Neutral Citation Number: [2022] EWHC 2051 (Admin)

Case No: CO/3240/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2022

Before :

ROBERT PALMER QC
sitting as a Deputy Judge of the High Court

- -

Between :

THE LONDON BOROUGH OF BRENT

Appellant

- and –

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) YEHUDA ROTHCHILD

Respondents

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- -

Ashley Bowes (instructed by **Prospect Law Ltd**) for the **Claimant**
George Mackenzie (instructed directly by public access) for the **Second Respondent**

Hearing date: 12 July 2022

- -

APPROVED JUDGMENT

ROBERT PALMER QC sitting as a Deputy Judge of the High Court:

Introduction

1. The Appellant, the London Borough of Brent ("LBB"), appeals under section 289 of the Town and Country Planning Act 1990 ("the 1990 Act") against the decision of an Inspector appointed by the First Respondent ("the Secretary of State") dated 24 August 2021 ("the Decision"). The Decision quashed an enforcement notice issued by LBB as the local planning authority on 11 December 2019, in respect of a terraced house at 51 Nutfield Road, London ("the Property"). The Second Respondent ("Mr Rothchild") is the current owner of the Property.

2. LBB contends that the Inspector erred in law in concluding that a single storey extension to the Property was permitted development within the meaning of the Town and Country (General Permitted Development) (England) Order 2015 (SI 2015/596), referred to below as "the GPDO", or as "the GPDO 2015" where it is necessary to distinguish it from its predecessors.

3. By letters to the Court dated 18 October 2021 and 10 November 2021, the Secretary of State informed the Court that he did not intend to defend the appeal, as he accepted that the Inspector had erred in law in the Decision. He has therefore taken no further part in proceedings. However, Mr Rothchild resists the appeal in full.

4. The main issue between the parties concerns whether the Inspector was right to proceed on the basis that a dwellinghouse in use as a "*house in multiple occupation*" ("HMO") within the meaning of Use Class C4 of the Town and Country Planning (Use Classes) Order 1987 (SI 1986/764) ("the Use Classes Order") is necessarily also a "*dwellinghouse*" within the meaning of the GPDO. Use Class C4 concerns "Use of a dwellinghouse by not more than six residents as [an HMO]". Class A of Part 1 of Schedule 2 of the GPDO grants planning permission for "*the enlargement, improvement or other alteration of a dwellinghouse*", subject to various conditions and limitations.

    i) Dr Ashley Bowes, counsel for LBB, submits that for an HMO to be considered a "dwellinghouse" for the purposes of the GPDO, it is not enough that it fulfil the well-known test in *Gravesham Borough Council v Secretary of State for the Environment* (1984) 47 P&CR 142 that it affords to those who use it the facilities required for day-to-day private domestic existence ("the *Gravesham* test"). It must also be occupied by, or in a manner akin to occupation by, a single household. He submits that the Inspector erred in law in failing to consider whether the Premises met that condition at the time the extension was built.

    ii) Mr George Mackenzie, counsel for Mr Rothchild, submits that it is sufficient that a residential unit fulfil the *Gravesham* test to amount to a "dwellinghouse", and that a dwellinghouse in use as an HMO within the meaning of Use Class C4 must necessarily also be a dwellinghouse attracting permitted development rights as such under the GPDO. He submits that the Inspector was correct to proceed on that basis.

5. There is also a second issue, which concerns whether, if the Premises did enjoy permitted development rights as a dwellinghouse, the Inspector erred in law by failing

to consider whether the extension was in fact built in accordance with information previously provided to LBB, as it was required to be. Dr Bowes submits that the Inspector was bound to investigate this matter, even though LBB raised no such issue before the Inspector, and that he erred in law in failing to do so. Mr Mackenzie submits that the Inspector was not required to consider the issue at all, in the absence of any objection by LBB to that effect.

6. Permission to appeal was granted by Lang J on 7 December 2021.

The statutory framework

The Town and Country Planning Act 1990

7. By section 55(1) of the 1990 Act, "development" is defined to include "building operations", and the making of any "material change in the use" of buildings. "Building operations" are further defined to include "structural alterations of or additions to buildings": section 55(1A).

8. Section 55(2) provides that certain operations or uses of land shall not be taken for the purposes of the Act to involve "development" of the land, including "(f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class."

9. By section 57(1), planning permission is required for the carrying out of any development of land. By section 58(1), planning permission may be granted (amongst other means) by a development order. Section 59 empowers the Secretary of State to make a development order for the granting of planning permission, and provides that such an order may itself grant planning permission for development specified in the order or for development of any class specified.

10. Section 171A(1) provides that for the purposes of the Act, carrying out development without the required planning permission constitutes a breach of planning control. Section 172(1) provides that the local planning authority may issue an enforcement notice where it appears to them that there has been a breach of planning control, and that it is expedient to issue the notice. Section 174(1) provides that a person having an interest in the land to which an enforcement notice relates may appeal to the Secretary of State against the notice. The grounds upon which an appeal may be brought are set out at section 174(2)(a)-(g).

11. Section 289(1) provides for a right of appeal against the Secretary of State's decision on an appeal against an enforcement notice "on a point of law".

The GPDO 2015

12. Pursuant to his power under section 59 of the 1990 Act, the Secretary of State made the GPDO 2015. It provides for the granting of planning permission for certain classes of development. Those classes are set out in Schedule 2.

13. Part 1 of Schedule 2 is concerned with development within the curtilage of a dwellinghouse. "Dwellinghouse" is not defined by the GPDO, other than at Article 2(1) of the GPDO so as to exclude from its scope "a building containing one or more flats, or a flat contained within such a building." A "flat" is then defined to mean "a separate and self-contained set of premises constructed or adapted for use for the purpose of a dwelling and forming part of a building from some other part of which it is divided horizontally."

14. Class A of Part 1 permits "the enlargement, improvement or other alteration of a dwellinghouse", subject to exclusions, conditions and limitations which then follow in paragraphs A.1 to A.4.

15. Small single storey extensions to a dwellinghouse are permitted, provided that they extend beyond the rear wall of the original dwellinghouse by no more than 3 metres (or 4 metres in the case of a detached dwellinghouse), and do not exceed 4 metres in height: see paragraph A.1(f)

16. Paragraph A.1(g) provides that larger single storey extensions to a dwellinghouse may also be permitted, where they extend beyond the rear wall of the original dwellinghouse by no more than 6 metres (or 8 metres in the case of a detached dwellinghouse), and do not exceed 4 metres in height. However, in the case of these larger extensions, the grant of permission is made subject to a system of prior notification and approval, pursuant to the conditions set out in paragraph A.4. In broad summary, those conditions require that:

    i) Before beginning the development the developer must provide to the local planning authority a written description of the proposed development including its dimensions, a plan indicating the site and showing the proposed development, and certain other information: paragraph A.4(2);

    ii) The local planning authority must then notify each adjoining owner or occupier about the proposed development by serving on them a notice which describes the development by setting out the written description provided to the authority by the developer, along with its address and the date by which representations are to be received: paragraph A.4(5);

    iii) Where any owner or occupier of any adjoining premises objects to the proposed development, the prior approval of the local planning authority is required as to the impact of the proposed development on the amenity of any adjoining premises: paragraph A.4(7);

    iv) The development must not begin before either the developer receives from the local planning authority written notice either that their prior approval is not required or that such prior approval has been given, or before 42 days have elapsed since the original information was provided to the local planning authority without the local planning authority notifying the developer as to whether prior approval is given or refused: paragraph A.4(10);

    v) Where prior approval is not required, the development must be carried out in accordance with the information (i.e. the written information and the plan)

provided at the outset, unless the local planning authority and the developer agree otherwise in writing: paragraph A.4(11)(b).

17. Part 3 of Schedule 2 of the GPDO 2015 is concerned with Changes of Use. Class L of Part 3 permits development "consisting of a change of use of a building from a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order, to a use falling within Class C4 (houses in multiple occupation) of that Schedule" and vice versa.

The Town and Country Planning (Use Classes) Order 1987

18. The Use Classes Order was made in exercise of the Secretary of State's powers under the predecessor provision to what is now section 55(2)(f) of the 1990 Act, and has been amended since.

19. In its current form, it defines Classes C3 and C4 as follows:

> **Class C3. Dwellinghouses**
>
> Use as a dwellinghouse (whether or not as a sole or main residence) by—
>
> (a) a single person or by people to be regarded as forming a single household;
>
> (b) not more than six residents living together as a single household where care is provided for residents; or
>
> (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within class C4).
>
> **Interpretation of Class C3**
>
> For the purposes of Class C3(a) "single household" is to be construed in accordance with section 258 of the Housing Act 2004.
>
> **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.

20. The current definition of Class C3 was introduced with effect from 6 April 2010, by way of the Town and Country Planning (Use Classes) (Amendment) (England) Order 2010. Class C4 was newly introduced at the same time, and with effect from the same date. Simultaneously, a new class of permitted development was introduced by way of

amendment to the GPDO 2015's predecessor, the Town and Country Planning Act (General Permitted Development) Order 1995 (SI 1995/418) ("the GPDO 1995"). Class I of the GPDO 1995 granted permission for development consisting of a change of use of a building to a use falling within Class C3 from a use falling within Class C4. It was only with effect from 1 October 2010 that the GPDO 1995 was further amended to permit development consisting of a change to a use falling with Class C4 from a use falling within C3.

21. The Use Classes Order does not provide any definition of "dwellinghouse". As to the definitions of "single household" and "house in multiple occupation" in the Housing Act 2004 to which Use Classes C3 and C4 respectively refer:

i) Section 258(2) of the Housing Act 2004 provides that persons are to be regarded as not forming a single household unless (a) they are all members of the same family, or (b) their circumstances are of a description specified in regulations. No such regulations have been made.

ii) Section 254 of the Housing Act 2004 defines a house in multiple occupation by reference to a number of alternative tests. The "standard test", set out in section 254(2), provides that a building or part of a building meets that test if:

> "(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
>
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it … ;
>
> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
>
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
>
> (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."

(iii) Alternative tests for an HMO apply to self-contained flats (section 258(3), which applies section 258(2)(b)-(f) to self-contained flats), and converted buildings. A converted building is a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed: section 258(8). It will meet the "converted building test" for an HMO if 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), and the same conditions as are set out at section 258(2)(b)-(e): see section 258(4).

The Planning Inspectorate's Guidance Note

22. I was referred by both counsel to a guidance note dated 15 January 2014 produced by the Planning Inspectorate to provide advice to its Inspectors entitled "*Houses in Multiple Occupation (HMOs) and Permitted Development Rights)*". Both accepted that it did not amount to an authoritative source of law. It reads as follows:

    1. *The Town and Country Planning (General Permitted Development) Order 1995 (as amended) (GPDO) Schedule 2 Part 1 Class A grants certain permitted development rights to dwellinghouses.*

    2. *Houses in Multiple Occupation, including those which fall within Class C4 can benefit from the permitted development rights granted to dwellinghouses by the GPDO. Class C4 use is defined as use of a dwellinghouse by not more than six residents as a "house in multiple occupation".*

    3. *The test for whether a property is eligible to use the permitted development right is whether it can be considered a "dwellinghouse" within the context of the GPDO. This will depend on the facts of the case.*

    4. *Case law* [footnote: *Gravesham*] *has established that the distinctive characteristic of a "dwelling house" is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. Whether a building is or is not a dwelling-house is a question of fact.*

    5. *For the purposes of the GPDO a "dwellinghouse" does not include a building containing one or more flats, or a flat contained within such a building.*

<u>The factual background</u>

23. On 1 February 2015, the then owner of the Premises notified LBB of an intention to build a rear single-storey extension pursuant to Class A.1(ea) of Part 1 of Schedule 2 the GPDO 1995. In relevant part, this was in materially identical terms to Class A.1(g) under the GPDO 2015. A determination was sought as to whether prior approval was required for the proposed extension.

24. As required by paragraph A.4 of the GPDO 1995 (again, in materially identical terms to that of the GPDO 2015 in relevant part), the notification provided the relevant dimensions of the extension: it would extend 6 metres beyond the rear wall of the original dwelling, would be 3m tall at its maximum height, and 3m tall at the eaves. This was within the tolerances permitted by Class A.1(ea) of the GPDO 1995 (and subsequently Class A.1(g) of the GPDO 2015). As also required, it was accompanied by plans indicating the site and showing the proposed development. The required dimensions were marked on the plan's illustrations of the development. The plans also indicated the internal layout of the extension: it would be composed of a single dining/family room with bifold doors to the garden on the northern elevation.

25. No adjoining owner or occupier objected to the extension being built. On 17 March 2015, LBB therefore resolved in writing that prior approval was not required for the proposed extension. As all parties accept, that must have been because it accepted that

the property was at that time a dwellinghouse enjoying the claimed permitted development rights under Class A.1(ea) of the GPDO 1995, and the proposal met the relevant criteria. The advent of the GPDO 2015, which came into force on 15 April 2015, did not affect the validity of the prior notification for the purposes of permitted development under the new but materially identical Class A.1(g).

26. In February 2016, a property investment company of which Mr Rothchild is a director purchased the freehold title to the Property. He set about building an extension. He also completed works to render the Property suitable for use as an HMO, by installing bathrooms to form en-suite rooms, and a communal kitchen.

27. On 22 May 2019, LBB served a Planning Contravention Notice ("PCN") on Mr Rothchild. The notice alleged that there had been a breach of planning control, namely "Without planning permission, the change of use of the premises into 6 flats and the erection of a single storey extension." In his response to the PCN dated 13 June 2019:

    i) Mr Rothchild confirmed that the single storey extension had been erected "in order to create a larger HMO", that the works had been completed on 17 May 2016, and that it was 3m high and 6m deep (as previously notified). He was not asked to confirm details of its internal layout or fenestration.

    ii) He explained that the use of the premises was not as flats but as an HMO. In answer to a question as when each of the alleged "flats" had been first occupied, he said that they were first occupied on 20 - 29 June 2016. He said that prior approval had been granted for the rear extension, and that the use was permitted development.

    iii) In response to a request to state the name and address of any person (including former and current tenants) known to him to use or have used the land for any purpose, or to be carrying out, or have carried out, any operations or activities on the land, he listed six names. He did not specify whether they were all current or former tenants, or whether they had carried out operations on the land.

    iv) He stated that prior approval had been granted for the rear extension, and the use was permitted development.

28. On 11 December 2019, LBB issued an enforcement notice. The enforcement notice identified the alleged breach of planning control as follows:

> "Without planning permission, the material change of use of the premises to a House in Multiple Occupation (HMO) and flats ('the unauthorised change of use')
>
> AND
>
> Without planning permission, the erection of a single storey rear extension to the premises ('the unauthorised development')"

29. The enforcement notice required, among other things, the cessation of the alleged unauthorised use and the demolition of the rear extension within 6 months.

30. On 19 January 2020, Mr Rothchild appealed against the enforcement notice under section 174 of the 1990 Act on grounds (a), (b), (c), (f) and (g).

31. The appeal proceeded by way of written representations. LBB produced a written Statement of Case, together with various exhibits, in support of its case. In its Statement of Case, LBB contended that the appeal premises were a single planning unit in mixed use as flats and shared HMO accommodation. It contended that at least two of the six units of accommodation within the house met the *Gravesham* test of containing the facilities required for day to day private domestic existence as such. The remainder of the premises were used as an HMO within the meaning of section 254 of the Housing Act 2004. The extension and other alterations to the property were carried out to facilitate its conversion to flats and a HMO. There was no permitted development right for a change of use from its former use as a single family dwellinghouse to its current mixed use. Nor was there any permitted development right for operational development associated with such use.

32. In response to the ground (c) appeal (i.e. that the matters stated in the notice did not constitute a breach of planning control), LBB argued that there could not be any permitted change of use to the alleged mixed use. In respect of the extension it said as follows at paragraphs 4.13-4.14:

> *"4.13 There is no evidence that the appeal premises were a dwellinghouse, for the purposes of the GPDO, at the time of the extension. Whilst the government has advised its Inspectors that some HMOs may benefit from permitted development, status as a dwellinghouse is a matter of fact and degree. The use the appeal premises has been put and the purpose for which the extension was built is a multiple household, communal facility HMO rather than a single household dwelling offering all the facilities for private day to day domestic existence as described in Gravesham.*
>
> *4.14 The extension was built for the sole purpose of facilitating the unlawful use. It was not built as an extension to a dwellinghouse or to be used as a dwellinghouse within the meaning of the GPDO. It is not permitted development."*

33. Mr Rothchild's written representations were submitted late, and so those representations and any evidence he had in support of his case were not provided to the Inspector, and were not taken into account. Although Mr Rothchild was permitted to respond to LBB's Statement of Case by way of some "Final Comments", it appears that inadvertently these were not placed before the Inspector either. The appeal therefore proceeded on the basis of LBB's written case and evidence alone.

34. On 9 June 2021, the Inspector conducted a site visit. It is said by LBB that on this site visit, he would or should have seen that the rear extension was not (as of that date) laid out as a single dining/family room with bifold doors on the northern elevation, as shown on the original plans attached to the notification. Instead, as at 9 June 2021, it had been split into the narrow communal kitchen on one side with a single door opening to the north into the garden, and a bedroom and ensuite bathroom on the other side with a single window. But no complaint was made about this in LBB's statement of case; nor even was there a description of the current state of the extension or any allegation as to whether or not it had been constructed in this way at the outset, in May 2016. Although

LBB's witness in these proceedings, Nigel Wicks (who is a planning consultant specialising in enforcement of planning control) has produced a plan showing that this was the layout of the extension as at 14 May 2020, neither this plan nor any other to similar effect was put in evidence before the Inspector.

The Inspector's Decision Letter

35. On 24 August 2021, the Inspector allowed Mr Rothchild's appeal and quashed the enforcement notice. In summary:

    i) In respect of the alleged unauthorised change of use, he allowed the appeal under ground (b), namely that the matters said to constitute the breach of planning control had not in fact occurred: he rejected LBB's case that the use of the Property had changed to mixed use as flats and HMO. He found that there were no flats, but only a single HMO falling within Use Class C4.

    ii) In respect of the extension, he allowed the appeal under ground (c), namely that its construction did not constitute a breach of planning control. He found its construction was permitted development under the GPDO.

    iii) It followed that he did not need to go on to consider the appeal on other grounds.

The Inspector's conclusions on the change of use

36. The Inspector's decision to allow the appeal on ground (b) in respect of the alleged change of use is not the subject of the present appeal: LBB's appeal before this court is restricted only to the Inspector's decision to allow the appeal in respect of the extension. It is nonetheless necessary to set out the core of his reasoning in the Decision Letter ("DL") with respect to the alleged change of use. Since these conclusions are not challenged, I can do so briefly. In summary:

    i) The Inspector first explained at DL4-DL5 that he interpreted the alleged unauthorised change of use to an HMO and flats to amount to an allegation of a mixed use of a single planning unit. Specifically, LBB was alleging that at least two flats existed at the time of issue of the notice, and that at least two rooms were in use as part of an HMO, with the potential for the uses of all the rooms to fluctuate between the two.

    ii) The Inspector applied the *Gravesham* test to determine whether or not any of the rooms were in use as a self-contained flat: he asked himself whether the alleged flats afforded those who used them the facilities required for day-to-day private domestic existence: DL13.

    iii) He found that none of the alleged flats met that test. Although each of the rooms had lockable doors, a shower/toilet, a sink and a fridge, none had cooking equipment as permanent fixtures: DL8. The Council had relied on the fact that two of them had microwave ovens, but this was insufficient to meet the *Gravesham* test: DL9, DL14.

    iv) Instead, all residents made use of the communal kitchen on the ground floor of the property, which was available to all of the occupiers of the rooms: DL10-

DL11. Those occupiers who had availed themselves of a microwave oven were not solely dependent upon that equipment to cook food. They had, and always had had, the option of using the communal kitchen to cook a greater range and/or quantity of food: DL15.

v) His critical conclusion was at DL16, which I set out in full (with emphasis added):

> "16. The provision of microwave ovens in the individual rooms occupied by the tenants does not provide the facilities required for day-to-day private domestic existence. The availability and use of the communal kitchen in the appeal property is essential to the existence of a dwellinghouse in *Gravesham* terms. Consequently, irrespective of whether all or some of the six rooms were equipped with microwave ovens or not, as a matter of fact and degree I consider that on the date the notice was issued the appeal property was an HMO falling within Use Class C4. I conclude that, on the balance of probability, the breach of planning control alleged in the notice has not occurred."

vi) He therefore decided to quash the notice insofar as it related to the allegation of a mixed use as an HMO and flats.

37. Implicit in that reasoning was the finding that the Property as a whole did provide the facilities required for day-to-day private domestic existence, taking into account the presence of the communal kitchen. Further, it is clear that the Inspector was satisfied that its occupiers were in fact occupying their house as their only or main residence or were to be treated as so occupying it: that is a necessary condition of the definition under section 254(2)(c) of the definition of "HMO". LBB had not made any suggestion to the contrary: indeed, it was a central part of its own case that the house was being occupied in part as such an HMO, and in part as flats (whose occupiers were on the Council's case using the accommodation in the same way, but with the benefit of microwave ovens in their room).

38. The Inspector made no express finding as to how many people were living in the six rooms. However, he made a clear finding that on the date the notice was issued, the appeal property was an HMO falling within Use Class C4, which, as he also expressly set out at DL12, encompassed the "use of a dwellinghouse by not more than six residents as an HMO."

39. Before me there was no challenge to the Inspector's finding that there had been a change of use from Use Class C3 (at the time of the prior approval notification) to Use Class C4 (at some time following Mr Rothchild's acquisition of the Property), and the appeal proceeded on that basis.

The Inspector's conclusions on the extension

40. Given his conclusion in respect of the change of use, the Inspector considered only the construction of the extension under the ground (c) challenge. His reasoning on that issue appears at DL20-DL22 which I set out in full below.

> "20. The appellant's case in this respect, albeit stated very briefly on the appeal form, is that Prior Approval was granted for the extension. That is not strictly correct. In fact, on 17 March 2015 the Council resolved that Prior Approval was not required for a single-storey rear extension to the appeal property extending 6m beyond the rear wall of the original house, with a maximum height of 3m (Council Ref:15/0601). The corollary is that the Council must have accepted that the property was a dwellinghouse at the time.
>
> 21. An HMO is a dwellinghouse. As such, an HMO is capable of benefitting from the provisions of permitted development for the purposes of Class A, Part 1, Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). The Council does not contend that the extension constructed is not that found not to require Prior Approval in March 2015, or otherwise not permitted development for the purposes of the GPDO. It is academic whether the property was extended whilst still occupied as a single-family dwelling or when already an HMO: it would still constitute permitted development for the purposes of the GPDO. Consequently, I conclude that, on the balance of probability, the erection of the single-storey extension subject to the notice does not constitute a breach of planning control.
>
> 22. Accordingly, the appeal on ground (c) succeeds."

LBB's grounds of appeal

41. On 21 September 2021, LBB filed an Appellant's Notice, and applied for permission to appeal against the Inspector's decision. There was said to be a single ground of appeal, expressed as follows: "The Inspector misdirected himself in law, when assessing whether the single storey extension to the Property had been built in accordance with the requirements of [the GPDO 2015]."

42. Although there was said to be only a single ground of appeal, the Appellant's Notice (which was not drafted by Dr Bowes) in fact made a series of complaints, not all of which are easy to disentangle from each other, and some of which amounted to arguments with the Inspector's factual findings rather than identifiable errors of law. However, the following three discrete grounds are discernible:

    i) Although the Inspector had correctly accepted that the Property had been in use as a dwellinghouse at the time that it resolved prior approval for the extension was not required, the Inspector failed to go on to consider whether the Property was still in use as a dwellinghouse at the time when the extension was built.

    ii) Even if the Property was in use as a dwellinghouse at the time that the extension was built, the extension was not built in accordance with the information supplied in the prior approval notification. The Inspector should have identified the substantial differences in its external appearance, internal layout and its use on his site visit.

iii) The Property could not have fallen within Use Class C4: on the evidence, it was either 6 flats, or a mix of flats and a HMO, or a large *sui generis* HMO, or "multiple household dwellinghouse HMO" that did not fall within Use Class C4. LBB's evidence had been that when the extension was built in 2016, the Property was neither a C3 nor a C4 dwellinghouse but was divided into flats; Mr Rothchild had provided no evidence that in 2016 the Property was not divided into flats, but only that the property was in use as a 6 bedroom HMO at the time of the appeal, some 5 years later. The Inspector had "not considered the facts of the case" in concluding that the Property had become a Use Class C4 HMO. Further, the Inspector had ignored evidence that the HMO was occupied by 7 persons [in November 2019, because the Council had observed one of the units was occupied by a couple on its site inspection at that time], indicating that the use of the Property could not have fallen within Use Class C4.

43. On 10 November 2021, the Government Legal Department wrote to the Court on behalf of the Secretary of State to make clear that he would not defend the appeal, stating that "the Secretary of State accepts that the Inspector erred in failing to consider the use of the property at the time of the extension and whether the rear extension was that granted prior approval in 2015 and that the Decision was consequently unlawful." This concession reflected grounds (i) and (ii) above, but not (iii).

44. The third ground was not pursued before me by Dr Bowes. He accepted that the Inspector had found that there had been a change of use from use as a dwellinghouse within Use Class C3 to "Use of a dwellinghouse by not more than six residents as a house in multiple occupation" within Use Class C4, and did not seek to challenge that finding. Instead, Dr Bowes directed his submissions exclusively towards grounds (i) and (ii).

45. Dr Bowes was right not to pursue ground (iii).

i) First, it largely amounts to a straightforward disagreement with the Inspector's conclusion that the two bedrooms relied upon by LBB as constituting "flats" did not fulfil the *Gravesham* test, lacking adequate cooking facilities. This does not disclose any error of law. The conclusion that all six bedrooms were in use as part of an HMO was otherwise consistent with LBB's own case. Insofar as it was contended that the Property remained in mixed use as flats or a mix of flats and HMO, the ground was hopeless.

ii) Secondly, the suggestion that the HMO was in use by more than 6 residents formed no part of LBB's written case under Ground (c); the Inspector was not obliged to deal expressly with the brief reference in LBB's written case to the fact that (on the single occasion of its inspection in November 2019) one of the residents had a partner staying.

Ground (i)

Submissions

46. Dr Bowes submitted on behalf of LBB that the Inspector had failed to make any finding as whether the building was in use as a dwellinghouse at the point of the construction of the extension in 2016. Had the building not been in that use at that point, it could not

have benefited from the deemed grant of planning permission under the GPDO. The Inspector's conclusion at DL21 that the building must have been either in C3 or C4 use at the time of the construction of the extension was insufficient: not all buildings which fall within C4 use are dwellinghouses for the purposes of the permitted development rights in the GPDO, even if they afford the facilities required for day-to-day private domestic existence per *Gravesham*. The Inspector had been wrong to say "An HMO is a dwellinghouse." It was established in *Moore v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202 ("*Moore 2012"*) at [35]-[36] that there is a further evaluation to be performed, namely whether the "*particular characteristics of the use*" reveal it to be occupied in a manner "*akin to occupation by a single household*". The Inspector failed to make this evaluation.

47. It did not follow that everything in C4 is to be regarded as being in use as a dwellinghouse, he submitted. That was clear from comparing the different descriptions of C3 and C4 within the Use Classes Order. C3 provided that it embraces "*use **as** a dwellinghouse …",* whereas C4 covers "*use **of** a dwelling house by not more than six residents as a 'house of multiple occupation'".* To fall within C4, therefore, a building must have the characteristics ***of*** a dwellinghouse but it need not be in use ***as*** a dwellinghouse." This view was consistent with that of the Planning Inspectorate in its guidance note, which emphasises at paragraph 3 that the test for whether a property is eligible to use the permitted development right is whether it can be considered a dwellinghouse within the context of the GPDO, and that "*this will depend on the facts of the case*".

48. LBB had raised this point expressly in its Statement of Case in the proceedings before the Inspector at paragraph 4.13, Dr Bowes submitted. The Inspector was therefore wrong to have said at DL21 that "*The Council does not contend that the extension constructed is not that found not to require Prior Approval in March 2015, or otherwise not permitted development for the purposes of the GPDO."* But even if the point had not been raised, the decision could still not stand, given that a finding that the use of the building was a dwellinghouse when the extension was completed was an essential pre-requisite to lawfully concluding that the extension was not a breach of planning control.

49. For Mr Rothchild, Mr Mackenzie submitted that *Moore 2012* was not authority for the proposition that the GPDO only grants permitted development rights for an extension to a dwellinghouse which is occupied by, or in a manner akin to, a single household, as opposed to any dwellinghouse. Any such argument was inconsistent with *Rectory Homes Ltd v Secretary of State for Communities and Local Government* [2020] EWHC 2098 (Admin), in which Holgate J expressly accepted that a dwellinghouse may be used in a number of different ways, not just for use by a single household or in a manner akin to such. The GPDO rights permitting an extension to be built apply to any building properly characterised as a dwellinghouse, regardless of the precise use to which that dwellinghouse is put. Any building accepted to fall within Use Class C4 must by definition be a dwellinghouse, and must attract GPDO rights as such accordingly. GPDO rights were not confined to those dwellinghouses which are in use as a single household within Use Class C3. It follows that the Inspector made no error in failing to embark on a determination as to whether, in May 2016, the residents could be said to have occupied the Property in a manner akin to a single household. It was sufficient to find that its use fell within either Use Class C3 or C4 at that time.

Discussion

50. On the face of it, Dr Bowes' submission is flatly inconsistent with the language of Use Class C4 itself. Use Class C4 applies only to the use of a dwellinghouse by not more than six residents as an HMO. If the building in question is not a dwellinghouse at all, it will not fall within Use Class C4 in the first place. Equally, if a building is accepted to be in Use Class C4, it must by definition be a dwellinghouse.

51. Dr Bowes submits that it nonetheless necessary to consider whether such a dwellinghouse in C4 use is occupied by or in a manner akin to a single household before it can be said to be a dwellinghouse for the purposes of the GPDO. That is again a surprising submission: in *R (Innovia Cellophane Limited) v Infrastructure Planning Commission* [2012] PTSR 1132*,* Cranston J emphasised that "dwellinghouse" is well understood in the context of the 1990 Act and secondary legislation made under it, and that like other terms used in the package of planning legislation on the statute book (subject to any express definition to the contrary), should be construed in pari materia. This would recognise the reality that the drafter of a later statute [or in the present case, statutory instrument], obviously related to an earlier one, will have employed a word or concept in the sense that has become accepted in the interpretation of the earlier.

52. It follows that I would not readily accept that the term "dwellinghouse" had been used in a different sense in Use Class C4 to that in which it had been used in the GPDO, unless there were express words to that effect or authority compelling such a conclusion. Barring the exclusion of flats and any building containing flats from the definition of "dwellinghouse" in the GPDO, there is none.

53. Dr Bowes' reliance on *Moore 2012* is in my judgment misplaced. His submissions conflate two separate issues that have arisen in the authorities. It is important to disentangle them, in order to explain why the Inspector was not required to ask himself whether the HMO was being occupied "in a manner akin to a single household", as Dr Bowes suggests.

54. The first issue concerns whether a building is a "dwellinghouse" for the purposes of planning law. The principles to be derived from *Gravesham* on that question are well known, and have been reaffirmed many times in subsequent caselaw. I summarise the relevant principles as follows:

    i) A dwellinghouse is a unit of residential accommodation which provides the facilities needed for day-to-day private domestic existence (see further *Innovia* at [27]-[28]; *Rectory Homes Ltd v Secretary of State for Communities and Local Government* [2020] EWHC 2098 at [53], per Holgate J);

    ii) whether any particular building is or is not a dwellinghouse is a question of fact; and

    iii) a factual assessment of whether or not something is a "dwellinghouse" may require consideration not only of whether it provides the facilities needed for day-to-day private domestic existence, but also consideration of the actual use to which it is being put. Thus a building which, although possessing all those facilities, was in mixed use by an occupier who lived in the upper part of the house while operating an estate agent's in two rooms on the ground floor, was held on the facts not to be a dwellinghouse in *Scurlock v Secretary of State for Wales* (1976) 33 P&CR 202. Equally, a dwellinghouse converted for use as (for

example) a hostel or a hotel would no longer be a dwellinghouse, as it would no longer allow for "private domestic" existence.

55. The third of those principles should not be understood as requiring a dwellinghouse to be used in any single way. It merely indicates that the nature of the use to which a building is put is one of the factors that may be taken into account in making the required factual assessment as to whether or not it is a dwellinghouse. Thus:

    i) In *Gravesham* itself, McCullough J noted that a variety of uses were perfectly consistent with the status of a building as a "dwellinghouse". A dwellinghouse would not lose its character as such simply because it was vacant, or a second home only visited at weekends or in a particular season, or incapable of use as such owing to weather conditions or a national emergency. It could still be a dwellinghouse if it was put to use to house a company's employees and their family during a tour of duty, or it was being used on a timeshare basis for holidays along with other owners.

    ii) In *Moore v Secretary of State for the Environment* (1999) P&CR 114 ("*Moore 1999"*), the Court held that an inspector had erred in law when he concluded that ten self-contained units of residential accommodation, converted from the outbuildings of a country house in breach of planning control, could not constitute ten single dwellinghouses because they were not occupied as the permanent home of one or more persons, but were managed for the commercial purpose of holiday or other temporary lettings. Approving *Gravesham,* Nourse LJ held that on the facts of that case the individual units could only be considered to be in use as ten single dwellinghouses.

56. The second issue concerns the question of whether there has been a material change of use of a dwellinghouse. That will obviously be so where the change of use has meant that the building is no longer a dwellinghouse at all, but is used as a hotel, a hostel or a school, for example. But there may still be a material change of use of a building which does not in itself affect its status as a dwellinghouse. This may include a case where the use no longer falls within the same Use Class as it formerly did (or in any Use Class at all); equally, however, the mere fact that a new use falls outside the previous Use Class does not mean that the change of use is a material one. Whether there has been a material change of use of a dwellinghouse is a matter of fact and degree.

57. In *Blackpool Borough Council v Secretary of State for the Environment* (1980) 40 P&CR 104, the issue was whether an Inspector hearing an enforcement appeal had erred in law in deciding that an alleged material change of use from a "private dwellinghouse" to "holiday lettings on a commercial basis" had not occurred: he had concluded that if the house was occupied by one household at a time, whether or not on holiday and whether or not paying rent (as some but not all families did), the use was in accordance with the permitted use as a "private" dwelling-house. (The case pre-dated the introduction of Use Class C3, so the issue did not turn in any way upon whether each use fell within that class; but the description of the permitted use as being that of a "private" dwellinghouse is broadly equivalent to it.) Ackner LJ held (at 111) that the Inspector had made no error of law: the Inspector had been entitled to make a finding of fact that the character of the user from a planning point of view had not been changed by the fact that the premises were being occupied not only by the owner and his family

but also by his friends or by members of his office staff or by paying tenants during the summer season, and hence that there was no material change of use.

58. This conclusion did not entail any finding that a dwellinghouse must be occupied by one family or household if it is to retain its status as a "dwellinghouse" (for the purposes of the GPDO or otherwise) as a matter of law: the Court was merely considering whether the Inspector had reached a factual finding to which he was entitled to come, concerning the nature of the use to which the dwellinghouse was being put, and whether it materially differed from its permitted use.

59. I now turn to *Moore 2012* (an unrelated case to *Moore 1999*), upon which Dr Bowes strongly relies. In that case, the Court of Appeal upheld an Inspector's decision to dismiss an appeal against an enforcement notice alleging a change of use without planning permission of a house "from a C3 dwelling to use as commercial leisure accommodation which does not fall within Class C3(a)-(c), and which therefore constitutes a sui generis use." (By this stage, the current version of Use Class C3 was in force.) An eight bedroom dwellinghouse formerly occupied by a family – and which therefore fell within Use Class C3(a) – was now being used for short term holiday lets, managed through a company. The Inspector held that there was no dispute that the property should be described as a "dwellinghouse", applying the *Gravesham* test, as it ordinarily afforded the facilities required for day-to-day existence. However, the dwellinghouse was now being used for accommodating up to 20 people at a time for short periods of 3, 4 of 7 nights. The short lets did not, he accepted, disqualify it from being a dwellinghouse. However, on the evidence (as the Inspector noted at his paragraph 15, cited by the Court of Appeal at [12]), it was not clear that the dwellinghouse was only being occupied by single households: there had been a yoga group of 15 people, for example, and a cycling group of 20 people. It appeared that there were many who had come for other reasons, including for reunions, parties and celebrations of various sorts. Such groups were not "single households". The Inspector had ultimately concluded, after further analysis of the differences between the current use of the property and its use by a family/household, as follows (see [13] of the Court of Appeal's judgment):

> "21. In summary, I consider there are a number of distinct differences between the current use and use of the appeal property as a family dwellinghouse. Notably, the pattern of arrivals and departures, with associated traffic movements; the unlikelihood of occupation by family or household groups; the numbers of people constituting the visiting groups on many occasions; the likely frequency of party type activities, and the potential lack of consideration for neighbours.
>
> …
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> 25. Overall, as a matter of fact and degree, I consider the use of the property as part of the appellant's holiday letting business results in a use of the dwellinghouse that is quite different in character from that of a private family dwellinghouse. I consider this change in character has resulted in a material change of use of the property that is development requiring planning permission under the provisions of Section 55(1) of the Act. No planning permission has been obtained, nor is this any form of permitted development. There has

therefore been a breach of planning control, and the appeal on ground (c) must fail."

60. The proper characterisation of that conclusion is not that he found the property was no longer a dwellinghouse. It was instead a two stage finding – first that as a matter of fact, the dwellinghouse was no longer being used for a purpose falling within Use Class C3, and second that as a matter of fact and degree, the use to which the dwellinghouse was in fact being put was a material change of use from the permitted Class C3 use.

61. On appeal before the Court of Appeal, the Appellant did not challenge the finding that the holiday lets business fell outside Use Class C3. However, he argued that the Inspector had erred in law in concluding that the change from such use to use for holiday lets was a material change of use, relying on *Moore 1999.* The Court of Appeal rejected that submission. Sullivan LJ, giving the judgment of the Court said this at [27]-[29]:

> 27. Starting from first principles, without the assistance of any authority, whether the use of a dwellinghouse for commercial letting as holiday accommodation amounts to a material change of use will be a question of fact and degree in each case, and the answer will depend upon the particular characteristics of the use as holiday accommodation. Neither of the two extreme propositions - that using a dwellinghouse for commercial holiday lettings will always amount to a material change of use, or that use of a dwellinghouse for commercial holiday lettings can never amount to a change of use - is correct.
>
> 28. The Divisional Court's decision in *Blackpool* supports this approach: the Court concluded that the Inspector would have erred if she had approached the matter on the basis that there could be no material change of use if the house was in some form of residential use - "not every use is necessarily a use as a private dwelling-house" - but she was entitled to conclude that the character of the dwelling-house was not materially changed by the particular pattern of holiday lettings in that case.
>
> 29. In *Gravesham* the Court was concerned with a different issue: whether it was an essential characteristic of a dwelling-house that it should be occupied residentially throughout the year. McCullough J rejected that proposition. McCullough J did not have to consider whether some forms of commercial letting for holiday purposes throughout the year might be capable of amounting to a material change of use. *Blackpool* was not relevant to that issue, and was not cited.

62. Having considered *Moore 1999*, Sullivan LJ concluded at [33] that that case was not authority for the extreme proposition that the use of a dwellinghouse for commercial holiday lettings can never amount to a material change of use. He recorded that the Appellant [in *Moore* 2012] had not contended otherwise, but had nonetheless argued that on the strength of *Moore 1999*, the Inspector should have approached the question of whether there had been a material change of use on the basis that a dwellinghouse could lawfully be used for some degree of holiday letting without there being a material change of use, and then asked whether there was anything about the particular characteristics of the holiday lettings which amounted to such a change.

63. Sullivan LJ dealt with that point at [34], concluding that on analysis of the Inspector's reasoning, that had in fact been the Inspector's approach (which indeed had been correct). The Inspector had not rejected the Appellant's argument that a permitted use as a dwellinghouse did not preclude its use for purposes other than as a family dwellinghouse. Instead, he had reminded himself that he had to compare the character of the current use with that of the previous lawful use, and he had then proceeded to examine in some detail the particular characteristics of the current use.

64. Sullivan LJ then continued at [35]-[36] to examine the Inspector's reasoning and conclusions. As will be clear, those paragraphs turn on the particular facts of that case, and the Inspector's approach to it. However, since they form the lynchpin of Dr Bowes' case, I set them out here.

> 35. In this context, paragraph 15 of the decision is of particular significance. The Inspector rejected the Appellant's contention that those who occupied the property did so in pre-formed groups so that their occupation was akin to occupation by a single household. One of the factors which had persuaded the Inspector in the *Blackpool* case that there had been no material change of use was the fact that when the house was being let out for rent it was let to "family groups", or "single households"…. In the present case, the Inspector concluded that the large groups (the property can accommodate up to 20 people, see paragraph 13 of the decision) who occupied the property came together largely as a result of their shared interests (yoga, cycling etc.) but they did not occupy the property as "single households".
>
> 36. In our judgment the Inspector adopted the correct approach. Although he was not referred to *Blackpool* he did not fall into the error of assuming that any use for holiday letting amounted to a material change of use. He carefully examined the characteristics of the lettings in the present case and concluded that, as a matter of fact and degree, they were a material change of use from the permitted use as a dwelling- house. In our judgment, he was not merely entitled to reach this conclusion; it was clearly, on the facts of this case, the correct conclusion. As a matter of common sense, this particular use for holiday lettings is very far removed from the permitted use as a dwellinghouse and a material change of use has occurred.

65. In my judgment, Sullivan LJ was here doing no more than deciding that the Inspector had reached two unimpeachable conclusions to the effect that:

i) first, the dwellinghouse was no longer in use by single households, and so no longer fell within Use Class C3 – having rejected the Appellant's submission to the effect that all visiting groups were pre-formed groups that occupied the dwellinghouse in a manner akin to a single household, for the reasons the Inspector had given at his paragraph 15; and

ii) second, as a matter of fact and degree, the true use to which the dwellinghouse was in fact being put amounted to a material change of use from that permitted by Use Class C3, for the reasons the Inspector had given at his paragraphs 21 and 25.

66. Contrary to Dr Bowes' submission, Sullivan LJ was not stating at [35] that the *Gravesham* test of a "dwellinghouse" must be supplemented by consideration of whether the property in question is occupied by a family or a pre-formed group whose occupation is akin to that of a single household. That suggestion misunderstands the exercise that Sullivan LJ was in fact conducting at this point in his judgment. Indeed, it had been no part of the Inspector's reasoning that the premises had ceased to be a dwellinghouse.

67. Similarly, when Sullivan LJ referred at [36] to the finding that there had been a material change of use from "the permitted use as a dwellinghouse", he was referring to the change of use from the permitted C3 use as a single family/household dwelling, from which the Inspector had found there to have been a material change. He was not suggesting that the Inspector had found that the property was no longer a "dwellinghouse" within the meaning of that term in planning law.

68. To the contrary, as I have explained above, a "dwellinghouse" may remain as such while being put to a number of different uses. Use Category C3 is not exhaustive of the uses to which a dwellinghouse may be put, as Holgate J made clear in *Rectory Homes* when rejecting a submission to the contrary at [54]-[57]:

> "54. The Claimant's argument depends upon an assertion that anything which is a dwelling or dwelling-house must fall within the C3 Use Class. In other words, that Use Class exhaustively defines what may be considered to be a "dwelling" and therefore a unit of residential accommodation falling within Class C2 cannot include a "dwelling".
>
> 55. The Claimant rightly accepted before the Inspector that a property cannot fall within the C3 Use Class unless it has the physical characteristics of a "dwelling" as defined in *Gravesham* and is used in a manner falling within that Class (see [30] above). It follows that a property might properly be described as a "dwelling" in accordance with the physical criteria given in *Gravesham* without being used within the parameters of Class C3. Indeed, Class C3 demonstrates this point, both in the form in which it was originally enacted and in the version substituted (in England, but not Wales) by the Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (SI 2010 No. 653).
>
> 56. In its original form Class C3 applied to use as a dwelling house either (a) by a single person or "by people living together as a family" or (b) by not more than 6 residents living together as a single household (including where care is provided for residents). Where a single household (not being a family) comprised more than 6 persons, the use would fall outside Class C3, but the property could still be described as a dwelling-house.
>
> 57. The amended version of the C3 Use Class excludes from that Class the use of a dwelling house by no more than 6 residents living together as a single household where no care is provided and the use falls within Class C4 (also introduced in 2010). Class C4 applies to the use of a dwelling house by no more than 6 residents as a "house in multiple occupation" (as defined). Class C4 shows that Class C3 does not cover all cases in which a property

> has the physical characteristics of, and is used as, a dwelling house. "Dwelling house" is not a term of art confined to the Class C3 Use Class. If recourse is had to the Use Classes Order …, the Order demonstrates that properties having the physical characteristics of a "dwelling" may be *used as a dwelling* in more than one way."

69. Dr Bowes made clear that he was not advancing the same submission as was rejected in *Rectory Homes:* he did not contend that anything which is dwellinghouse must fall within the C3 Use Class. He accepted that a dwellinghouse could be used as an HMO, and if used as such by not more than six residents, would be in C4 use. However, his further gloss that the HMO must be occupied in a manner akin to a single household if it is to remain a "dwellinghouse" – a proposition which I find difficult to reconcile with the very concept of an HMO as defined in section 254 of the Housing Act 2004 – incorrectly seeks to import a requirement which belongs only in Use Class C3, and cannot properly be derived from *Moore 2012*.

70. I further reject Dr Bowes' argument that it is material in this regard that Use Class C3 embraces "*use **as** a dwellinghouse …",* whereas C4 covers "*use **of** a dwellinghouse".* For a building to fall within either use class, it must both be a dwellinghouse and be used in one of the ways specified in each. Use of a dwellinghouse by people who are to be regarded as forming a single household, or who are living together as such, falls within Use Class C3. But that requirement cannot be imported into either Use Class C4 or into the definition of "dwellinghouse" itself.

71. My conclusion is also consistent with the Planning Inspectorate's guidance note, set out at paragraph 22 above. It accurately records that an HMO may have the benefit of the permitted development rights attaching to dwellinghouses, if it is itself a dwellinghouse. Its terms reflect the fact that some HMOs as defined by section 254 of the Housing Act 2004 are not "dwellinghouses" as defined in the GPDO – such as those which are self-contained flats, or which are "converted buildings" which contain a flat. The guidance also reflects the fact that an HMO may be a dwellinghouse even if is not in C4 use (as C4 use requires no more than 6 residents to using the dwellinghouse). It confirms that the *Gravesham* test must be applied to any HMO to determine whether it is in fact a dwellinghouse. But the guidance note provides no support for the view that a "dwellinghouse" must be occupied in a manner akin to a single household before it can be considered to be such for the purposes of the GPDO, nor for the view that a dwellinghouse in use as an HMO within Use Class C4 is not a necessarily a dwellinghouse for the purposes of the GPDO.

72. Finally, as the Senior President of Tribunals observed in *City & Country Bramshill Limited v SSHCLG* [2021] 1 WLR 5761, at [28], the decision letter must be read fairly, with due tolerance for minor imperfections or infelicity. There are two such infelicities in DL21, but neither affects the lawfulness of the Inspector's decision.

    i) First, Dr Bowes is correct to say that the Inspector's observation at DL21 that "an HMO is a dwellinghouse" was too broad. As I have explained, under the definition in section 254 of the Housing Act 2004, an HMO may be a flat or a building containing one or more flats. Such HMOs would be expressly excluded from the definition of "dwellinghouse" in the GPDO, and would not attract permitted development rights. However, the point is academic here: by this

stage of the DL, the Inspector had rejected the claim that the Property contained flats, and had found that it was a dwellinghouse in C4 use as an HMO. When he refers to an "HMO" in DL21, he is referring in this context to such an HMO falling within Use Class C4. His decision is to be read as proceeding on the basis that such an HMO is a dwellinghouse. That is correct.

ii) Second, Dr Bowes objects to the Inspector's observation that the Council did not contend that the extension was "*otherwise not permitted for the purposes of the GPDO*", stating that the Council had raised precisely such an objection at paragraph 4.13 of its Statement of Case. But that complaint ignores the fact that the sentence follows on from the Inspector's earlier findings that the Property was in C4 use, and as such benefited from the permitted development rights attaching to dwellinghouses. Once that conclusion had been reached, there was nothing left in the Council's paragraph 4.13 to consider. The Inspector's use of the word "otherwise" must be taken to embrace the fact that he had so found.

Conclusion on Ground (i)

73. The Inspector made no error of law in concluding that, whether the Property fell within Use Class C3 or C4 at the time of construction of the extension, the HMO enjoyed permitted development rights as a "dwellinghouse" under the GPDO. He therefore made no error of law in concluding that it was academic whether the Property was extended whilst it was still occupied as a single-family dwelling or when already an HMO, following its permitted change of use under Class L of the GPDO. Ground (i) accordingly fails.

Ground (ii)

74. Under this ground of appeal, LBB contends that even if the Property was in use as a dwellinghouse at the time that the extension was built, the extension was not built in accordance with the information supplied in the prior approval notification. LBB point to the fact that at the time of the site visit, it would have been apparent to the Inspector that the extension was not laid out as a single dining/family room with bifold doors in the northern elevation, but had been sub-divided into the communal kitchen and a bedroom with ensuite bathroom, with a door and window in the northern elevation.

75. As Dr Bowes frankly acknowledged, this point formed no part of LBB's case on appeal at all. There was no evidence before the Inspector describing the current layout of the extension; still less was there any evidence describing the layout at the time the extension was built. Nor was he invited to ascertain what the original layout had been on his site visit. The Inspector's express observation at DL21 that "The Council does not contend that the extension constructed is not that found not to require Prior Approval in March 2015" is entirely accurate.

76. Dr Bowes submits that there is no general rule that a party to a planning appeal is prevented from raising, in a challenge to that decision, an argument that had not been advanced in representations made on the appeal, and referred me to *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74; [2017] PTSR 1126. In that case, Sullivan J (as he then was) observed at [12] - [15] as follows (underlining added):

> "12. Mr Craig drew my attention to the decision of Mr George Barlett QC, sitting as a deputy judge of the Queen's Bench Division, in *South Oxfordshire District Council v Secretary of State for the Environment, Transport and the Regions* [2000] All ER 667. The *Encyclopedia* in para 288.16 summarises the effect of his decision in this way:
>
> > "there was no general rule that a party to a planning appeal was to be prevented from raising, in a challenge to that decision, an argument that had not been advanced in representations made on the appeal. If the inspector had omitted a material consideration, the decision could be unlawful, notwithstanding that the matter had not been raised in representations."
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> 13. It is important that the *South Oxfordshire* decision is not regarded as a licence to introduce new material, that is to say material that was not before the inspector, in section 288 applications. That this was not the deputy judge's intention is plain from the manner in which he dealt with the two additional grounds of challenge that were in contention in that case. …
>
> 15. Whilst I accept that there is no general rule preventing a party from raising new material in a section 288 application, it will only be in very rare cases that it would be appropriate for the court to exercise its discretion to allow such material to be argued. It would not usually be appropriate if the new argument would require some further findings of fact and/or planning judgment (matters which are for the inspector not the court)."

77. I accept Mr Mackenzie's submission that I should not exercise my discretion to allow this new point to be introduced at this stage. Had the Inspector considered the point he would have had to:

    i) make findings of fact as to the manner in which the extension was constructed in May 2016 (not the state it was in at the time of the site visit in June 2021); and

    ii) make a series of planning judgments as to:

        a) whether any variations in the fenestration and internal partitioning of the extension (if they were present in 2016) rendered the extension outwith the scope of the prior notification decision; and/or

        b) whether any such variations were within the scope of the prior notification condition but should be treated as a breach of a condition or a limitation subject to which permission was granted; and/or

        c) whether any variations to the extension were in any event permitted development under Class A in their own right.

78. LBB never raised any of these matters. Mr Rothchild did not, therefore, have the opportunity to respond to them in his "Final Comments" in response to LBB's case. (It is irrelevant that those Final Comments were not put before the Inspector in any event: that was an error on the part of the Inspectorate.) It would have been procedurally unfair

for the Inspector to deal with the issue without seeking such representations: compare *Commercial Land Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] EWHC 1264 (Admin) at [40]-[41].

79. It might well be that the Inspector had the jurisdiction to raise these matters with the parties, had he adverted to the point and considered it necessary to make a determination upon it. But that falls a long way short of establishing that he had an obligation in law to do so: see *Taylor & Sons v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 1254 at [40]-[42]. As explained at [40], even if a potential point becomes apparent to an Inspector on a site visit which was not apparent from the written representations, it is well within his or her discretion not to lengthen the process by reverting to the parties for further comment and submissions. Further, as observed by the Court at [42], "The function of a site visit is to enable an inspector to make a judgment about submissions which have been made rather than to explore new possibilities. If the latter were to become commonplace it would be a fruitful breeding ground for further disputes."

80. Similarly, in *West v First Secretary of State* [2005] EWHC 729 (Admin), Richards J (as he then was) explained at [42] that "the general rule is that it is incumbent on the parties to a planning appeal to place before the inspector the material on which they rely. Where the written representations procedure is used, that means that they must produce such material as part of their written representations. The inspector is entitled to reach his decision on the basis of the material put before him." Although the Inspector does have an inquisitorial burden in reaching his decision on the basis of the parties' written representations, as Richards J explained at [44], in general "that process does not require anything beyond proper consideration of the material put forward by the parties."

81. In my judgment, the Inspector was entitled to record that LBB did not contend that the extension constructed was not that which had been found not to require prior approval in March 2015, and he was not bound to raise the matter further simply because his site visit in June 2021 showed a different internal layout and fenestration from that shown in the notified plans. He committed no error of law in proceeding on that basis. Nor is this a case where he can be said to have committed an "error of fact" in the sense which gives rise to an error of law, as described in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [63]: LBB's claim that the extension was not built in accordance with the notified plans is not a matter of established fact, and LBB cannot be said not to be responsible for the Inspector's failure to consider the point.

82. In the circumstances, ground (ii) fails also.

Conclusion

83. The appeal is dismissed. I am conscious that the Secretary of State was prepared to concede that the Inspector erred in law in respect of both grounds (i) and (ii). However, for the reasons I have given I am satisfied that he did not do so.

84. I am grateful to both counsel for their very full and well informed written and oral submissions. At my invitation at the close of the hearing, both counsel also submitted further written submissions on the issue of whether, if I acceded to the Appellant's

submissions, I should nevertheless not remit the decision. In the event, it is not necessary for me to address those submissions.