



Appeal Decision

Inquiry held on 7 and 9 February 2023

Site visit made on 7 February 2023

by D Boffin BSc (Hons), DipTP, MRTPI, Dip Bldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 14th April 2023

Appeal Ref: APP/A5270/C/21/3287173

12 - 14 Regina Road, London W13 9EF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act). The appeal is made by Regina Properties Limited against an enforcement notice issued by London Borough of Ealing.
 - The notice was issued on 4 October 2021.
 - The breach of planning control as alleged in the notice is:
Without planning permission: the material change of use of the premises to a mixed use as an HMO and self-contained flats.
 - The requirements of the notice are:
 - a. Cease the use of all and any part of the premises as self contained flats;
 - b. Cease the use of all and any part of the premises as an HMO;
 - c. Remove all kitchen and bathroom facilities within the self-contained flats and HMO rooms and all other kitchen and bathroom facilities which facilitate the unlawful change of use;
 - d. Remove all partitions and door locks which facilitate the unlawful change of use;
 - e. Remove all resultant debris from the land.
 - The period for compliance with the requirements is: 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (d) and (g) of the 1990 Act.
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Preliminary Matters and Background

1. The Inquiry commenced on the 7 February 2023 and was programmed to last one day. However, an additional sitting day was required to hear all the evidence, and this was held virtually on 9 February 2023. All of the oral evidence given to the Inquiry was given by sworn affirmation. I undertook an accompanied site visit on the 7 February, and I was able to gain access to most of the rooms. The rooms I could not access were 17, 21, 23 and 25. Both parties agreed that they were satisfied that I had observed sufficient parts of the appeal site to enable me to determine the appeal.
2. The appeal was originally made by Mr Umair Siddiqui of IWAAN Property Management Limited (IPML). There was consensus at the Inquiry that IPML do not have a relevant interest in the appeal premises. However, it is apparent that IPML have acted as managing agents for the owner of the property for some time. An electronically signed email dated 3 February 2023 from a Waleed Abdullah Alburayh (WAA) states that they are a director of Regina Properties Limited (RPL) and that they have granted full authority to IPML to conduct the appeal proceedings on behalf of RPL. A register entry for the directors of RPL indicates that WAA is a director of RPL. Land registry documents show that RPL own the freehold of 12 and 14 Regina Road. A

further email from WAA dated 8 February 2023 indicates that WAA wrote the earlier email in capacity as a director and the company only exists to manage the appeal property. In my judgment, the email correspondence together with the submitted evidence indicates that IPML were acting on behalf of RPL when they made the appeal. As such, it is apparent that the appeal should have been made in the name of RPL and it was an administrative error that the appeal forms were completed in the name of IPML. It is clear that the intention was to appeal on behalf of the owner RPL therefore the name of the appellant in the banner heading above has been amended to RPL.

3. The appeal was originally lodged under grounds (d) and (g). However, The Council highlighted that the substance of the appellant's appeal submissions related to an appeal under ground (b), in so far as they consider that the breach of control alleged in the enforcement notice has not occurred as a matter of fact. Prior to the Inquiry opening the appellant confirmed that a ground (b) appeal was being made. As both parties were aware of this prior to the Inquiry opening, I am satisfied that neither party are prejudiced by the inclusion of this. I have thus determined the appeal on this basis.
4. To ensure that there was clarity with regards to the room numbering I was provided with a copy of the floor plans annotated with the existing room numbers.

The ground (b) appeal

5. To succeed on this ground, the onus is upon the appellant to show on the balance of probabilities that the allegation has not occurred as a matter of fact. Under this ground of appeal, the appellant's primary submission, is that there is no mixed use and the use of the appeal property should be described as a large sui generis House in Multiple Occupation (HMO). To avoid confusion I shall use the neutral term 'rooms' to describe the accommodation within the property. Assessing whether what is alleged in the notice has occurred is a matter of fact and degree.
6. The appeal property consists of 12 and 14 Regina Road which are occupied as one property. There is consensus that the whole property included with the enforcement notice is the relevant planning unit to assess against whether a material change of use has occurred. The property is 3 storeys tall and has been extended to the rear at some time in the 20th Century. There are 21 rooms of accommodation within the building even though the room numbering cites rooms 22, 23, 24 and 25. There are no rooms numbered 9, 10, 19 and 20.
7. There is no dispute that an HMO licence has been issued for the property as it meets the definition of an HMO under the converted building test at section 254 of the Housing Act 2004. Nevertheless, the existence of that licence does not determine whether a material change of use of the property for planning purposes has or has not occurred. Moreover, under the converted building test criteria b) is that '*it contains one or more units of living accommodation that do not consist of a self-contained flat or flats*'. For the purposes of the Housing Act an HMO can therefore include self-contained flat/s. Section 254 of the Housing Act also requires that for a property to be an HMO it must contain two or more households who occupy living accommodation and share one or more basic amenities, or the living accommodation is lacking in one or more basic

amenities. Basic amenities are a toilet, personal washing facilities or cooking facilities.

8. By contrast the judgment of *Gravesham*¹ 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 existence. The *Brent*² judgment confirms the important distinction in the definition of an HMO and the definition of a dwellinghouse established in *Gravesham*. The judgment, 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.
9. 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.
10. The recent *Kabala*³ judgment stated that '*it is possible, at least in principle, for a house to remain in use as a single dwellinghouse falling within the scope of Use Class C4, notwithstanding that it includes a mixture of both self-contained and shared residential accommodation*'. In that case the alleged breach of planning control related to the sub-division of a dwellinghouse to five self-contained flats. Moreover, I acknowledge that the provision and use of communal facilities within a property is one of the considerations as to whether a material change of use of that property has occurred. I have had regard to these judgments in my determination of and approach to this appeal.
11. In support of the Council's contention of the mixed use, it states that when its Officers visited the appeal site in September 2021, those Officers accessed 3 of the rooms of accommodation, that 2 of them contained cooking facilities and that none of the kitchens appeared to be used but one tenant was seen with a pan of hot food and a hob was witnessed as being warm. Nevertheless, the tenant entered a room where there were no cooking facilities. They have also referred to site visit notes that were produced by Officers within its Housing Department which indicated that in November 2021 several rooms of accommodation had cooking facilities within them. It considers that whilst some of the rooms share cooking facilities there are rooms within the property that are 'self-contained flats' in that they afford the facilities for day-to-day private domestic existence.
12. During my visit, I observed that whilst the rooms varied in size and shape, they were all relatively small, each containing an ensuite with a shower cubicle, toilet and sink, and small kitchenette area comprising a fridge, sink and worktop area with cupboards. The design and materials of the worktops/cupboards is similar throughout the building consistent with the appellant's evidence that they were all installed at the same time. The only obvious alterations/additions to the worktops/cupboards that I observed were in Room 1. This room was vacant at the time of my visit and appeared to have

¹ *Gravesham BC v SSE & O'Brien* [1983] JPL 306

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

³ *Welwyn Hatfield Borough Council v SSLUHC & Anor* [2022] EWHC 3175 (Admin)

been recently renovated and the finish/materials of some of the cupboards/worktops in that room was appreciably different to the remaining ones. Some of the kitchenettes also have a built-in oven and hob and some have an extract fan as well. Several rooms have other forms of cooking appliances such as microwaves, portable hobs, slow cookers and air fryers on the worktops. All the rooms appear cramped and contain a bed, other pieces of furniture and various household and personal belongings. In most of the rooms cooking utensils, crockery, cutlery and food stuffs were in or near the kitchenette areas. I also have no reason to believe the layout of the property has changed since the enforcement notice was issued.

13. Four communal rooms are located within the building with one on the ground floor, 2 on the first floor and one on the second floor. The ground floor room contains a conventional hob/oven, sink, washing machine and dryer, fridge/freezer, worktops and cupboards for food preparation and storage. Even though it is quite restrictive in size it was adequate to prepare and cook food in and all the appliances appeared to be well used. There was food residue on the oven surfaces, detergent residue in the washer drawer and the freezer was full of bags of frozen food. There was very little stored in the fridge or the cupboards. The hob was in use with saucepans of food cooking on it.
14. The 2 communal rooms on the first floor are also limited in size and only one of the rooms contains an oven/hob. That room also contains a range of cupboards, a sink and worktop, a fridge freezer, washer and dryer. The oven and hob in that room were in use for cooking food at the time of my visit. Again, the appliances all appeared to be well used. The second communal room contained cupboards, worktop, sink and a washer and dryer – both of which were well used. The fridge and cupboards in both of these rooms had very little stored in them.
15. The communal room on the second floor is also limited in size and contains an oven, hob, washer, fridge and a microwave. It also has cupboards, worktop and a sink. The oven has stickers, from when it was sold, on its door, but it appears to be well used given the evidence of food residue inside it. Some cooking utensils were on top of the microwave.
16. As such, whilst the communal rooms all appeared clean, tidy and unused for the storage of cooking utensils or general foodstuffs (other than frozen), they were nevertheless clearly being used by the tenants for cooking food and washing and drying clothes. In my judgement, due to the number of tenants and the short-term nature of some of their stays the tenants store food stuffs and cooking utensils in each of their rooms to minimise any thefts of their belongings. Furthermore, each of the rooms of accommodation has its own pre-payment meter for electricity which is topped up by the management company on behalf of the tenants. I heard at the Inquiry that at regular intervals a machine is taken around the property for the tenants to put credit onto their meters. The communal rooms are attached to a separate meter. Therefore, the tenants are not directly paying for the electricity used in the communal rooms.
17. I acknowledge that the communal rooms are not generous in size and that it might be difficult for several tenants to use one of them at the same time. Nevertheless, there are three communal rooms with cooking facilities and four with a washing machine in. Moreover, there appears nothing to stop any of the

communal rooms being used by anyone residing within the appeal property and to minimise their expenditure on electricity they are highly likely to cook some of their meals in the communal rooms. I observed that a tenant in Room 18 who has an oven/hob in her room was using the oven/hob in one of the communal rooms to cook food at the time of my visit.

18. 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. It seemed to me that the rooms did not lend themselves to the preparation and cooking of food that creates steam and smell. This is because of the relatively small size of the 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. In addition, the kitchenettes even those with an oven and hob have very limited preparation space. Moreover, clothes washing is limited in the rooms to washing by hand in a sink because there is insufficient space for a washing machine.
19. The occupiers of all the rooms are as a result obliged to rely on the well-equipped communal rooms to provide some of the facilities, they require for day-to-day domestic existence that are lacking in the rooms and cannot be provided there because of the shortage of space. Furthermore, I observed that there are no external doorbells for each room. In my view, all the rooms of accommodation as a matter of fact and degree have been and are used in a similar way to each other. There is no material difference in the way that they are used and on the balance of probability, in this case, the whole property is best described to be in use as an HMO.
20. The Council points out that the responses provided, on behalf of the appellant, within the Planning Contravention Notice issued by it on 11 August 2021 described the use as 21 studio flats in a block of purpose-built flats with each flat having its own kitchen. Nevertheless, that does not indicate that the property was in a mixed use of HMO and self-contained flats as alleged within the notice.
21. I have had regard to the 2 appeal decisions⁴ provided 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 a mixed use of flats and HMO were found to be present, do not therefore bear on the outcome of this appeal. I also accept that uses falling within the general category of "residential" can be materially different.
22. As such, having carefully considered all the evidence before me put forward by both parties, I conclude, on the balance of probabilities, as a matter of fact and degree, the use of the appeal property has not materially changed to a mixed use as an HMO and self-contained flats as alleged in the notice. The breach of planning control has not occurred, and the appeal succeeds on ground (b).
23. Under section 176(1)(a) of the 1990 Act, I have the power to correct, vary or amend the notice provided I am satisfied that there is no injustice caused to either party. I have considered whether the notice could be corrected to allege a material change of use to an HMO. However, I cannot discount the possibility

⁴ APP/A5270/C/20/3255140 & APP/A5270/C/18/3193115

that the appellant would make their appeal on other grounds if the allegation was corrected on that basis. Neither can I discount the possibility that the appellant would seek to re-cast their appeal(s) on grounds already pleaded. Furthermore, I cannot be certain that the Council would consider it expedient to pursue its objection to the development if the allegation was corrected as suggested or, if so, what its case against the development would be. For these reasons, I consider that correcting the notice would cause injustice. I therefore have no option other than to quash the notice.

Conclusion

24. 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 (d) and (g) do not fall to be considered.

D Boffin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Miss Daisy Noble: Counsel instructed by Piers Desser of Ronald Fletcher Baker LLP

She called:

Mr Umair Siddiqui

Mr Umar Mukiibi

Mr Yussuf Mwanza MZA Planning

FOR THE LOCAL PLANNING AUTHORITY:

Mr Roderick Moreton: Solicitor, Ivy Legal instructed by Planning Enforcement Manager, Ealing Council

He called:

Ms Ingrid Smith Planning Enforcement Officer, Ealing Council

DOCUMENTS

Correspondence relating to owner and director

Appeal Decisions - APP/A5270/C/20/3255140 & APP/A5270/C/18/3193115

Floor Plan with annotated room numbers