



Appeal Decision

Site visit made on 20 October 2021

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 December 2021

Appeal Ref: APP/T5150/C/20/3245322

Flats 1-6, 16 Clifford Way, London NW10 1AN

- 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 N Bindinger, Holmleigh Properties Ltd, against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 18 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.
 - 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 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) and (f) of the Town and Country Planning Act 1990 as amended.
-

Formal Decision

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

Preliminary matter

2. It is understood from the appellant's evidence that changes have recently been made to the internal layout of the property, particularly with regard to the size of the ground floor rooms. This, however, does not alter the findings I have reached on the basis of my site visit.

Application for costs

3. An application for costs was made by London Borough of Brent against Mr N Bindinger, Holmleigh Properties Ltd. This application is the subject of a separate Decision.

The appeal on ground (b)

Reasons

4. The ground of appeal is that the matter alleged in the notice has not occurred as a matter of fact. The appellant argues that the property is in use as an HMO with six rooms and not in the alleged use as an HMO and flats. The burden of proof rests with the appellant to make their case, and the standard of proof is the balance of probability.
5. 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.
6. 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.
7. A recent High Court judgement considered the approach taken by an Inspector who was considering a similar alleged breach to that which has been alleged in this case². 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.
8. 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 being able to afford the facilities for day-to-day private domestic 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. The appellant and Council were given the opportunity to comment on this High Court challenge and I have had regard to the judgement in my consideration of and approach to this appeal.
9. The Council says that the property consists of "6 units of accommodation and communal accommodation". It is apparent from its evidence that officers visited the property on 3 December 2019. The Council says that it inspected four rooms and found cooking facilities present in one of them. It refers to some fluidity in the use of the units.
10. From my visit it was evident that the accommodation comprised of six rooms for occupation by tenants and a shared kitchen on the ground floor. I saw that each tenant had access within their respective rooms to en-suite washing facilities, including toilets. Whilst each room contained a fridge and a small sink, five of the rooms did not contain any cooking facilities. A stored portable hob and portable grill were present in the sixth room.

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

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

11. It seemed to me that because of the limited size of the six tenant 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.
12. In this context, because they would be too cramped, I find that none of the tenant rooms would meet the *Gravesham* test of affording the facilities for day-to-day private domestic existence, even if as the Council's evidence suggests cooking has previously occurred in one of the rooms, such that it was equipped with basic amenities. The rooms would not be suitable for such use.
13. Within the shared kitchen I noted that a microwave oven and a conventional oven and hob facility with four plates were available for use; also that some of the storage space was in use. 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.
14. The Council has submitted various evidence which refers to or depicts rooms as individual flats. These documents include energy performance certificates, Council tax records, housing benefit applications in relation to two of the units (referring to the lack of shared facilities) and tenancy agreements. However I do not consider this evidence to be incompatible with the analysis that I have made above because the documents are not directly related to the *Gravesham* test and as such are not determinative of the suitability of use or actual use of the building. Furthermore, that accommodation where cooking was prohibited has been described in certain tenancy agreements, provided by the appellant, as flats seems to me to indicate that the term 'flat' is loosely defined in this context.
15. I have had regard to the various appeal decisions submitted or referred to 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 or a mixed use of flats and HMO were found to be present, do not therefore bear on the outcome of this case.
16. The Council argues that there has been an increase in the number of units of accommodation from five to six and that accordingly the size of those units has changed. It says that this is consistent with the fluidity of a mixed use. However, I have set out above why I consider none of the six units, subject to the enforcement proceedings, to be suitable for use as self-contained flats, together with the significance of shared facilities enabled by the communal kitchen. These findings would be inconsistent with the possibility of a mixed use of flats and HMO being present.
17. 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, on the balance of probability, be regarded as an HMO and not as an HMO and flats. I acknowledge that the

HMO licence associated with the property contains various conditions relating to maximum occupancy. However this is a separate regime of control and does not alter my finding that the property is an HMO.

Conclusion

18. For the reasons given I conclude the use as alleged has not taken place and that the appeal should therefore succeed on ground (b). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under grounds (a) and (f) 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.

Roy Merrett

INSPECTOR