
Appeal Decision

Site visit made on 9 June 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 August 2021

Appeal Ref: APP/T5150/C/20/3245160

Land at Flats 1-6, 51 Nutfield Road, London NW2 7EA

- 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 Yehudah Rothchild against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice, numbered E/17/0348, was issued on 11 December 2019.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use of the premises to a House in Multiple Occupation (HMO) and flats, and the erection of a single storey rear extension to the premises.
- The requirements of the notice are:

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: Demolish the unauthorised rear extension and remove all items and debris arising from that demolition, and remove all materials associated with the unauthorised use and development 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 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 the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: the appeal is allowed and the enforcement notice is quashed.

Application for costs

1. An application for costs was made by the Council of the London Borough of Brent against Mr Yehudah Rothchild. This application is the subject of a separate Decision.

Procedural Matters

2. The appellant failed to provide his Statement of Case within the required timescale. The appellant's Final Comments were turned away as seeking to

introduce new evidence. Accordingly, the appellant's case is limited to that briefly stated on the Appeal Form. I have, however, been able to derive the facts surrounding this case from the Council's Statement of Case, including those relating to a notification of Prior Approval for the single-storey rear extension of the appeal property. I have therefore based my consideration of this appeal on the Council's evidence, my site visit and relevant case law.

The Enforcement Notice

3. The breach of planning control alleged in the notice is, without planning permission, the material change of use to a House in Multiple Occupation (HMO) and flats. Two points arise from that allegation.
4. Firstly, it is not immediately clear from the wording of the allegation whether the Council is alleging a mixed use of the property. However, on only the briefest further consideration, I reached the conclusion that the notice must be alleging a mixed use of single planning unit. The plan attached to the notice relates to the whole property. It is also settled case law that a mixed use can subsist where the different elements are not associated with particular parts of the premises, and where the uses fluctuate. In this case, the occupiers of the self-contained flats would have no need to interact with the occupiers of the HMO: for example, by using the communal kitchen and lounges. I therefore see no reason why an HMO and one or more flats could not provide a mixed use of a single planning unit.
5. This last point leads inexorably to the second point that arises from the allegation as set out in the notice: the number of flats alleged is not specified there. The allegation relates to 'flats', in the plural. The obvious corollary is that the Council must have considered that at least two flats existed at the time the notice was issued: indeed, the Council subsequently explains in its evidence that there were six units of accommodation, of which at least two contained all the facilities required for domestic existence. At least two of the units did not contain all the facilities required for domestic existence. The Council is silent in relation to the remaining two units. Nevertheless, given that uses within a mixed use can fluctuate, I see no reason why the number of flats should be specified in the allegation.
6. Whilst the wording of the notice could have been clearer, it informs the recipient with reasonable certainty what the breach of planning control is and what must be done to remedy it. The notice is therefore not a nullity and is capable of being corrected without causing injustice. In other circumstances, I would have corrected and varied the notice in that respect. However, given that I intend to quash the notice, there is no merit in doing so.

The appeal on ground (b)

7. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters have not occurred. An appeal on this ground is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice have not occurred. This ground of appeal relates only to the alleged material change of use of the premises to an HMO. As stated on the appeal form, the appellant's case on this ground of appeal is that the property is in use as six room HMO and not the use alleged in the notice.

8. The starting point for consideration of this ground of appeal must be the facilities provided by each of the rooms within the appeal property. At the time of my site visit, each of the six rooms had a shower/toilet. All had a sink and a fridge. All had lockable doors. Two had microwave ovens but none had cooking equipment as permanent fixtures.
9. The Council states that two of the units contained cooking facilities, including “ovens”, when the property was inspected on 26 November 2019. The Council does not specify whether the ovens were permanent fixtures or microwave ovens. However, photographs taken by the Council on that date show microwave ovens that were clearly in two separate rooms. It is therefore likely that the Council was referring to these microwave ovens in its written evidence. Moreover, none of the photographs taken by the Council show conventional ovens in any of the individual rooms occupied by tenants.
10. One constant is the existence of a communal kitchen on the ground floor of the property. At the time of my site visit, the equipment within the kitchen included an oven with hob, a microwave oven, a kettle and a fridge/freezer. The Council does not indicate whether this communal kitchen was present when Council officers inspected the premises on 26 November 2019 but, given that at least two of the units had no cooking facilities whatsoever, the obvious implication is that the occupiers of those units must have relied on the communal kitchen for all their cooking. It is therefore reasonable to conclude that the communal kitchen has been in situ throughout the intervening period.
11. This evidence before me is that toilet and washing facilities have always been provided in each of the rooms. As of November 2019, it is more likely than not that the appeal property was operating with the occupiers of two of six rooms having a microwave oven in their individual rooms, but also with the communal kitchen available to them. The occupiers of at least two of six rooms had no cooking facilities whatsoever in their rooms, and therefore were totally reliant upon the communal kitchen for their cooking.
12. In that context, the use of a dwellinghouse by not more than six residents as an HMO falls within Use Class C4 of the Town and Country Planning (Use Classes) Order 1987. For the purposes of Use Class C4, an HMO has the same meaning as in section 254 of the Housing Act 2004¹. The definition of an HMO set out in section 254(1) relates to ‘a building or part of a building’, meaning that a building can be in a mixed use as a small HMO and something else. The question before me on this ground of appeal then becomes whether or not one or more of the rooms in the appeal property had become self-contained flats by the time the notice was issued, such that a mixed use had been created.
13. The effect of introducing plug-in cookers in rooms within an HMO was considered in detail by the High Court in *Brent LBC v Secretary of State and Reiner* [2020] EWHC 3620 (Admin). The *Brent* judgement confirms the important distinction in the definition of an HMO and the definition of a dwellinghouse established in *Gravesham BC v SSE & O’Brien* [1983] JPL 306. It was held in *Gravesham* that the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence. That distinction is vital to the consideration of this ground of appeal, given that a self-contained flat is considered to be a dwellinghouse for the purposes of the 1990 Act.

¹ Except that it does not include a ‘converted block of flats’ to which s257 applies.

14. The provision of a microwave oven in the rooms occupied by tenants would allow for cooking and/or warming up of some foods. But the range and quantity of foods that could be cooked in a microwave oven is limited. To adopt the phrase rehearsed in *Brent*, that type of cooking equipment might be adequate for occasional use but is too small and basic for normal, everyday residential use. I fully accept that some people can survive using just a microwave alone, particularly over a short period of time. But the test in *Gravesham* is concerned with what generally would be considered to comprise a dwelling, not the bare minimum that it is actually possible to survive on. In other words, reliance on microwave ovens does not pass the *Gravesham* test of providing a facility for day-to-day domestic existence.
15. Furthermore, it is apparent that those occupiers who have availed themselves of a microwave oven are not solely dependent upon that equipment to cook food. They have, and always have had, the option of using the communal kitchen to cook a greater range and/or quantity of food should that be desired or required.
16. The provision of microwave ovens in the individual rooms occupied by the tenants does not provide the facilities required for day-to-day private domestic existence. The availability and use of the communal kitchen in the appeal property is essential to the existence of a dwellinghouse in *Gravesham* terms. Consequently, irrespective of whether all or some of the six rooms were equipped with microwave ovens or not, as a matter of fact and degree I consider that on the date the notice was issued the appeal property was an HMO falling within Use Class C4. I conclude that, on the balance of probability, the breach of planning control alleged in the notice has not occurred.
17. I have considered whether the notice could be corrected to allege an HMO. However, I cannot discount the possibility that the appellant would make his appeal on other grounds if the allegation was corrected on that basis. Neither can I discount the possibility that the appellant would seek to re-cast his appeal(s) on grounds already pleaded. Furthermore, I cannot be certain that the Council would consider it expedient to pursue its objection to the development if the allegation was changed to an HMO or, if so, what its case against the development would be. For these reasons, I consider that correcting the notice to allege an HMO would cause injustice. I therefore have no option other than to quash the notice insofar as it relates to the allegation of a mixed use as an HMO and flats.
18. Accordingly, the appeal on ground (b) succeeds.

The appeal on ground (c)

19. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. An appeal on this ground is another of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control. In this case, the ground of appeal was initially made in relation to both the alleged material change of use of the property and the erection of the single-storey rear extension. However, given my finding in relation to the appeal on ground (b), this ground now only falls to be considered in relation to the single-storey rear extension.

20. The appellant's case in this respect, albeit stated very briefly on the appeal form, is that Prior Approval was granted for the extension. That is not strictly correct. In fact, on 17 March 2015 the Council resolved that Prior Approval was not required for a single-storey rear extension to the appeal property extending 6m beyond the rear wall of the original house, with a maximum height of 3m (Council Ref:15/0601)². The corollary is that the Council must have accepted that the property was a dwellinghouse at the time.
21. An HMO is a dwellinghouse. As such, an HMO is capable of benefitting from the provisions of permitted development for the purposes of Class A, Part 1, Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). The Council does not contend that the extension constructed is not that found not to require Prior Approval in March 2015, or otherwise not permitted development for the purposes of the GPDO. It is academic whether the property was extended whilst still occupied as a single-family dwelling or when already an HMO: it would still constitute permitted development for the purposes of the GPDO. Consequently, I conclude that, on the balance of probability, the erection of the single-storey extension subject to the notice does not constitute a breach of planning control.
22. Accordingly, the appeal on ground (c) succeeds.

Conclusion

23. For the reasons given above, I conclude that the appeal should succeed on grounds (b) and (c). The enforcement notice will be quashed. In these circumstances, the appeals on grounds (a), (f) and (g), and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act, do not fall to be considered.

Formal Decision

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

Paul Freer
INSPECTOR

² Copy of the application, including the Council's Decision Notice, provided as Appendix 4 of the Council's evidence.