



Appeal Decision

Site visit made on 14 March 2022

by Roy Curnow MA BSc(Hons) CMS MRTPI

An Inspector appointed by the Secretary of State

Decision date: 08th June 2022

Appeal Ref: APP/T5150/C/20/3245156

650 North Circular Road, London NW2 7QJ

- 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 Richard Lewis against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice, numbered E/19/0814, 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; and 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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Decision

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

Application for costs

2. An application for costs was made by Mr Richard Lewis against the Council of the London Borough of Brent. This application is the subject of a separate Decision.

Preliminary Matter

3. On 1 July 2020 the Council granted conditional planning permission for 'Change of use of the premises to 5 room HMO for 5 individuals with the provision of a communal kitchen and communal lounge area; and the retention of the existing ground floor rear extension'. Its statement of case explained that the terms of the Notice ceased to have effect insofar as it was inconsistent with that permission.

4. The Appellant makes the case, in paragraph 14 of his Statement of Case, that this had the effect of restricting the terms of the Notice's requirements to that part of Step 1 relating to the cessation of the use of the premises as flats; all other Steps having fallen away. Whilst the Council's Final Comments made reference to the extension, it has clarified that it now has express planning permission¹ and the requirements of the notice are no longer effective in that respect.

Reasons

Whether the Notice is a Nullity?

5. The Appellant states that the Notice lacks clarity and could not be corrected without injustice. He does not say as much, but I have taken this to be a claim that the Notice is a nullity. The appropriate test is whether the notice is hopelessly ambiguous and uncertain, either as regards the description of the breach of planning control, or the necessary remedial steps².
6. The Notice contains the required constituent parts and I find that the Appellant can tell with reasonable certainty what the breach is and what he has to do to remedy this. The Notice is not fundamentally defective and I do not find it to be a nullity.

Ground (b)

7. An appeal made under ground (b) is that the matters alleged in the Notice have not happened. Given the Council's position with respect to the extension, this ground of appeal only relates to the alleged material change of use (mcu). The onus lies with the Appellant to make his case on the balance of probability.
8. The main issue is whether the Council's assertion that 650 North Circular Road (No 650) had a mixed use of flats and HMO is correct. The Appellant's case is that it has solely been used as a HMO. The Town and Country Planning (Use Classes) Order 1987, as amended, ('UCO') 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.
9. Although I have not been given full details of planning permission 20/0925, I am told that, amongst other things, it allowed for the use of the premises as a 5 room HMO for 5 individuals. At my site visit, I saw that the property had 6 letting rooms across its two floors and that, on the ground floor, there was a communal kitchen.
10. The Appellant's position is that there have been no flats within the property, and that it has been used solely as a HMO.
11. Case law³ has established that different forms of residential use can be materially different from one another. The Council claims that the use of No 650 includes "micro flats", which it describes as "a relatively recent phenomenon" that "blur the lines between HMOs and flats". The Council cites *Westminster CC v SoSCLG* [2015] EWCA Civil 482 in support of its description

¹ Council Reference 20/0925

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

³ *Birmingham Corporation v Habib Ullah* [1964] 1 QB 178; *ZZZ Inc v FSoS & Anor* [2003] QBD Administrative Court; *Lipson v SSE* [1977] 33 P&CR 95

of the use of the property in the Notice's allegation. At this stage of my decision letter, I shall use the neutral terms 'units' or 'rooms' to describe the accommodation within the property.

12. Assessing whether what is alleged in the Notice has occurred is a matter of fact and degree. Appeal decision, reference APP/U5360/C/19/3241370 and associated judgement, *Brent London Borough Council v (1) Secretary of State for Housing, Communities & Local Government (2) Chaim Reiner* [2020] EWHC 3620 (Admin), reaffirmed that there is a need to consider not just physical attributes but also evidence of use.
13. In support of its position, the Council cites several appeal decisions in Appendix 12⁴ to its statement in this respect. What is apparent from these decisions, and those referred to by the Appellant, is how each was reached after an assessment of the cases' individual merits on a fact and degree basis, in the manner of *Brent*.
14. The Council sets out that there is fluidity in the use of the units in the property and alleges that at least 2⁵ of the units have contained 'the facilities required for day-to-day domestic existence'⁶ and were used as self-contained flats. Later in its statement⁷, it states that a site visit on 26 November 2019 found "at least one flat", with the other units reliant on the communal accommodation with "varying levels of self-containment".
15. I was not provided with a copy of the notes of the Council's investigation into the alleged breach. However, the Appellant provided what he says is the text of these notes in his Statement of Case (SoC). As the Council does not challenge this in its Final Comments, I take it to be the case. It is not clear from these how the Council reached the conclusion that there had been at least 2 flats in the property, as they show that only 2 units were entered and, of these, one had no facilities to allow for any sort of cooking.
16. Photographs of parts of the property were submitted as Appendix 7 of the Council's statement, and are dated to the 26 November 2019 site visit. The kitchen shown in one appears to be the communal kitchen that I saw at my site visit. I am not sure which unit the pictures of the shower and small kitchen area were taken within, but the photographs of the Temporary Accommodation Agreement, which have the same date, from Barnet Homes relate to 'Flat 1'.
17. When I visited the property, all but one of the rooms were in residential use; Room 1 had a bed in it but was unoccupied at that time. Each room had a lockable door, and had a bed, together with a small kitchenette, consisting of a sink, fridge and cupboards above and below a work surface, similar to that in the Council's photograph. Some rooms had microwaves and toasters. The amount and type of furniture varied from room to room, with small tables, chairs, and storage cupboards and wardrobes being present. Each room had an en-suite shower and wc.
18. A communal kitchen was located on the ground floor. This was well-equipped, with two hobs with ovens, fridge-freezer, washing machine, two sink units, and

⁴ APP/T5150/C/15/3137960, APP/N5090/C/17/3190564, APP/N5090/C/18/3204349, APP/T5150/X/15/3138588, APP/T5150/C/15/3138227, APP/T5150/C/17/3176717, APP/T5150/C/16/3155655, APP/T5150/C/17/3183003, APP/T5150/C/18/3219015, APP/E5330/X/12/2189661 and APP/T5150/C/20/3244766

⁵ Council Statement of Case - paragraph 3.5

⁶ See *Gravesham BC v SSE and Anor* [1984] 47 P. & C.R. 142

⁷ Council Statement of Case - paragraph 3.8

- wall and low-level cupboards. This room, from what I saw and from the Council's photograph, was clean, tidy and well-suited to its communal purpose.
19. The Council's comment that the Appellant "may have recently rearranged the accommodation as an HMO" is neither explained, nor substantiated.
 20. The Appellant has submitted three statutory declarations in support of his case. The first is made by EAB, a Director of Freshview Estates (FE). It should be noted that I have used the initials of the declarations' authors, to maintain their privacy. He previously worked for London Rental and Sales (LRS) a company managing properties in the London area. In 2016, LRS was instructed as managing agents for the property, shortly after the works to convert it to a 6-room HMO with communal kitchen had been undertaken. The first tenants moved in in July 2016.
 21. He moved to FE in September 2016. It took over the management of the property in May 2018, at which time the layout of the property was the same as under LRS. The declaration states that from the outset tenants were not provided with cooking facilities in their rooms, nor were they allowed to cook there and this was a rule that was strictly controlled during his time with LRS. During his time with FE, some tenants have had small microwaves in their rooms to warm up pre-cooked food, but the strict 'no cooking' rule was still in place. All cooking was done in the communal kitchen.
 22. A statutory declaration was submitted by KN. He moved into Room 6 on 3 November 2017 and lived there at the date he signed the declaration, 3 March 2020. He says that there were 6 rooms when he moved in, each being "a bedroom with a fridge and on-suite [sic] bathroom". He states that there were no cooking facilities in the rooms, though some had microwaves for heating up food. It would be impossible, it says, for these to be used for day-to-day cooking. He states that no cooking was ever carried out in the individual rooms, with the managing agent making it clear that this should only be carried out in the communal kitchen, and that all 6 tenants only cook there.
 23. The third declaration is signed by MTT, who moved into Room 5 on 1 April 2019. He says much the same as KN.
 24. I find that these declarations provide a precise and unambiguous record of how the property has been managed and how two of its residents have lived there. Notwithstanding that KN and MTT do not say that they could be sure that no cooking was ever carried out in other rooms, it seems most likely that they would have seen other tenants using the communal kitchen. I give these declarations significant weight in my deliberations.
 25. That a room might have basic amenities does not necessarily equate with the day-to-day facilities test in *Gravesham*, which is concerned with what would reasonably be required in a dwelling. I do not agree that just because a microwave is introduced into a room, it changes to a self-contained flat. The kitchen areas in the rooms were small and would only allow for a minor amount of food preparation. There was limited storage space in the rooms, and I saw that the worktops and tables in rooms were used for storage – some kitchen-related, some not. Overall, as a matter of fact and degree, I consider that the rooms were not suited for day-to-day use in the *Gravesham* sense.

26. Energy Performance Certificates (EPC) were issued in July 2016 for the units in the property. I note that the 'Property Type' for each is given as a 'flat'. The Council informs me that the regulations under which EPCs are issued differentiates between self-contained and shared accommodation. However, I was not provided with a copy of those regulations. Notwithstanding this, that the EPCs refer to flats cannot of itself be determinative of the units' uses. The task of an EPC assessor is to determine energy performance, not whether the units are flats or HMOs for planning purposes. I note that some Inspectors have found differently, such as in the decision in APP/T5150/C/20/3244766. However, other Inspectors have reached the same finding as I do. This is a matter of judgement and I base my finding on the information before me.
27. I note that Council Tax records refer to 6 flats in the property since 13 July 2016. Furthermore, the Council refer to "at least two tenants" having received housing benefits for flats, though I can only see that for 'Flat 6' made by FE in 2017. In this, the accommodation was described as being a 'self-contained studio flat'. The Council says that the sum that was claimed was precisely that which was allowed for a 1 bedroom self-contained unit in this location. Be that as it may, it cannot be determined from this that this is how the property was used. Overall, my view is that the word 'flat' has been used in these documents as a general term to describe the units of accommodation. It has not been given as a lawful definition in planning terms, and cannot be held to be determinative of the actual use of the units.
28. Furthermore, were I to accept that this evidence provided evidence of each unit being a flat, in particular the EPC and Council Tax records as they refer to all units, it would have to be the case that all of the units in the property were flats. This would be at odds with what the Council alleges in the Notice. As such, this documentation does little to help me determine whether or not the breach, as alleged, has occurred in this case.

Conclusion

29. Having considered the evidence, and for the reasons set out above, I conclude that the use of No 650 has not changed to a HMO and flats, as alleged in the Notice. I find that the property has been in use as a HMO and that the breach of planning control alleged in the Notice has not occurred. Therefore, the appeal succeeds on Ground (b) and I shall quash the Notice. Therefore, the appeals on the remaining grounds no longer fall to be considered.

Roy Curnow

Inspector