

Appeal Decision

Site visit made on 23 February 2017

by George Mapson DipTP DipLD MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 March 2017

Appeal Ref: APP/K5600/X/16/3161419

144 Lexham Gardens, London, W8 6JE

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Luca Pepere against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref CL/16/01770, dated 23 March 2016, was refused by a notice dated 28 May 2016.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The proposed use for which a certificate of lawful use or development is sought is described on the application form as "*Class C3*". The First Schedule of the Council's decision notice describes the proposed use as "*Use of property as Class C3 Residential Dwelling House (Certificate of proposed use)*".
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Decision

1. The appeal is dismissed.

Main issue

2. The appeal is confined to reviewing the Council's decision, to establish whether the refusal to grant a certificate of lawfulness was well-founded; that is, the decision itself, not necessarily the reasons for it.
3. Although the application seeks a certificate of lawfulness for a proposed use, the reason for refusal is: "*The applicant has failed to demonstrate that the lawful use of the property is as a Class C3 single residential dwelling house*".
4. The wording of the decision notice appears to reflect the purpose for which the application was made; namely, to establish whether the lawful use of the property as a single dwellinghouse has survived.

Evidence and burden of proof in LDC cases

5. A certificate of lawfulness is not a planning permission. Its purpose is to enable owners and others to ascertain whether specific uses, operations or other activities are or would be lawful. Lawfulness is equated with immunity from enforcement action.
6. The purpose of the LDC procedure is to arrive at an objective decision based on the best facts and evidence available at the time that the decision is taken. The issue of a certificate depends entirely on factual evidence about the history and planning status of the building or land in question and the interpretation of any relevant planning law or judicial authority. The planning merits are not relevant in deciding an LDC application or appeal and are not therefore an issue for me to consider.

7. The burden of proof regarding decisive matters of fact rests on the applicant, now the appellant. He has asserted that the proposed use of the appeal premises as a single dwellinghouse would be lawful and thus immune from enforcement action. He must therefore adduce enough relevant, clear and unambiguous evidence to demonstrate the truth of that assertion.
8. The relevant test of the evidence is 'the balance of probability' (i.e., that it is more probable than not).

Lawful use rights and ways that they can be lost

9. Lawful development is (a) development against which no enforcement action may be taken and where no enforcement notice is in force, or (b) development for which planning permission is not required¹. Planning permission for a building confers the right to use it for the purpose for which it is designed; that is its lawful use.
10. An unlawful use of a building – one that has commenced without first obtaining the required planning permission for it – can acquire immunity from enforcement through the passage of time and thus become lawful².
11. A lawful use may be lost in several ways³. These include:
 - by a material change to some other use;
 - by the carrying out of acts inconsistent with the continuation of any existing use (including the destruction of the building or installations necessary for it to be carried out); and
 - by abandonment.

Interpretation of 'dwellinghouse' and 'Class C3'

12. As regards the description of the development proposed, two matters should be clarified. The first is that there is no definition of "*dwellinghouse*" in the Act, but in *Gravesham BC v SSE and O'Brien*, [1983] JPL 306 it was accepted that the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence.
13. The second is that Class C3 Dwellinghouses – split into 2 parts in the original version of the Town and Country Planning (Use Classes) Order 1987 – is now split into 3 parts. These are: C3(a) – a single person or people living together as a single household, as defined by the Housing Act 2004 (a 'family'); C3(b) – not more than 6 people living together as a single household and receiving care; and C3(c) – not more than 6 people living together as a single household with no care provided and who do not fall within the C4 definition of a house in multiple occupation⁴.

¹ 'Planning Policy Guidance' paragraph 003 Reference ID: 17c-003-20140306

² Some documents submitted by the appellant's agent reveal a misunderstandings on the writers' part about the time limits for taking enforcement action (i.e., for issuing an enforcement notice). Section 171B of the 1990 Act sets out the time limits that have been operative since 27 July 1992. The 4-year period in section 171B(2) applies to enforcement notices alleging a material change of use of a building (which includes part of a building) to use as a single dwellinghouse. It applies to the sub-division of a residential building into flats, because flats are dwellinghouses for the purposes of the Act (though not the GPDO). Each subdivided unit has the protection of the 4-year rule (*Van Dyck v SSE, Doncaster MBC v SSE* [1993] JPL 564), but where units are not self-contained they are not used as dwellinghouses.

³ Other ways that lawful use rights can be lost include: (i) by a discontinuance order under section 102, or in accordance with a planning obligation under section 106; (ii) by an express condition on a subsequent planning permission; (iii) by the implementation of an inconsistent permission; and (iv) following the issue of an enforcement notice where the notice is not challenged on appeal on grounds (b) or (c).

⁴ A separate use Class C4 (HMO) was added by the 2010 amendment to the UCO. It covers small shared houses or flats occupied by between 3 and 6 unrelated individuals who share basic amenities. Large HMOs are *sui generis*; they do not fall within any use class.

Background

The appeal property

14. No. 144 Lexham Gardens is an unlisted, late 19th century terraced building that lies within the Lexham Gardens Conservation Area. It was constructed as a single dwellinghouse and was occupied as such for many years. It comprises lower and upper ground floors and four floors above. Following a grant of planning permission in August 2008, the 4th (top) floor was created by constructing a mansard roof in place of the original 'butterfly' (or 'valley') roof.

Present condition

15. The building is vacant and in a derelict state; to all intents and purposes, it is an open and draughty shell. The upper ground floor is supported from below by Acrow props. Some external and internal doors and door frames have been removed. So too have some of the windows and window frames. As a result, the building is not secured from entry and parts of the interior are exposed to the elements.
16. Internally, all the fireplaces and chimney breasts have been taken out. Plaster has been stripped from walls and ceilings. Architraves, skirting boards and some floorboards have been removed allowing daylight to pass from one floor to another.
17. At 4th floor level, with the new mansard roof in place, new timber ceiling and floor joists have been fitted, double glazed windows have been installed at the front and rear and a new staircase has been constructed. This part of the building appears to be weather-proof but the work is unfinished.

The appellant's case

18. The appellant is aware that the onus of proof lies with him. He has no direct first-hand knowledge of the appeal property prior to his involvement with it from 2014 or 2015. A statutory declaration (dated 14 December 2016) has been made by Mr Glyn Dale Smith, who was the asset manager for Lazarus Properties Limited⁵ when that company bought the property in 2007. This provides a first-hand account of the condition of the building and its usage at that time.
19. The gist of the case is that a Major James Langley Vickers occupied part of the building as a tenant - sometimes alone, sometimes with others (including a carer in the later years of his life) - from 1973 until his death in 2016. In essence, his occupancy is proffered as evidence of a continuous use of the appeal property as a single dwellinghouse that has survived and is lawful.
20. A document entitled 'Grounds of Appeal (Secondary Statement)', submitted on his behalf by Citadel Partners, draws conclusions from pieces of information on the use of the property that have been gleaned from Council records. Paragraph 1.6 states that:
- "What can be said for the lawful use of the property is scant. Whilst the building was originally constructed as a single dwelling house it may be inferred from available information that it had, for some unspecified period of time and for unspecified parts or all of the building been used for residential accommodation of some form. The nature and extent of this use/these uses is unclear save for the occupation of Major Vickers and latterly (and in the same rooms) his carer, Sam (Mr Saname Intararak)."*
21. At paragraph 1.7 the writer states the opinion that:
- "... we believe that the use of the property can only be one of two positions. Firstly, that the building is a single dwellinghouse given that the [Council's] stated view of HMO status is*

⁵ Lazarus Properties subsequently sold it in 2014. An undated/unsigned copy of a 'claim for possession of rented residential premises' brought to the County Court by DMG Global Consulting Limited states that the company (the claimant) bought the freehold of the property in May 2014. A notice to quit was served on Major Vickers and two others (the defendants) on 17 July 2014.

unproven and unprovable or secondly, that a potential number of unlawful residential form uses have been undertaken at the property over time and by virtue of Young v SSE⁶ the property has a nil use."

My assessment and conclusions on the evidence submitted

Evidence that sheds some light on the uses/occupation of the property from 1960 to 2016

22. In chronological order, the main points to emerge from the evidence are as follows:

- On 4 August 1960 planning permission (LBK Ref. 6801) was granted for the erection of a garage in the back garden of the appeal property. The officer's report on this application describes No. 144 as *"this multi-occupied house"*.
- On 13 February 1973 a tenancy agreement was signed by Major James Langley Vickers and two other people (Nakorn Rujimora and Amorn Rujimora) for a flat within the appeal property. A 'Replication of Tenancy Agreement' has been submitted which appears to suggest that tenants other than those of the 1st floor flat may also have occupied the property at that time. It states that:

"The Landlord shall let and the Tenants shall take the flat on the 1st floor of the messuage or building known as 144 Lexham Gardens W8 together with the use of the entrance hall staircase, outer door of the said building in common with the other tenants thereof..."

- On 9 August 2008 planning permission (Ref. PP/08/1871) was granted for the erection of the mansard roof and associated development⁷. On the Council's case file is an extract from its land use records which lists the use of the property at that time as *"six flats"*⁸.
- On 25 January 2011 an officer of the Environmental Health Department recorded⁹ in note form that:
"Mr Vickers lives in a non self contained flat on the first floor. There are two othe [sic; 'other'] people living in the room(s) next door on the same floor. There is a shared kitchen and WC/shower room on the ground/first mezzanine landing. The basement, ground floor, second and third floors are empty and have been stripped of facilities as part of a failed conversion to flats. The comp says that previously there were 13 bed sits in the property. Mr Vickers has lived in the property since 1973 and is a stat tenant the other couple have lived there since 1983 their tenancy status is to be confirmed."
- On 17 July 2014 DMG Global Consulting Limited, at that time the owners of the property, served on Major Vickers and two other people a notice to quit the:
"First Floor Flat, 144 Lexham Gardens, London, W8 6JE (including for the avoidance of doubt, two bedrooms and one living room on the first floor, and the bathroom and kitchen on mezzanine floor)".
- On 1 July 2016 Mr Glyn Jones, Head of Property at Malcolm C Foy and Co. (solicitors and notaries of Doncaster) wrote to the appellant's wife informing her that Mr Vickers *"continued to reside in the property as a tenant until his death earlier in 2016."* There is no evidence of any subsequent occupation of the property.

Loss of lawful use rights by a change to some other use.

23. Dealing first with 'unlawful residential form uses' to which the Citadel Partners' statement refers, the first point to make is that the concept of a material change of use is not defined in any statute or statutory instrument. It is a question of fact and degree

⁶Young v SSE [1983] JPL 677 HL

⁷ LPA Ref. PP/08/01871: Erection of a mansard roof extension, elevational alterations and the creation of an off-street parking space at the rear

⁸ The RBKC Electronic Atlas Property Search Report identifies the flats as: (1) Basement Flat; (2) Ground Floor Flat; (3) First Floor Flat; (4) Second Floor Flat (front); (5) Second Floor Flat (rear); and (6) Third Floor Flat.

⁹ This reference is contained in an email from

- in each case. In cases where there is a dispute as to whether a material change of use has occurred, it is first necessary to ascertain the correct planning unit, and the present and previous primary (as opposed to ancillary) uses of that unit.
24. The second point is that the mere sub-division of a planning unit, when the uses of both parts remain within the same Use Class, is expressly excluded from the definition of development by section 55(2)(f) of the 1990 Act.
25. However, the third and crucial point to make is that section 55(2)(f) does not apply to dwellinghouses or land occupied with them (Article 4, UCO). Section 55(3)(a) specifically provides that *"the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used"*. This sub-section relates to individual buildings, or to flats or maisonettes within them.
26. Furthermore, a change of use from a private dwellinghouse to multiple occupation is material even though the use can be described broadly as 'residential'¹⁰.
27. Turning next to the documentary evidence, this appears to indicate that at various times since 1960 the appeal property has been put to various uses other than use as a single dwellinghouse. Over the years, the unauthorised actions of some previous owners or occupiers have resulted in the subdivision of the original dwellinghouse to create smaller, self-contained units of accommodation and/or units of accommodation with some shared facilities.
28. The precise nature of those uses - and whether they subsisted for a continuous period that would have ensured immunity from enforcement action - cannot be established with any certainty from the information provided. Nevertheless, a consequence of the material changes to other uses that have taken place is that the right to use the property lawfully as a single dwellinghouse would have been lost and there is no automatic right of reversion to that use.

Loss of lawful use rights by the carrying out of acts inconsistent with the continuation of any existing use.

29. As mentioned in paragraph 12 above, the distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. The destructive actions of past owners (or possibly occupiers) have resulted in the removal of all the facilities required for day-to-day private domestic existence. Those actions were inconsistent with the continuation of its use as a single dwellinghouse.

Loss of lawful use rights by abandonment; nil use

30. Abandonment is a legal concept used by the courts to describe the circumstances in which rights to resume a use which has been lawfully carried on in the past may be lost because of the cessation of that use.
31. The mere cessation of a use is not development, but in the Court of Appeal judgment in *Hartley v MHLG* [1969 3 AER 1958 and [1970] 1 QB 413, Lord Denning found that if a building or land *"remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned"*, then the concept of abandonment applies. Abandonment involves the cessation of a use in such a way, and for such a time, as to give the impression to a reasonable onlooker, applying an objective rather than a subjective test, that it was not to be resumed¹¹. In such a case the land may be left with a nil use.

¹⁰ *Birmingham Corporation v MHLG and Habib Ullah* [1964] 1 QB 178134 and *Panayi v SSE* [1985] JPL 783

¹¹ *Nicholls v SSE and Bristol CC* [1981] JPL 890

32. In *The Trustees of Castell-y-Mynach Estate v Taff-Ely Borough Council* [1985] JPL 40, the court suggested four criteria for abandonment. These are: (1) the period of non-use; (2) the physical condition of the land or building; (3) whether there had been any other use; and (4) the owner's intentions as to whether to suspend the use or to cease it permanently.
33. Having regard to those judgments, and others that have been cited in the written representations, the evidence suggests that the use of No.144 Lexham Gardens as a dwellinghouse probably ceased permanently sometime before 1960. There is no evidence to suggest that there was an intention to resume it.
34. Once that use ceased, planning applications were made to use the building or parts of it for other purposes. Given the number of unlawful residential uses that have been undertaken over time, the opinion expressed by Citadel Partners - that if the lawful use is not as a dwellinghouse then it must be considered to have a nil use - is one that appears to be supported by the evidence.

Conclusions

35. On behalf of the appellant, it is acknowledged that the Council has been extremely helpful in providing file notes from its Planning, Environmental Health and other departments to assist in the preparation of his case.
36. It is argued that the information provided contradicts, rather than consolidates, the Council's view that the appeal property was lawfully used as an HMO or some other lawful arrangement of smaller units. However, it is not the Council's remit to demonstrate the lawfulness or otherwise of any intervening uses. The burden of proof is on the appellant to demonstrate that despite those uses the lawful use of the appeal property as a dwellinghouse has survived.
37. In seeking to discharge that burden, the appellant is in an unenviable position. He has candidly acknowledged that what can be said for the lawful use of the property is scant. That reflects the difficulties that he has faced in making his application for a certificate of lawfulness and his appeal.
38. Those difficulties have not been overcome and the burden of proof has not been discharged. I find, as a matter of fact and degree, that the appellant has failed to adduce sufficient relevant, clear and unambiguous evidence to demonstrate, on the balance of probability that the proposed use of the property as a Class C3 residential dwellinghouse would be lawful.
39. I have taken account of my observations at the site and all the matters raised in the written representations. For the reasons given above I conclude that the Council's refusal to grant a Certificate was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me under section 195(3) of the 1990 Act as amended.

George Mapson

INSPECTOR