
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: 13 July 2022

Appeal Ref: APP/T5150/C/20/3245608

645 and Flats 1-5, 645A North Circular Road, London NW2 7AY

- 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 Chaim Reiner against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice, numbered E/14/1040, 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; and 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), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected by: omitting reference to "and its occupation by more than ONE household" in Step 1, and the entirety of Step 2 and Step 3, from Schedule 4 of the Notice. Subject to the correction, the appeal is allowed and the enforcement notice is quashed.

Application for costs

2. Applications for costs were made by Mr Chaim Reiner against the Council of the London Borough of Brent (the Council) and by the Council against Mr Chaim Reiner. These applications are the subject of a separate Decision.

Reasons

Site description

3. Numbers 645 and 645A North Circular Road are located in a mid-terrace building set close to that road. Save for one, each property in the terrace has a similar appearance when viewed from the road. They had what appeared to be a commercial unit at the ground floor with what appeared to be two floors of residential accommodation above.

4. At my site visit, I saw that Nos 645 and 645A had separate and independent means of access. No 645 is accessed via a door from the footway on the North Circular Road, whilst the access to No 645A is via a door at the rear.
5. Whilst the shopfront is still in-situ in No 645, the shop no longer trades. I saw three rooms at ground floor level, one of which, Room 1, was behind the former shop window. This and Room 2 had en-suite toilet and shower facilities. Within the rooms were a bed, a small kitchen-type unit with a sink and worktop over a cupboard, a small fridge and a small amount of furniture.
6. Room 3 had an en-suite facility in it, but was fitted out and used as a kitchen; having, amongst other things, a worktop, a small cooker, a microwave, a washing machine and a fridge.
7. Stairs led down to a basement, where building works were being undertaken. Here I saw the remnants of a kitchen and what appeared to have been a bathroom.
8. A door from the rear yard area gave access to a flight of stairs leading to the first and second floors, which constituted No 645A. On the first floor, I saw three rooms with facilities like those in the rooms in No 645, together with a further two, similarly equipped, on the second floor. A kitchen on the second floor had a table, washing machine, cooker, fridge, cupboards with worktops and a microwave.
9. At the time of my visit, one could not move between the accommodation in Nos 645 and 645A, without exiting the building and walking around it to the door on its other side.

Whether the Notice is a Nullity or Invalid

10. I wrote to the parties expressing reservations regarding the validity of the Notice, enquiring whether the Council might withdraw it, and inviting comments on the matter. Both made 'Responses' to this correspondence and they have been taken into account in my decision.
11. The Appellant claims that the property was originally set out as two separate units and this continues to be the case. One was retail, set over the ground floor and basement; this was accessed from the North Circular Road. The other two floors were in residential use and accessed from the rear.
12. The Council's position is that the whole of the property is a single planning unit.
13. Turning to the building's planning history, I set this out based on the information I have been given. Neither party has, it seems, given me a comprehensive history of the property, some of the applications are referred to by both parties and others not. However, where a case has been referred to by just one party, as the other has not challenged it I take it to be the case. In this, I shall state whether the application related to No 645, No 645A or both.
14. In June 1986, planning permission was granted, (Council reference 85/1158), for, amongst other things, the erection of extensions and the conversion of the first and second floors to 2 self-contained flats. An application for similar development was approved in August 1991, (Council reference 91/1048). What was termed an application for the renewal of 91/1048, which had expired,

- (Council reference 96/1429), was approved in October 1996. That 1996 permission was itself renewed in January 2001, (Council reference 01/2287).
15. The Appellant says that these permissions were not implemented. The Council does not argue otherwise. From the evidence of what I saw at my site visit and what is shown on the approved drawings, set out in the Council's Appendices 4-6, I find that on the balance of probability this is the case.
 16. The site address for the first two of these applications was given as 645, whilst the third was for Nos 645 and 645A and the fourth just No 645. The drawings for all of the applications are dated May 1985 and they are entitled 645 North Circular Road. The existing floor plans show that the building was physically divided. Its ground floor is shown as being in use as a shop with accesses from the front and the rear. A separate door at the rear gave access to a 3-bedroom maisonette on the first and second floors. There was no link between the two.
 17. A certificate of lawfulness for the proposed use of first and second floor maisonette as a house in multiple occupancy was issued in January 2015 (Council reference 14/4513). The site address was No 645A. The drawings show the same physical division as those dating from 1985.
 18. Whilst not part of the planning history, a Valuation and Mortgage Valuation Report¹ dated 6 June 2014 is relevant here. It was produced for the Appellant and refers to No 645, though it describes both elements of the building. The report makes reference to a Ground Floor Shop and an Upper Residential Maisonette, accessed via a rear door. Each of these elements are described. There is no reference to any internal connection between the two and, on the balance of probability, I find that this indicates that they were separate at the time of the report.
 19. In January 2015, an application was made for a certificate of lawfulness for internal works to form shower rooms and a common kitchen. Following unsuccessful attempts to obtain further information from the applicant, the Council did not validate this application. Copies of the property's existing floor plans show that the two elements were not internally linked at that time.
 20. Prior approval for the change of use of the ground floor from retail (Use Class A1) to residential (Use Class C3) involving the creation of 1 x 1 bed self-contained flat in March 2015, (Council reference 15/0220). This related to No 645. The decision did not have any drawings relating to the first and second floors, but the drawings clearly show that the elements were not linked.
 21. In September 2020, an application for, amongst other things, the amalgamation of the property to form a 7-room HMO and associated works was refused, (Council reference 20/2125). Both the 'Pre-Existing' and 'Existing' drawings show the two elements to be separated, with no internal link.
 22. The Council states that the floors across the building have been arranged in various combinations, ranging from combined internal access to all floors to separate access to each floor. It cites its Appendices 10, 13 and 17 in support of this. These are documents relating to three applications made to the Council, numbered 15/0220, 15/0241 and 20/2125, respectively. These are referred to above and, as I have said, none of the plans that were attached to those

¹ Appellant SoC – Appendix 16

applications give any support to the contention that there was combined internal access to all floors.

23. The Appellant's claim that "the property has only ever been in use as two separate planning units" is not proven beyond 1985. However, the claim as far as then is not inconsistent with his evidence in paragraphs 64 and 65 of his SoC nor the Council's Appendices 4,5, 6 and 13. The first three of those Appendices relate to proposals to convert the building, not that it had already been converted. Those proposals were not implemented and the separation of the two elements remained. The Council has not identified how the permission (15/0220) to convert the shop to a residential unit, which is the subject of the latter Appendix, is inconsistent with the Appellant's claim. I do not find it to be so.
24. The Appellant's Appendix 15 does not provide evidence to support his claim that the development in 15/0220 actually occurred. This is an application under the Building Regulations for 'Refurbishments, converting shop into dwelling'. Under 'Important Dates', the answers to the 'questions' regarding commencement and completion of the works are all "Not available".
25. However, a statutory declaration provided by AG, I use initials to protect their privacy, states that "During 2015, the ground floor shop was converted to a one bedroom flat". In the absence of evidence to the contrary, I give this substantial weight in my deliberations, and on the balance of probability I find that the works were undertaken. AG has worked for the company that manages Nos 645 and 645A since late 2014 and is able to demonstrate knowledge of it.
26. The Appellant does not say that he amalgamated the basement and ground floors in this work, as suggested by the Council. Had this been the case, it might indicate that the two were independent units previously. However, the two were linked by stairs and the evidence does not support that contention.
27. The statutory declaration goes on to say that No 645 was converted to a HMO in 2017, which included the re-positioning of the stairs between the ground and basement levels. This accords with the Council's photographs in its Appendix 21. Due to flooding, the Appellant and AG say that only two rooms were ever let. This did not change the situation regarding the number of units in the building.
28. The Council's submission that minor works to 'reinstate' an internal doorway between the ground and first floors would return the building to one unit is immaterial. There is no evidence of there having been such a door, certainly not since 1985.
29. Also of importance to this issue is AG's statement that the two were separate units and always were as such – by which I take it to mean since his involvement with the building. This reinforces the evidence before me that points, on the balance of probability, to the building having been divided into two separate planning units since May 1985, at least. This was quite possibly the case before that date, but it has not been evidenced.
30. Taking the principles established in *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207 into account, I find that the evidence clearly shows that

Nos 645 and 645A North Circular Road are separate planning units. This has been shown to be the case since 1985.

31. In reaching this position, I have taken into account, and accept, the reasons given by the Appellant as to why some housing records refer to No 645A as No 645, and how this was addressed through a request to the Council to amend its records.
32. This finding clearly has ramifications for the requirements set out in the Notice. The Council withdrew Steps 2 and 3, pursuing only Step 1. This includes the requirement to "Cease...its occupation by more than ONE household".
33. As part of its Response, the Council cited a number of court judgements that I have taken into account. Of these, those setting out that a Notice may address more than one planning unit and that an Inspector has a duty to get a Notice in order, if possible, are relevant at this juncture.
34. Thus, even though I have found there to be two units, the Council's action in serving the Notice on the whole building is not necessarily fatal. Following the duty to get the Notice in order, a simple correction to omit reference to ceasing the building's occupation by more than one household would overcome the problems that the Appellant identifies in respect of complying with the Notice. This change would not cause injustice to either party.
35. Therefore, the Notice is neither a nullity nor is it invalid. Having reached this finding, I shall proceed to address the merits of the various appeals that have been lodged.

Ground (b)

36. An appeal made under ground (b) is that the matters alleged in the Notice have not happened. The onus lies with the Appellant to make his case on the balance of probability.
37. Given my findings on the validity of the Notice, The main issue is whether the Council's assertion that either or both No 645 or No 645A North Circular Road had a mixed use of flats and HMO is correct. The Appellant's case is to some extent put forward in the alternative, and depends on whether I find that the facilities within the rooms create self-contained flats. The point he makes is that whatever my finding on this, there was no mixed use. The situation would have been, he says, that the units were wholly in use as flats or wholly in use as HMOs.
38. What might be termed his preferred position is that the two units were used as HMOs at the time that the Notice was issued. 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.
39. Case law² has established that different forms of residential use can be materially different from one another. The Council claims that the use of the building includes "micro flats", which it describes as "a relatively recent phenomenon" that "blur the lines between HMOs and flats". It cites

² *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

Westminster CC v SoSCLG [2015] EWCA Civil 482 in support of its description of the use of the property in the Notice's allegation.

40. 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 the associated court 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.
41. In support of its position, the Council cites several appeal decisions in Appendix 20³ 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.
42. The Council sets out that there is fluidity in the use of the units, claiming that some of the units have contained 'the facilities required for day-to-day domestic existence'⁴ and were used as self-contained flats.
43. 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). The Council does not challenge them in its Final Comments, so I take them to be accurate.
44. The building was first accessed in February 2015, this found "five bedsits with a shared kitchen". Although a suspicion was expressed that they might have been removed for the site visit, no cooking facilities were found.
45. The next time that it is reported that the Council accessed the building was on 3 December 2019. This showed the Council that the building was in two separate elements, as the Officers could not access the ground floor and basement. They accessed No 645A and the report references "two flats, 2 and 3 each with a kitchenette and bathroom. Second floor: 'flats' with kitchenette and bathroom. Communal kitchen".
46. Photographs from the 3 December 2019 site visit were submitted as Appendix 18 to the Council's SoC. Amongst them are three photographs of rooms, though I have not been told which rooms they are. In one of these, a microwave is shown balanced on what appears to be a barrel. There is also a picture of the communal kitchen at 645A.
47. A copy of a completed and returned Planning Contravention Notice has been submitted, which appears to be that served by the Council on 22 May 2019. The questions are, to a degree, leading as it does not ask the respondent how the building is used, but is based on the premise that it is in use as flats. Whether there was an accompanying letter that explained this to the respondent, I have not been told.
48. Notwithstanding this, in answer to the question that asks for the facilities in the flats to be stated, the respondent states that each room has a small kitchenette, toilet and shower and there was a shared kitchen and laundry room. They refer to their being five flats in the building, but states that there

³ APP/T5150/C/15/3137960, APP/N5090/C/17/3190564, APP/N5090/C/18/3204349, APP/A5270/C/18/3193115, 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

⁴ See *Gravesend BC v SSE and Anor* [1984] 47 P. & C.R. 142

was a “change to HMO January 2015”. I take the respondent’s reference to ‘flats’ to merely follow the lead given by the Council’s questions. I do not take this as a statement that these were actually flats, in the lawful sense of the word.

49. The reference to a change in January 2015 accords with AG’s statutory declaration where it states, “In late 2014-early 2015 the upper 2 floors were converted into a 5 room HMO”. AG also states that all of the tenants were made aware that cooking is not allowed in their rooms. As I have said when discussing the validity of the Notice, above, I give this declaration significant weight.
50. 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, as shown in one of the Council’s photographs, it changes to a self-contained flat. The kitchen areas in the rooms were very 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 all manner of storage. 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. In contrast, the communal kitchens that I saw were well-suited and equipped to serve the HMOs in both Nos 645 and 645A.
51. An Energy Performance Certificates (EPC) were issued in May 2019 for Flat 5, described as a ‘Mid-floor flat’. I do not find that the EPC refers to a flat to be of itself be determinative of the unit’s use. 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, this is a matter of judgement and I base my finding on the information before me.
52. I find similarly with applications for housing benefit and the like that describe a room as a flat. Overall, my finding is that the use of ‘flat’ as a descriptive term is used as a general term to describe the accommodation. It has not been given as a definition in terms of planning law and cannot be held to be determinative of that room’s actual use.

Conclusion

53. The onus lies with the Appellant to make his case. Although his first-hand evidence is limited to a single statutory declaration, this was sworn by a person that has good knowledge of Nos 645 and 645A. I find that when this is taken cumulatively with the documentary evidence provided it is precise and unambiguous. The evidence put forward by the Council does not cast sufficient doubt on what he says and, as a matter of fact and degree, I find that the Appellant has made his case on the balance of probability.
54. From the evidence before me, I conclude that the material change of use of the premises to a House in Multiple Occupation (HMO) and flats and the plan attached to the notice are incorrect. The appeal succeeds on ground (b).
55. The enforcement notice will be corrected and quashed. In these circumstances, the appeal on grounds (c), (d), (a) and (f) and the application for planning

permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Roy Curnow

Inspector