



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: 26 August 2021

Appeal Ref: APP/T5150/C/20/3245155

Land at Flats 1-6, 56 Tadworth Road, London NW2 7UD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Solomon Itzinger against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice, numbered E/17/0092, 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 to a House in Multiple Occupation (HMO) and flats.
- 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: Demolish the 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 3: 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 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), (d), (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

Applications for costs

1. An application for costs was made by Mr Solomon Itzinger against the Council of the London Borough of Brent. An application for costs was also made by the Council of the London Borough of Brent against Mr Solomon Itzinger. These applications are the subject of a separate Decisions.

The Enforcement Notice

2. 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.
3. 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. I therefore see no reason why an HMO and one or more flats could not provide a mixed use of a single planning unit.
4. 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 served: indeed, the Council subsequently explains in its evidence that there were six units of accommodation, probably comprising 2 flats and 4 bedsits. 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.
5. 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)

6. 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.
7. 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. None had cooking facilities of any description, be it permanent fixtures or plug-in cookers/hobs.
8. That may or may not have been the situation *at the time the notice was issued*. I emphasise that point here because the ground of appeal is expressed in the past tense: that the matters stated in the notice have not *occurred* (emphasis added). There appears to have been some fluidity in the use of rooms within the property over time, and the use of the rooms at the time of my site visit may not necessarily have been the same as when the notice was issued.

9. The one constant is the existence of a communal kitchen. This was present when Council officers inspected the premises on 26 November 2019, prior to issuing the notice. It was also present at the time of my site visit. It is therefore reasonable to conclude that the communal kitchen has been in situ throughout the intervening period.
10. The appellant confirms in his response to the Planning Contravention Notice (PCN) served on him in May 2019 that works to convert the property into a six-room HMO commenced in July 2014 and were completed by October 2014. The appellant goes on to indicate in his response that it was only some 2-3 months *after* occupation that tenants began to bring plug-in cookers into their rooms. The obvious implication of that response is that there was a period of some 2-3 months from first occupation when the occupiers solely relied on the communal kitchen for cooking.
11. This position is re-iterated in the appellant's written evidence. This evidence confirms that toilet and washing facilities are provided in each of the rooms. The evidence then goes on to confirm that *some months after occupation* of the six rooms started plug-in cooking facilities were introduced into each of the six rooms (emphasis added). The corollary is that, as of May 2019, it is more likely than not that the appeal property was operating with occupiers of all six rooms bringing a plug-in cooker/hob into their individual rooms, but also with the communal kitchen available to each of those occupiers.
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 principal difference between the first occupation of the rooms (in or around October 2014) and the subsequent use of those same rooms (say, from January 2015 onwards) was the introduction by some occupiers of plug-in cookers/hobs into some of the rooms. Neither the appellant nor the Council indicates that anything more substantial has been installed in any of the rooms: for example, the installation of a fully equipped kitchen with an oven, a hob and extraction hood as a permanent fixture. Indeed, the Council inspected two out of the six of rooms and found that one contained cooking facilities (described as being an electric hob). The other did not contain cooking facilities of any description. Importantly, the communal kitchen remained available to all the occupiers, irrespective of whether they had brought in plug-in cooker/hob to their own individual rooms.
14. The effect of introducing plug-in cookers/hobs 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

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

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.

15. The provision of a plug-in cooker or hob would allow for cooking and/or warming up of some foods. But the range and quantity of foods that could be cooked on a plug-in cooker or hob 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 plug-in cookers and/or hobs does not pass the *Gravesham* test of providing a facility for day-to-day domestic existence.
16. Furthermore, it is apparent that those occupiers who have availed themselves of a plug-in cooker and/or hob 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.
17. The provision of plug-in cookers/hobs 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 plug-in cookers/hobs or not, as a matter of fact and degree I consider that from around October 2014 onwards the appeal property has been an HMO falling within Use Class C4. There is no evidence to show that any point between then and the date on which the notice was issued the appeal property has been in a mixed use comprising an HMO and one or more flats. I conclude that, on the balance of probability, the breach of planning control alleged in the notice has not occurred.
18. I have considered whether the notice could be corrected to allege an HMO. However, given the planning history of the site, 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.

Conclusion

19. For the reasons given above, I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed. In these circumstances, the appeals on grounds (a), (d), (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

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

Paul Freer
INSPECTOR