



Appeal Decision

Site Visit made on 3 November 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 December 2021

Appeal Ref: APP/T5150/C/20/3250293

Flats 1-6, 99 Yeats Close, London NW10 0BW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr A Spitzer against an enforcement notice issued by London Borough of Brent.
 - The notice was issued on 27 February 2020.
 - 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 unauthorised change of use").
 - The requirements of the notice are:
 - Step 1 Cease the use of the premises as a House in Multiple Occupation (HMO) and its occupation by more than one household.
 - Step 2 Cease the use of the premises as flats.
 - 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 of the premises 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 after this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

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

Ground (b)

2. An appeal under ground (b) is made on the basis that the matters alleged in the notice have not occurred. The onus of proof is firmly on the appellant to show that some or all of the alleged matters had not in fact occurred by the time the notice was issued, on the balance of probabilities.
3. The main thrust of the appellant's case under ground (b) is that the property is in use as a House in Multiple Occupation (HMO). The Town and Country Planning (Use Classes) Order (UCO) 1987 (as amended) sets out that for the purposes of Class C4 a "house in multiple occupation" does not include a converted block of flats to which section 257 of the Housing Act 2004 applies but otherwise has the same meaning as in section 254 of the Housing Act 2004.
4. It is not disputed that the accommodation is occupied by persons who do not form a single household as their only or main residence, that their occupation

of the living accommodation constitutes the only use of that accommodation and rents are payable in respect of the living accommodation. What is in dispute is whether or not the building includes self-contained units which would not meet the definition of an HMO for the purposes of the UCO.

5. I acknowledge the extent to which a use fulfils a legitimate or recognised planning purpose is relevant in deciding whether there has been a material change of use, as established in *Richmond upon Thames LBC v SSETR & Richmond upon Thames Churches Housing Trust* [2001] JPL 84. However, while there may be a material difference between a dwellinghouse, an HMO and flats, *Lipson v SoSE* (1977) 33 P&CR 95 (1976), if I find the property is an HMO for the purposes of the UCO, the change would be permitted by the Town and Country Planning (general Permitted Development) Order 2015 (as amended).
6. The Council has drawn my attention to *Westminster CC v SSCLG* [2015] EWCA Civ 482, where it was held that a mixed use can subsist where the different elements are not associated with particular parts of the premises, and where the uses fluctuate. The Council states that at least 1 of the units have contained all the facilities required for day-to-day domestic existence, including cooking facilities, however, there appears to be some fluidity in the use of the units and the use of the remaining communal accommodation and has drawn my attention to appeal decision APP/A5270/C/18/3193115.
7. Although the Inspector in that case found there to be a degree of fluidity, this was based upon the case specific facts and evidence before him. It is not uncommon for changes to occur during the course of an investigation or following the issue of an enforcement notice. Indeed, the appellant does not dispute that the layout of the building has changed, with one of the rooms on the first floor being converted to a communal kitchen.
8. A breach does not need to be framed so as to accommodate future changes, rather it needs to describe those matters which appear to the local planning authority to constitute the breach of planning control at the time the notice was issued. This is important, not least because the terms of the deemed planning application flow from the matters alleged in the notice.
9. The appellant points out that it is unclear as to which and how many of the rooms are deemed to be flats and how many are considered in HMO use. The Council's case in this regard is far from clear. It suggests in its statement of case that 'the appeal premises appear to be a single planning unit in mixed use as flats and shared HMO accommodation'. The alleged breach on the enforcement notice, on the other hand, is the material change of use of the premises to a House in Multiple Occupation (HMO) and flats. The time period referred to in the enforcement notice is 10 years.
10. It is a well-established principle that a notice should not fail on the basis of a mere technicality, a notice must tell the recipient fairly what they have done wrong and what they must do to remedy it¹. The Council appears concerned with a phenomenon it defines as 'micro flats' which are asserted to blur the lines between HMOs and flats, in respect of housing benefits, licensing, planning, rating and other legislation. The Council suggests the description of

¹ *Miller Mead v MHLG* [1963] 2 WLR 225

the breach, HMO and flats is no more than a label and have pointed out my powers under section 196 of the Act to choose another label if it suits².

11. It is established in *Gravesham*³ that premises can be properly regarded as being used as a dwellinghouse where they are a single, self-contained unit of occupation which contains the normal facilities for cooking, eating, washing and sleeping associated with use as a dwellinghouse. In my view, such accommodation would generally be regarded as a separate planning unit, distinct from any other part of the building therein and would not therefore comprise a single planning unit in mixed use as flats and shared HMO accommodation.
12. Nevertheless, I accept it is possible for part of a property to be used as a dwellinghouse and the overall property to be in mixed use, as was the case in *Scurlock*⁴. However, it will be a matter of fact and degree⁵ having regard to the layout and function of the building concerned. *Impey v SSE & Lake District SPB* [1981] JPL 363; [1984] P&CR 157 established the principle that a change of use could take place as a result of physical works, but it is necessary to look in the round. As reaffirmed in appeal decision, reference APP/U5360/C/19/3241370 and associated judgement, Brent London Borough Council and Secretary of State for Housing, Communities & Local Government (2) Chaim Reiner [2020] EWHC 3620 (Admin), there is a need to consider not just physical attributes but also evidence of use.
13. I have been provided with photographs of the appeal property, dated 3 February 2015 and 9 February 2019, both of which show a microwave in different units. During my visit I saw that the rooms were generally of a modest size, each with an en-suite bathroom and kitchenette comprising a fridge, sink and worktop area. Some of the units had kettles and/or toasters, and one of them contained a plug-in hob which was being stored under the sink at the time of my site visit. Another plug-in hob was located in one of the cupboards of the first floor communal kitchen.
14. Given the very modest size of the rooms and the availability of what I consider to be two well-equipped communal kitchens within the building, I consider it highly unlikely that occupants would choose to prepare and cook all their meals in their respective rooms. Even prior to the conversion of the first floor kitchen, although the ground floor kitchen is modest in size, I consider occupants would have used the communal facilities, which include an oven and hob, as this would enable a wider variety of meals to be prepared than using a microwave alone.
15. I have been provided with a number of statutory declarations, which all state that the occupants of the various rooms cook in the communal kitchens. One of the occupants advises that they may have used a microwave to warm food in their room, but that they only ever do cooking in the communal kitchen next to their room. Such documents provide me with first-hand accounts as to how the property has been used. The accounts support the appellant's case that the

² *Hammersmith and Fulham LBC v SSE & Sandral* [1975] 30 P&CR 19

³ *Gravesham BC v SoSE and Another QBD* 8 November 1982 (1984) 47 P. & C.R. 142

⁴ *Scurlock v SSE* [1977] 33 P&CR 102

⁵ *Rogers v LB Islington* CA 1999 WL 478098, *Birmingham Corporation v. Habib Ullah* [1964] 1 Q.B. 178, *Rogers v LB Islington* CA 1999 WL 478098 and *R (oao Gore) v SSCLG & Dartmoor NPA* [2008] EWHC 3278 (Admin); [2009] JPL 931

- premises is an HMO and are therefore a matter to which I afford significant weight.
16. The appellant has provided me with correspondence between the Council and Milton Properties regarding a Health and Safety inspection on 9 May 2017, which details issues regarding communal areas and their use, including the ground floor kitchen, which occupants were stated to be found smoking in. This points towards the property being used as an HMO.
 17. Appendix 12 of the Council's Statement of Case comprises a claim for housing benefit or Council Tax support. In it, the applicant describes the accommodation as a 'studio flat' and states that the tenancy started on 8 November 2018, which is consistent with the details provided in one of the statutory declarations. However, the identification of the property as having one bedroom, one kitchen and one bathroom, with no shared rooms, is inconsistent with the statutory declaration. The form was completed on 8 November 2018, in less than 20 minutes, at the start of the applicant's tenancy. While the applicant may not have intended to share the communal kitchen with other tenants, it is clear from their statutory declaration that they have, in fact, used the communal kitchen.
 18. The property was registered as 6 flats with the Valuation Office in 2014. As set out in Appeal Decisions APP/T5150/C/20/3245606 and 3250446, Government guidance on how domestic properties are assessed for Council Tax bands advises that HMOs with adapted letting rooms, so that they have their own kitchenette or separate shower/bath and wc, will be given their own band even though they may share some facilities. As such, the registration cannot, of itself be determinative. Similarly, whilst Energy Performance Certificates (EPC) have been provided for flats this is also not, of itself, determinative since the assessor is charged with determining the energy performance of the property, not whether the units are dwellinghouses for the purposes of the Act.
 19. Were I to accept the suggestion that Energy Performance Certificates and Council tax banding demonstrates that a change of use had occurred, it would suggest that all of the units had been converted to flats, but this is not what the Council is suggesting and rightly so, since the way in which the property is actually used is important. As such, the documentation provided does little to help me determine whether or not the breach, as alleged, has occurred in this case.
 20. The tenancy agreements also do little to assist in determining how the premises has been used. Whilst it would have been possible for the agreements to evidence the facilities provided, the fact that they do not, is not indicative that the communal facilities have not been used. While I note the appellant has referred to the different units as flats in the agreements and in correspondence with the Council, given the complexities in determining whether or not a property comprises flats, an HMO or something else, I consider very little weight can be given to the appellant's use of this term.
 21. I have had regard to the various decisions commended to me by both the Council and appellant, however, each decision must turn on its own facts. Having carefully considered the evidence put forward by both parties, for the reasons given above, I conclude, on the balance of probabilities, the premises comprises an HMO and not an 'HMO and flats'.

Conclusion

22. 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) 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.

M Savage

INSPECTOR