor 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. The appellant's case in this appeal is consistent with the information given in response to the planning contravention notice and I attach significant

weight to this fact, since the information was given in a town-planning context and it is an offence to respond with false information.

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 (c), (f) and (g)

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

D.A.Hainsworth

INSPECTOR