



Appeal Decision

Site visit made on 19 April 2022

by **D Fleming BA (Hons) MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 22 June 2022

Appeal Ref: APP/P5870/C/20/3248071

Flat 56, Hazelwood House, 4 Brunswick Road, Sutton, Surrey SM1 4DQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr John Skene against an enforcement notice issued by London Borough of Sutton.
 - The notice was issued on 30 January 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the making of a material change of use of the property into multiple self-contained flats.
 - The requirements of the notice are to:
 - (i) Cease the use of the property as multiple self-contained flats.
 - (ii) Remove all but one set of kitchen facilities from the property, including kitchen units, cooking facilities, sinks and worktops.
 - (iii) Remove all but two sets of bathroom facilities from the property, including toilets, baths, basins and showers.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f), (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
-

Decision

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

Preliminary Matter

2. The Council's case, in part, relies on the test for a dwellinghouse set out in *Gravesham*¹. The appellant commented that this case was 37 years old. Both parties were therefore asked for their views on a more recent case, *Brent LBC*², prior to the determination of the appeal. I have taken these views into account in making my decision.

Background

3. The appeal relates to a large ground floor property within a five storey block of flats and maisonettes. The entrance to the property is via a porch in which there is a WC. From the entrance there is a single corridor providing access to eight rooms. I saw that five of the rooms are each fitted with a shower room (comprising a shower, WC and basin), a kitchen area, (which included a plug-in two-ring electric hob, sink, fridge, microwave, kettle, toaster and cupboards) and a bed and other furniture. Two rooms contain a shower room but no cooking facilities and one room is not fitted with either a shower/WC/basin or

¹ *Gravesham BC v SSE & O'Brien* [1982] 47 P&CR; 1983 JPL 307

² *LBC Brent v SSHCLG & C Reiner* [2020] EWHC 3620 (Admin)

any cooking facilities and appears to be used for storage. There is also a windowless room accessed from the corridor fitted with two washing machines and a basin.

The appeal on ground (b)

4. In appealing on ground (b) the burden of proof is firmly on the appellant to demonstrate that the matters stated in the notice relating to the material change of use of the property to multiple self-contained flats has not occurred as a matter of fact.

Whether there are multiple self-contained flats

5. The appellant states that the property is used as a Class C4 House in Multiple Occupation (known as a small HMO)³ with up to six occupiers and, on occasion, short term visitors. It remains as one planning unit in his ownership. Prior to this use, the property appears to have been used by one household as a single self-contained flat.
6. The Council submit that the former large flat, a single dwelling, was laid out as 7 smaller flats prior to the issue of the notice. The appellant disagrees and states there are 8 rooms but the property is only occupied by 6 people at a time. In addition, one room "lacks all three facilities" and one unit "lacks cooking facilities". He states it is useful when someone is going to leave, to be able to show a prospective tenant an unoccupied room and a spare room is also useful for short term visitors who do not count as residents according to planning or HMO law. He also states no one occupies the spare room on a permanent basis. In my view, it is not clear how they could if there are no cooking facilities and no other separate cooking facilities for them to use on a shared basis. They could be used in the manner of a hotel room but the appellant's contentions are less than clear without any substantiated evidence on this point.
7. The allegation in the notice refers to multiple rooms. At some point, prior to the issue of the notice, it appears that cooking facilities were removed from some of the rooms but this does not affect the wording of the allegation.
8. Be that as it may, the Council's view is that there are multiple self-contained flats with all the facilities for day to day living, such as cooking facilities and a toilet, basin and shower in each unit, behind a locked door (The *Gravesham* test). As such, there is no reliance on any shared basic amenities for habitation purposes, notwithstanding the provision of the shared laundry and entrance toilet. It is also the case that the remaining non self-contained room(s) are not useable as shared accommodation as shared cooking facilities were not in place prior to the issue of the notice.
9. The recent *Brent LBC* case upheld the Inspector's decision in that case that some of the accommodation was not self-contained as alleged. This is because the cooking facilities did not equate to facilities required for day to day private existence envisaged by reasonable people to satisfy the planning test

³ The Town and Country Planning (Use Classes) Order 1987 as amended, **Use Class C4. Houses in multiple occupation.** Use of a dwellinghouse by not more than six residents as a "house in multiple occupation". **Interpretation of Class C4:** 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.

(*Gravesham*) for a dwelling. In the current appeal the appellant states “no sane person would consider the rooms in Flat 56 to be self-contained flats.”

10. The layout of the appeal site comprises rooms varying in size between 8.8sqm and 15.5sqm. Regardless of size, they all have the same fittings, which means that in some rooms there is very little space between the bed and the cooking area. The rooms also all have the same cooking facilities, namely a small portable hob, a microwave and a toaster. I agree with my fellow Inspectors mentioned in the *Brent LBC* case that the cooking facilities provided by the appellant are basic and only adequate for occasional use or to enable people to survive. They are not sufficient, in my view, to lead a reasonable person to conclude that the rooms are self-contained flats. Indeed, the appellant agrees with this point.
11. The appellant describes the level of his accommodation as “well equipped rooms for single people who cannot afford larger living space”. That may be the case but, in my view, they are not self-contained flats, having regard to the size of the rooms and the basic cooking facilities. They are another example of the confusion that has arisen with the *Gravesham* test of “facilities required for day to day private existence” and “basic amenities” as set out in the Housing Act 2004 Act (the 2004 Act). This problem of whether a building is in use as flats due to the provision of basic portable cooking facilities or as an HMO was recognised by the Inspector in the *Brent LBC* case.

Whether the property is used as an HMO

12. The appellant’s reasoning for HMO use is that the tenants make use of a shared laundry area and there is a shared toilet at the entrance to the property. The use of the property in his view is therefore an HMO as it complies with the definition of an HMO in the 2004 Act, which refers to two or more households sharing one or more basic amenities.
13. In addition, he submits that the occupiers of the property share other items. These are: gas and electric systems; water and waste systems; a boiler; broadband; smoke, heat and carbon monoxide systems; and front and rear gardens. He submits that these are not the characteristics of self-contained flats but are usual in HMOs. I find that this is not the case though as these items can also be found in buildings laid out and used as self-contained student flats or flats for elderly people for example, where there are often shared facilities.
14. I will now turn to the definition of an HMO. The Town and Country Planning (Use Classes) Order 1987 as amended (The Use Classes Order) provides an interpretation of Class C4 and states it has the same meaning as in section 254 of the 2004 Act. This states for the purposes of the 2004 Act a building or part of a building is an HMO if it meets various tests.
15. The appellant states that the use of the property meets “the self-contained flat test” set out in s254(3) of the 2004 Act:

“(3) A part of a building meets the self-contained flat test if –

 - (a) It consists of a self-contained flat and
 - (b) paragraphs (b) to (f) of subsection (2) apply.”

The Ministry of Housing, Communities and Local Government publication "Houses in multiple occupation and residential property licensing reform - Guidance for Local Housing Authorities"⁴ (The MHCLG Guidance) is non-statutory guidance produced to assist with understanding the 2004 Act and other legislation. It states at page 9, paragraph b) that,

"a flat meets the self-contained flat test if the individual flat is occupied by five or more people forming more than one household and the flat lacks a basic amenity or more than one household shares a basic amenity (all of which are in the flat) e.g., a bathroom, toilet or cooking facilities."

16. However, paragraph (3)(a) is not satisfied in that the property is not laid out as one flat anymore but as multiple rooms containing some facilities, such as a bathroom, for day to day living behind a locked door. Contrary to the appellant's view on the size of the rooms or his intentions in carrying out the development, the layout of the rooms results in a *sui generis* form of residential accommodation.

17. Page 1 of the appellant's Final Comments includes two quotes from the "Official Guidance". I have found the first at the bottom of page 8 of The MHCLG Guidance but the source for the second quote is not clear. If this is a reference to "the converted building test" (s254(4) of the 2004 Act) then the required criteria to be met for this test are set out in paragraphs s254(4)(a) to (f) of the 2004 Act. I need only quote the first two:

"(4) A building or part of a building meets the converted building test if –

(a) it is a converted building;

(b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats)".

18. I find that the first requirement is satisfied as the appeal site is a converted building but the second requirement is not satisfied. This is because the building, namely the converted flat the subject of the appeal, does not contain one or more units of living accommodation that do not consist of a self-contained flat or flats. Other than the en-suite rooms, there is no other living accommodation as there is no shared kitchen. "The converted building test" is therefore not satisfied.

19. The appellant also refers to "the standard test" as this has to be met to satisfy "the self-contained flat test". A building or part of a building meets "the standard test" if it complies with a list of criteria including:

"Section 254(2)(f) 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." (My emphasis)

20. As the appellant has provided a shared toilet and laundry, he states he complies with section 254(2)(f). He considers a laundry is a basic amenity. Section 254(8), which contains a closed list, states "basic amenities" means "(a) a toilet, (b) personal washing facilities, or (c) cooking facilities". There is no further interpretation of the meaning of these amenities but the appellant

⁴ Published 2018

interprets “personal washing facilities” as a laundry. This is on the basis that personal is of, or pertaining to, a particular person, private things, or matters, and washing means to clean with water.

21. I find the appellant’s definition suits what he has provided at the property. However, for most people “personal washing facilities” has a more obvious meaning, namely some sort of fitting, such as a bath, shower or basin, that enables a person to wash themselves.
22. When interpreting legislation, it is also important to look at context as well as looking at the ordinary meaning of words. In the context of the 2004 Act, which, in part, seeks to improve housing conditions, a basic amenity is a fundamental fitting or fixture such as a water supply or windows for ventilation and natural light. “Personal washing facilities” may not be defined but the phrase is listed after “toilet” and before “cooking facilities” in s254(8). In that context, I consider those drafting the legislation meant something equally basic for the purposes of habitation, namely some sort of facility for ablutions, not a laundry.
23. The appellant also relies on the provision of a shared toilet to support his case. However, each of the occupiers has their own toilet. The MHCLG Guidance states at paragraph 2.3 that:

“A building meets the standard test if it is a building in which more than one household has living accommodation (other than self-contained flats) and:

 - *at least two households share a basic amenity...*

The degree of sharing is not relevant and there is no requirement that all the households share those amenities.”
24. This means to satisfy “the standard test” there need to be at least two households with living accommodation, which is not a self-contained flat, sharing a basic amenity. I believe the appellant misinterprets the legislation and guidance as all his households occupy en-suite rooms. The shared entrance toilet is a facility that perhaps enhances the building but just because it is a toilet that can be shared does not make it a basic amenity for use by a household with living accommodation, as described in the 2004 Act and the MHCLG Guidance.
25. The appellant also misinterprets other information he has before him. He refers to standards for room sizes for flats and HMOs but failing or meeting those standards does not define, as the appellant asserts, the use of the property for the purposes of planning control.
26. For example, use as a dwellinghouse is set out in the Use Classes Order (Class C3) and includes use by not more than six residents living together as a single household where no care is provided to residents. A flat is not defined in the 1990 Act but for the purposes of The Town and Country Planning (General Permitted Development)(England) Order 2015, a flat is a separate and self-contained set of premises constructed or adapted for use for the purposes of a dwelling and forming part of a building from some other part, of which it is divided horizontally. There is no reference to size in either case, the main point is that it is a self-contained dwelling.

27. Similarly, a dwellinghouse is not defined in statute. The test as to whether a building is a dwellinghouse is derived from case law, which requires the consideration of the character of the building, the facilities provided and the nature of the use. Size is not a consideration. The Council are of the view that because there are no shared cooking facilities the allegation is correct, on the basis that in *Brent LBC* the occupiers of the alleged flats had access to a shared kitchen used by the occupiers of the non self-contained rooms. However, that misses the point of the *Brent LBC* case, which is the finding that the alleged flats failed the *Gravesham* test. The alleged self-contained rooms were not flats due to their limited cooking facilities and their size.
28. The allegation before the *Brent LBC* Inspector was a mixed use as self-contained flats and HMO use. After the Inspector concluded some of the rooms were not flats, he then went on to consider whether the whole of the property was in HMO use. He found it was as there were two shared kitchens, each with a four ring hob and a large oven within the building. That is not the case with the appeal before me.

My finding

29. Having regard to all these points, I find that the alleged breach of planning control has not occurred as a matter of fact. The property is used as *sui generis* residential accommodation and is not used in the manner of a small HMO as set out in Class C4 of the Use Classes Order and as defined in the 2004 Act. The appeal on ground (b) therefore succeeds but not for the reasons put forward by the appellant.
30. It is open to me to correct the notice provided there would be no injustice caused to the parties. As the appellant's case in the ground (c) appeal is predicated on the alleged use being permitted development and the use that has occurred is materially different from the alleged use, there would be injustice caused to the appellant. It is therefore necessary to quash the notice.

Conclusion

31. 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 (c), (f) and (g) do not fall to be considered.

D Fleming

INSPECTOR