



Appeal Decisions

Site visit made on 20 October 2021

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 November 2021

Appeal A: APP/T5150/C/19/3240093

91 Barry Road, London NW10 8DE

- 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 Pincus Mann, Keren Invest, against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 25 September 2019.
- 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 and remove all items, materials, equipment, partitions, fixtures and fittings associated with the unauthorised change of use from the premises. This includes; the removal and demolition of the single storey rear extension; the removal of all items and debris arising from that demolition; the removal of all kitchens and cooking facilities, except ONE, on the ground floor of the premises; and the removal of all bathrooms and toilets, except ONE, from the premises; STEP 2 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 and a bathroom 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), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed and the enforcement notice is quashed.

Appeal B: APP/T5150/W/20/3261540

91 – 93 Barry Road, London NW10 8DE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr P Mann against the decision of the Council of the London Borough of Brent.
- The application Ref 20/1286, dated 28 April 2020, was refused by notice dated 9 October 2020.
- The development proposed is Proposed change of use of No 91 to a four room HMO for 4 persons together with the retention of a rear extension, and the provision of a communal kitchen and communal lounge area; and the erection of a rear extension at No 93 together with associated internal reconfiguration.

Summary of Decision: The appeal is allowed and planning permission granted subject to conditions set out below in the Formal Decision.

Appeal A on ground (b)

1. The ground of appeal is that the matter alleged in the notice has not occurred as a matter of fact. Essentially the appellant argues that the property is in use as a House in Multiple Occupation (HMO) with six rooms and not as self-contained flats. The burden of proof rests with the appellant to make their case and the standard of proof is the balance of probability.
2. 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.
3. By contrast the case of *Gravesham* established 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 existence¹. A self-contained flat is normally a dwellinghouse for the purposes of the Act.
4. The appellant has referred to a High Court judgement which considered the approach taken by an Inspector who was considering an alleged breach involving a mixed use of flats and HMO². The judgement, which found that none of the grounds of challenge against the Inspector's decision were arguable, emphasised and endorsed key aspects of the Inspector's approach.
5. These were that "pinning down exactly what each room is actually used for is an important part of the appeal..."; the fact that a unit may possess basic amenities does not necessarily mean that it meets the *Gravesham* test of having the facilities for day-to-day private existence; suitability is relevant to the question of the use of the rooms; there seemed nothing to stop one of the shared kitchens from being used by anyone in the building; the mixed use as alleged was not taking place. I have had regard to this decision in my consideration of and approach to this appeal.
6. It is undisputed that toilet and washing facilities are present in each of the tenant rooms. However it is unclear from the Council's evidence whether cooking facilities, and therefore all 'basic amenities' were found to be present there. It is apparent from the Council's evidence that officers visited the property on 13 September 2019. There is a photograph provided, taken at the time of this visit, showing some portable cooking facilities in one of the rooms only, (a microwave oven and a pressure cooker). However no description is given or analysis made of what each room is actually used for.
7. The accommodation subject to the notice is set out on both the ground and first floors of the property. From my visit it was evident that this comprised of six rooms for occupation by tenants and a small, shared kitchen on the ground floor. I saw that each tenant had access within their respective rooms to en-suite washing facilities. However notwithstanding the presence of fridges and small sinks, the rooms did not contain cooking facilities.

¹ *Gravesham BC v SSE & O'Brien* [1983]

² *Brent LBC v Secretary of State and Reiner* [2020] EWHC 3620 (Admin)

8. Furthermore it seemed to me that because of the limited size of the rooms and the resultant competition for space within them between furnishings, items requiring storage and the need to move around in and use the space with a reasonable degree of comfort, the rooms did not lend themselves to the provision of cooking facilities. Even if it is accepted that portable plug in cooking facilities might be utilised by tenants within their respective rooms from time to time, these would not tend to offer the flexibility and scope of food preparation that would be possible from a conventional oven, which would further weigh against the consideration that the rooms were equipped with necessary day to day facilities. In this context I find that none of the six tenant rooms would meet the *Gravesham* test of having the facilities for day-to-day private existence, also that they are not suitable for such use.
9. I found that the shared kitchen, though small, contained a conventional oven and hob facility, a microwave oven and a portable fryer. There was evidence of food and utensil storage and it seemed to me that there was nothing to stop the shared kitchen from being used by anyone in the building. The kitchen is therefore suitable for shared use.
10. The Council has provided photographs of what appear to be electricity meters relating to separate flats. It has also submitted various evidence which refers to or depicts the rooms as individual flats. These documents include energy performance certificates, valuation office records, housing benefit applications and tenancy agreements. However these features and documents are not directly related to the *Gravesham* test, referred to above, and as such are not determinative of the suitability of use or actual use of the building. They do not lead me to a different conclusion regarding the use of the rooms.
11. I have had regard to the various appeal decisions provided by the Council. However it is important to consider each case on its individual merits and I consider the specific observations from the site visit to be particularly relevant in a case of this type. The cases referred to, where self-contained flats were found to be present, do not therefore bear on the outcome of this case.
12. Drawing the above considerations together I am not persuaded that the Council's evidence is strong enough to contradict the conclusion that, as a matter of fact and degree, the premises should be regarded as an HMO and not as self-contained flats. Given the observations during my site visit I would have reached the same finding, on balance, even if limited portable cooking facilities were present in each of the tenant rooms at the time the notice was issued. This is because of the inherent unsuitability of the rooms' sizes to accommodate all the required facilities.

Conclusion

13. For the reasons given above I conclude that the appeal should succeed on ground (b). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under grounds (c), (f) and (g) as set out in section 174(2) to the 1990 Act as amended do not fall to be considered.

Appeal B

Main Issues

14. The main issues are the effect of the rear extension to No 91 Barry Road on the living conditions of the occupiers of No 93 Barry Road with particular regard to

light and outlook; the effect of the rear extension to No 91 on the character and appearance of the host dwelling and the wider street scene and whether the development would result in the permanent loss of a family sized dwelling at No 91.

Reasons

Living Conditions

15. Nos 91 and 93 Barry Road adjoin one another as part of a terrace of properties. The original rear building line of the terrace was staggered such that No 91 was recessed in relation to No 89, as no 93 is in relation to No 91.
16. The single storey rear extension to No 91, proposed to be retained, projects by some 3 metres. The extension is almost flush with the rear elevation of No 89, and covers almost the entire width of the property.
17. By contrast, its effect is to extend the depth of the building in relation to the existing rear elevation of No 93. However part of the proposal is to add a single storey extension, of similar albeit greater depth, to the rear of No 93. The effect of this would therefore be to restore the stagger in the building line between the two properties, similar to how it was originally.
18. In terms of natural light, No 91 is sited to the north of No 93. I am not therefore persuaded that when considering the path of the sun and the relatively limited depth of the single storey extension to No 91 it results in any significant loss of light to the rear on No 93.
19. I noted during my visit that part of the rear of No 93 is situated close to, and faces directly towards, the back of an electricity substation. Together with the staggered building line this does result in a degree of enclosure to the outlook from the back of No 93, including the rear garden area. However the effect would be mitigated by the proposal to extend the rear of that property, the single storey height of the extension to No 91 and the retention of visibility beyond the rear boundary line of the property across Barry Road. Furthermore the extension to No 93 would serve to offset the visibility of the No 91 extension from the opposite non-extended side of the building. On balance I consider that the development does not cause harm to outlook from No 93.
20. I conclude that the development does not result in harm to the living conditions of the occupiers No 93. As such the development complies with Policy DMP 1 of the Brent Development Management Policies Document 2016 (DMPD) insofar as it requires that the scale and layout of development should ensure high levels of internal and external amenity.

Character and Appearance

21. The appeal site is part of a predominantly residential area, characterised by buildings of two and three storeys in height and which vary in design. The site itself is part of a terraced cluster of dwellings with their rear gardens facing the street and fronts facing one another. As referred to above, there is a pronounced stagger in the rear building line of the street.
22. The rear extension to No 91 is modest in scale. Viewed from Barry Road it serves to bring the rear of the building at ground floor level almost in line with No 89, and does not appear obtrusive in relation to No 93 because of the

originally staggered nature of the two properties. Indeed, because of the limited height of the extension, the sense of the original staggered building line is retained at first floor level. It seemed to me that the residual rear garden area of No 91 was not dissimilar in size, and therefore character, to that of other properties in the same terrace. From Fawood Avenue to the south, the extension is viewed against, and visually absorbed by, the mass of the side elevation of No 89. I consider the choice of brick used to be sufficiently similar to that used in surrounding buildings.

23. I do not therefore concur with the view that the existing extension is over-dominant and find that it does not result in harm to the character and appearance of the dwelling or to the wider street scene. Accordingly it is not in conflict with Policy DMP 1 of the DMPD insofar as it seeks to protect visual amenity.

Family Dwelling

24. The Council has previously granted planning permission for, and has thus accepted the principle of, a 4 room / 4 person HMO at No 91³. However its concern is that the effect of the extension, in reducing the size of the rear garden, would mean that No 91 would lose the potential to be returned to a suitable family sized dwelling in the future.
25. Policy DMP 19 of the DMPD requires that new dwellings should have sufficient private external amenity space (expected to be 50 square metres for family housing). However I am not persuaded that the effect of this policy extends to safeguarding a potential future scenario that may not materialise. In any event I consider that the existing size of the rear garden would still allow for some practical use, for example children's play or relaxation, and the drying of clothes during finer weather. Therefore the argument that the development would preclude the property being returned to a family sized dwelling in the future is simply not compelling.
26. In addition, as set out above, it seems to me that the present size of the rear garden is commensurate with that of other properties in the same terrace. Furthermore the garden is only moderately smaller when compared with that which has previously been granted planning permission by the Council⁴.
27. I conclude that the development does not result in the permanent loss of a family sized dwelling. Accordingly I do not find conflict with Policy CP 21 of the Brent Core Strategy 2010 or with Policy DMP 17 of the DMPD insofar as they seek to retain a balanced housing stock.

Other Matters

28. The Council has referred in its delegated report to the emerging Brent Local Plan. However I have not been provided with any information that would lead me to assess the proposed development differently to how I have done so above.
29. There have been a number of further concerns raised by third parties. With regard to overcrowding at No 91, the proposal in this case is to limit occupancy levels to 4 persons. I note that the Council has previously granted planning

³ Planning permission Ref 20/1285

⁴ Planning permission Ref 20/1285

permission for a 4 room / 4 person HMO at No 91 which therefore carries considerable weight in the present decision. Further concerns have been raised about fly tipping, parking demand and noise from water use in the property. However again, the nature of the use proposed in this case, that is to say a 4 room HMO, has already been approved by the Council which therefore obviates the points being raised.

30. Both the proposed extension to No 93 and that proposed to be retained at No 91 are single storey in height with windows overlooking the respective rear garden areas. Overlooking of adjacent, or nearby, properties resulting in encroachment on the privacy of neighbouring residents is not therefore an issue.
31. There is no evidence before me to suggest that the occupation of the property as proposed would result in anti-social behaviour. The question of the licensing of the HMO is not a matter for me to consider as part of this appeal.

Conditions

32. I have considered the conditions suggested by the Council in relation to which the appellant has not objected. A condition confirming the approved plans is required in the interests of certainty. A condition requiring details of materials to be agreed is needed in the interests of the character and appearance of the area. A condition requiring the provision of cycle storage facilities is required in order to ensure that satisfactory facilities are made available for the occupiers of the property. A condition removing permitted development rights for any further extension of the building or siting of outbuildings is justified on the basis of the restricted size of the properties in this case.
33. A condition requiring compliance with proposed management measures is required in order to ensure a satisfactory standard of accommodation for occupiers and to protect the living conditions of neighbouring residents.
34. The Council proposed conditions requiring completion of the development within a restricted time period; preventing future alteration of the layout of the properties, without prior approval from the Council, and removing permitted development rights for the change of use of the properties. I am mindful that the Council would be able to exercise its enforcement powers in the event that it considers there to be an existing or future breach of planning control. In this context, and without satisfactory justification, I consider the aforementioned conditions would be excessively onerous and therefore unreasonable. These conditions therefore fail to meet all of the tests set out in the National Planning Policy Framework and should not therefore be included.
35. The Council also proposed conditions restricting the future number of occupiers of the properties without prior approval from the Council and seeking to control the equipment and facilities fitted in each of the rooms. However I note that these matters are encompassed within the management statement submitted by the appellant, covering the development permitted, and which will be subject to a condition as referred to above.

Conclusion

36. For the reasons given above I conclude that the appeal should be allowed.

Formal Decisions

Appeal A

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

Appeal B

38. The appeal is allowed and planning permission is granted for Proposed change of use of No 91 to a four room HMO for 4 persons together with the retention of a rear extension, and the provision of a communal kitchen and communal lounge area; and the erection of a rear extension at No 93 together with associated internal reconfiguration at 91 – 93 Barry Road, London NW10 8DE in accordance with the terms of the application, Ref 20/1286, dated 28 April 2020, and the plans submitted with it, subject to the conditions below.

Roy Merrett

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans: BR.91-93.LP.Rev B – Location Plan; BR.91-93.PR.01 Rev A – Proposed Floor Plans; BR.91.93.PR.02 – Proposed Section and Elevation.
- 2) The rear extension to No 93 shall not be commenced until details of the materials to be used in the construction of the external surfaces of the extension hereby permitted have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 3) The cycle storage shown on the approved plans shall be completed prior to the development being brought into use. Thereafter, these facilities shall be retained in perpetuity unless otherwise agreed in writing by the local planning authority.
- 4) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no extensions or buildings shall be erected other than those expressly authorised by this permission.
- 5) The management measures set out within the approved 'Planning and Management Statement' dated March 2020 prepared by Planning Advisory LTD shall be implemented for the life of the development hereby permitted and the premises shall not be occupied unless the management measures are implemented.

END OF SCHEDULE OF CONDITIONS