



Appeal Decision

Site visit made on 13 June 2023

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 July 2023

Appeal Ref: APP/T5150/C/20/3245605

Studio Flats 1-5, 81 Mandela Close, London NW10 8BQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended ("the Act"). The appeal is made by Mr Nathan Beck against an enforcement notice issued by the Council of the London Borough of Brent.
 - The notice, numbered E/15/0117, was issued on 18 December 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, (1) The material change of use of the premises to mixed use as a House in Multiple Occupation (HMO) and flats; and (2) the erection of a single storey extension to the rear of the premises.
 - The requirements of the notice are: (1) Cease the use of the premises as flats and/or a HMO and its occupation by more than one household; (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; (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 (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 after the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Act. 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.

Application for costs

2. An application for costs made by Mr Nathan Beck against the Council of the London Borough of Brent is the subject of a separate Decision.

The notice

3. The Council states the words "and a WC on the ground floor" are included in the list of facilities to remain after compliance with the notice in requirement (4) in error and should be deleted. However, that would make the notice more onerous. Accordingly, and to avoid injustice, I shall not vary it as suggested.

The appeal on ground (b)

4. An appeal on this ground must relate to matters of fact and may succeed if it is shown that the breach of planning control alleged in the notice has not

- occurred or has been incorrectly described. It is not disputed that the single storey extension described in the alleged breach of planning control had been erected on or before the date on which the notice was issued.
5. It is therefore necessary for the appellant to demonstrate that the alleged mixed use had not been instituted on or before the date on which the notice was issued. While Step 1 of the notice's requirements refers to use as "flats and/or a HMO" the description of the breach clearly alleges both had been instituted within the mixed use.
 6. The appellant states the premises were in use entirely as an HMO or, if that is not accepted, entirely as flats instead when the notice was issued. However, the main plank of his argument is that that the alleged mixed use comprising an HMO and flats had not been instituted as a matter of fact.
 7. An application for an HMO licence made in November 2015 described the building as a shared house with 5 tenants, 5 households, 5 lettings and 5 habitable rooms. All rooms were described as "bedroom with shower/bath". A licence issued by the Council in November 2019 described each room as a 1-bedroom self-contained flat. Evidence of how the rooms were described in any licence granted in response to the 2015 application and in the application for the 2019 licence has not been provided.
 8. To determine whether the alleged mixed use had been instituted it will be necessary to identify the actual use of each room. The building comprises 5 letting rooms, 1 - 3 on the ground floor and 4 and 5 at first floor. At the time of my site visit, all 5 rooms comprised living and sleeping areas with a kitchen area, and a separate WC/shower room. A separate kitchen is at first floor level.
 9. The *Gravesham* case¹ confirmed that the distinctive characteristic of a dwellinghouse is its ability to afford the facilities required for day-to-day private domestic existence. An HMO and a self-contained flat may be dwellinghouses in that sense, but a single room within an HMO with shared facilities would not.
 10. The facilities found within a *Gravesham* dwellinghouse may not be the same as those that define an HMO in section 254 of the Housing Act 2004. A significant difference is that the facilities within a *Gravesham* dwellinghouse must be appropriate for normal everyday residential use, not just occasional use. While an individual may be content to get by with only some facilities, perhaps for a short period, *Gravesham* is concerned with the facilities that most people would reasonably consider necessary for use as a dwellinghouse.
 11. If installing something as insubstantial as a microwave or plug-in hob in a room in an HMO would result in that room becoming a dwellinghouse, there would equally be a material change of use every time one was removed. It makes no sense that the presence or absence of an item that may be installed or removed in minutes, according to an occupier's preference, should be determinative of whether a material change of use has occurred.
 12. A tenancy agreement (TA) dated 8 December 2014 described **Room 1** as a dwellinghouse (Flat 1) and did not include any restrictions on cooking within it. TAs dated 2 April 2018 and 25 September 2019 continued to call the room Flat 1 but included clauses prohibiting cooking facilities and cooking within it.

¹ *Gravesham BC v SSE & O'Brien* [1982] 47 P&CR 142; [1983] JPL 307

13. A statutory declaration made by the occupying tenant in April 2021 confirmed that the building was an HMO with 5 rooms, each of which had a refrigerator and an ensuite bathroom, and a communal kitchen. The declaration stated that there were no cooking appliances in the rooms in September 2019 or in April 2021, although the tenant used a microwave in her room to warm food. At the time of my site visit, there was a sink, a refrigerator and a kettle in the room, but no hob, oven or microwave.
14. **Room 2** is described as a dwelling (Flat 2) in a TA dated 27 January 2015, which did not include any restrictions on cooking within the room. Later TAs dated 1 May 2017 and 6 September 2019, the latter some 3 months before the notice was issued, still called the room Flat 2 but included clauses prohibiting cooking facilities and cooking within it. At the time of my site visit, there was a sink, a refrigerator and a kettle in the room, but no hob, oven or microwave.
15. A TA dated 14 January 2015 described **Room 3** as a dwelling-house (Flat 3) and made no restrictions on cooking within it. The tenant's housing benefit (HB) application described the room as a non-self-contained studio flat. Questions about how many rooms the tenant had sole access to and how many were shared with other households were not answered.
16. Later TAs dated 6 March 2017 and 2 September 2019, the latter some 3 months before the notice was issued, still called the room Flat 3 but included clauses prohibiting cooking facilities and cooking within it. The occupying tenant made a statutory declaration in April 2021, stating that all washing of clothes and cooking needed to be carried out in a communal kitchen because the rooms lacked the necessary facilities. The tenant also confirmed that she had bought a microwave and used it in her room to warm food. At the time of my site visit, there was a sink, 2 refrigerators and a microwave in the room but no hob, oven or kettle.
17. **Room 4** is described as a dwelling-house (Flat 4) in a TA dated 8 December 2014. The agreement did not include any restrictions on cooking within the room, neither did the next 2 TAs, dated 26 February and 22 August 2016.
18. Later agreements dated 2 June 2017 and 11 October 2019, the latter some 2 months before the notice was issued, still called the room Flat 4 but included clauses prohibiting cooking facilities and cooking within it. HB applications relating to these tenancies both described the room as a flat in a house. Both applications included a question about how many rooms were shared with other households and in each case the answer was none. The earlier application stated the accommodation comprised a living room, a bedroom, a kitchen, a bathroom and a toilet and the later stated it comprised a bedsit room, a kitchen, a bathroom and a toilet. At the time of my site visit, there was a sink and a refrigerator in the room but no hob, oven, microwave or kettle.
19. A TA dated 8 December 2014 described **Room 5** as a dwelling-house (Flat 5) and did not include any restrictions on cooking within it. Later TAs dated 1 May and 11 December 2017 and 20 September 2019 still called the room Flat 5 but all included clauses prohibiting cooking facilities and cooking within it. The last of these was signed some 3 months before the notice was issued. At the time of my site visit, there was a sink and a refrigerator in the room but no hob, oven, microwave or kettle.

20. The separate kitchen on the first floor contains a sink, a 4-ring hob and oven with hood over, 2 microwaves and a washing machine. Other equipment consistent with use as a kitchen includes a crock pot and a steriliser for babies' bottles on the worktop.
21. Viewed from the perspective of the drafting of the various TAs alone, all 5 rooms could have been used as self-contained dwellings at first. However, from March 2017 onward, clauses within TAs introduced a prohibition on the installation of cooking facilities and cooking of food within all the rooms. Whether those prohibitions were observed or enforced is another matter and the appellant's response to a Planning Contravention Notice (PCN) confirmed that each room had a plug-in hob in June 2019. That was some 6 months before the notice was issued but none were visible at the time of my site visit.
22. Nevertheless, the appeal on ground (b) must turn on whether, on the date the notice was issued, the use of the building was a mixed use comprising an HMO and 1 or more flats, the latter being self-contained. All the appellant has to show, on the balance of probability, is that use as an HMO and use as 1 or more flats did not exist alongside each other in the period running up to and including the date on which the notice was issued.
23. There is some ambiguity in the appellant's evidence concerning the provision and use of cooking facilities. While the separate kitchen appears to have been available for use by all tenants since December 2014, the TAs pre-dating 1 May 2017 include no restriction on cooking within any of the rooms. Nevertheless, the appellant stated, in a letter to the Council in March 2015, that there were no cooking facilities within any rooms. Since 1 May 2017, all TAs for all rooms have included clauses prohibiting the tenant from having and using cooking equipment in the room. However, that is contradicted by the appellant's PCN response, which stated that all rooms had a plug-in hob in June 2019.
24. Despite the changes in the wording of TAs, they, the PCN response and the statutory declarations indicate the same use of all 5 rooms at each point in time. Therefore, while ambiguities may cast doubt on whether the appellant's evidence describes a flat or an HMO at various times, it is consistent in describing the same use of all 5 rooms. It indicates that an HMO and 1 or more flats did not simultaneously exist within the building.
25. In contrast, the Council states the building was found to be in mixed use as flats and an HMO on 3 December 2019, shortly before the notice was issued. No record of what the Council saw or may have been told that day has been presented, although it notes that at least 2 rooms were found to rely on the separate kitchen, consistent with use as an HMO. There is no reference to cooking facilities having been found in any of the rooms. The Council's evidence that any room was not part of the HMO but instead used as a flat is taken from HB applications and payments and some of the TAs.
26. The Council cites 3 HB applications relating to rooms 3 and 4 as evidence of self-contained dwellings and non-self-contained accommodation within the building, illustrating the alleged mixed use. However, the applications were made at different times, over a year apart, and they pre-date the issue of the notice by between 2 and 4 years. Furthermore, there are ambiguities and unanswered questions within the applications, as noted above. Consequently, the HB applications are not precise about how the room in question, or the rest of the building, was being used at that time or when the notice was issued.

27. The introduction of clauses in TAs to prohibit cooking in the rooms appears to have occurred as new tenancies were entered into from March 2017 onward. If the wording of each TA provided a reliable indication of how the room was subsequently used, any period of mixed use would have ended in April 2018, after which all 5 rooms were subject to TAs prohibiting cooking facilities being installed and used within them. Without reasonable facilities for cooking food, the facilities required for day-to-day private domestic existence would not all be present in a room and a dwellinghouse would not exist.
28. When all the foregoing evidence is considered, it is apparent that the appellant has demonstrated consistent use of all 5 rooms, at least from April 2018 onward. There is no evidence of a substantial cooking facility being installed and used in any room, such that all the facilities necessary for day-to-day private domestic existence were within that room. The Council's evidence to the contrary is limited and includes documents that are unclear or pre-date the issue of the notice by some years. While there may have been changes in the terms on which rooms were let and occupied over time, the evidence points to all rooms being occupied and used in the same way since April 2018, some 18 months before the notice was issued.
29. Accordingly, it has been demonstrated, on the balance of probability, that the alleged mixed use as HMO and flats had not been instituted in the period running up to and including the date on which the notice was issued. From the evidence presented, and having regard to the transient and insubstantial nature of any cooking facilities or equipment in the 5 rooms, I consider the building has, in all probability, been used as an HMO since December 2014.
30. The appeal on ground (b) should therefore succeed in respect of the alleged mixed use as HMO and flats.

The appeal on ground (c)

31. To succeed on this ground, the appellant needs to demonstrate that a matter alleged in the notice is not a breach of planning control. This could be because it is not development or does not require planning permission.
32. While the appellant states HMO use is lawful, that is not the mixed use alleged in the notice, and thus outside the scope of this appeal. He contends that the extension was permitted by reason of Class A of Part 1 of Schedule 2 ("Class A") of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ("the Order") at the time it was erected.
33. Article 3 of the Order and Class A grant planning permission for the enlargement, improvement or other alteration of a dwellinghouse, subject to certain limitations. Article 2 of the Order confirms that a dwellinghouse does not include a building containing one or more flats, or a flat contained within such a building. However, other secondary legislation confirms that an HMO with not more than 6 residents, Use Class C4, is use of a dwellinghouse². It is therefore necessary to determine whether the building was in use as a dwellinghouse when the extension was substantially completed.
34. A Final Certificate was issued on 9 March 2015 in respect of "Converting property into HMO's & single storey rear extension." While further details of what was certified have not been provided, the extension I saw accommodates

² Paragraph 4 of Part 3 of Schedule 1 to the Town and Country Planning (Use Classes) Order 1987 (as amended).

most of room 2 and part of room 3, which were first let in January 2015, so I am confident it is the same. TAs had been signed for rooms 1, 4 and 5 in December 2014, so the construction of the extension must have been part of a project to reconfigure the building as 5 letting rooms and a kitchen.

35. I have already found that the building was in use as an HMO when the notice was issued and that, in all probability, that use had begun in December 2014. Accordingly, and on the balance of probability, the extension was constructed when the building constituted a dwellinghouse for the purposes of the Order.
36. However, no evidence has been presented as to whether any of the limitations in paragraph A.1. of the Order applied to the extension when construction began. If any of those limitations applied, the extension would not have been permitted by the Order. Accordingly, and for that reason alone, it has not been demonstrated that the extension did not require an express grant of planning permission and the appeal on ground (c) must fail.

The appeal on ground (d)

37. As it has not been demonstrated that the extension did not require planning permission, it is necessary to consider whether enforcement action could be taken in respect of it. Section 171B(1) of the Act provides that no enforcement action may be taken in respect of any unauthorised operational development after the end of the period of 4 years beginning with the date on which the operations were substantially completed.
38. To succeed on this ground, the appellant needs to demonstrate, on the balance of probability, that the extension was substantially completed on or before 18 December 2015, 4 years before the notice was issued. If that can be shown, and on the understanding that the building was in all probability in use as an HMO, a dwellinghouse, at the time, it will be immune from enforcement action.
39. The Final Certificate issued on 9 March 2015, the TA for room 2 dated 27 January 2015 and the TA for room 3 dated 14 January 2015 demonstrate, on the balance of probability, that the extension was substantially completed more than 4 years before the notice was issued.
40. Accordingly, no enforcement action could be taken in respect of the extension on the date on which the notice was issued. The appeal on ground (d) should therefore succeed to that extent.

Conclusion

41. For the reasons given above, I conclude that the appeal should succeed on grounds (b) and (d). The enforcement notice will be quashed. In these circumstances, the appeals on grounds (a), (f) and (g) and the application for planning permission deemed to have been made under section 177(5) of the Act do not fall to be considered.

Mark Harbottle

INSPECTOR