
Appeal Decisions

Site visit made on 11 April 2017

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

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

Decision date: 21 April 2017

Appeal A: APP/E2205/X/16/3154001 28 Kings Prospect, Ashford TN24 0JB

- 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 Scott Baylis against the decision of Ashford Borough Council.
- The application Ref 16/00481/AS, dated 20 April 2016 was refused by notice dated 5 July 2016.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use of the property as an HMO for 8 people.

Summary of Decision: The appeal is dismissed.

Appeal B: APP/E2205/X/16/3154042 30 Kings Prospect, Ashford TN24 0JB

- 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 Scott Baylis against the decision of Ashford Borough Council.
- The application Ref 16/00727/AS, dated 12 May 2016, was refused by notice dated 5 July 2016.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use as an HMO for 7-8 people.

Summary of Decision: The appeal is dismissed.

Appeal C: APP/E2205/X/16/3154041 32 Kings Prospect, Ashford TN24 0JB

- 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 Scott Baylis against the decision of Ashford Borough Council.
- The application Ref 16/00728/AS dated 12 May 2016, was refused by notice dated 5 July 2016.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use as an HMO for 7-8 people.

Summary of Decision: The appeal is dismissed.

Background and procedural issues

1. The appellant says that he bought the three townhouses on 21 October 2007 and that the use of each house was at that time as a House in Multiple Occupation (HMO). He also says that the houses had been in this use since the date of their construction in about 2003. Although the context, in terms of submitted evidence, varies there are considerations pertinent to all three appeals that are common and I shall thus deal with Nos 28-32 together in my decision, except where evidence is unique to the subject appeal.
2. After the site visit I was provided with various documents, which were submitted as evidence with the applications. These have been taken into account in my decision.
3. Section 191(2)(a) of the Act¹ says that uses of land are lawful, amongst other circumstances, if the time for taking enforcement action has expired. The date of the application subject of Appeal A was 20 April 2016, and for appeals B & C the date was 12 May 2016. Consequently the appellant needs to demonstrate, on the balance of probabilities, that the use as a large HMO had commenced by 20 April 2006 (Appeal A) or by 12 May 2006 (Appeals B & C).
4. The onus of proof falls on the appellant but the Courts have held the evidence of the appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough².

Main issues

5. The main issues in these appeals is whether or not the use of the buildings:
 - as large HMOs would be lawful at the date of the application by reason of the passage of time; and/or
 - require an express grant of planning permission.

Reasons

6. The gist of the appellant's case is firstly, that the premises have been used as large HMOs since 2003 or 2004 and therefore for a period in excess of 10 years. Secondly he says that at the time the use commenced no express permission was required. I shall consider these two threads in turn.

Passage of time

7. As I have noted above the appellant purchased the 3 premises in Oct 2007, thus his first-hand knowledge about the use of Nos 28-32 amounted to about 8½ years at the date of the applications. As to the period prior to his purchase, he appears to make unsupported assertions about the use of the three houses. In terms of the period from late 2007 onwards he relies on the following evidence: statements by tenants, Housing Benefit payments, HMO licences and in respect of Appeal A (No.28) a Mortgage valuation report.

¹ Town and Country Planning Act 1990 (as amended)

² *Gabbittas v SSE and Newham LBC* [1985] JPL 630

Because the evidence is unique to each property I consider the individual appeals below.

Appeal A (No 28)

8. Two statements made by tenants, both of whom moved into No.28 in 2010, say that there were 6 rooms in the house and that occupation of the premises was by 7-8 persons and had been so for about 5 years. The HMO licence is dated 6 August 2008 and says that the premises are adequate for not more than 5 households and 8 persons.
9. In terms of the mortgage valuation report this is dated September 2007 and says that the property at that time "appears to be let to 5 persons all on individual ASTs". This document is inconsistent with the statutory declaration made by the appellant and the tenant's statements but is more reliable because it appears to rely on actual tenancy agreements rather than hearsay evidence. In these circumstances, on the balance of probability, No 28 was not in use as a large HMO as at 20 April 2006 or for any continuous period of 10 years.

Appeal B (No 30)

10. One statement has been submitted by a tenant who has lived in the property since 15 November 2012. He said that there were six rooms in the property and 7-8 people had lived there for about 4 years (since 2008). The submitted benefit payment records are for payments to residents identified as living at other addresses in Ashford. The only evidence before me that the premises were in use as an HMO or a large HMO prior to 2008 is the statutory declaration by the appellant. In view of the inconsistency of the statutory declaration with the valuation report in respect of No 28, I give less weight to the statutory declaration made by the appellant in respect of No 30.
11. The Council say that an HMO license was issued in 2008.
12. In this context, and in the light of the lack of an HMO licence until 2008, I find the appellant's version of events less than probable and his evidence alone is not sufficiently precise and unambiguous. Consequently, and on the balance of probability, No.30 was not in use as a large HMO as at 12 May 2006 or for any continuous period of 10 years.

Appeal C (No 32)

13. Three statements have been submitted by the tenants of this property. One tenant says he moved in during March 2012, and No 32 had 6 rooms and 7-8 people had been living there for about 5 years (Spring-Summer 2007). A second tenant said he moved in during late April 2009 and that 7-8 people had lived there for about 3 years (Spring-Summer 2006). The third statement was by a tenant who says she lived at No 32 between April 2011 and May 2014. Her evidence is that 7-8 people lived at the property and had done so since about April 2007. Of these statements only one suggests that as at May 2006 the property may have been occupied by more than 6 people. However that is no more than unsubstantiated assertion and moreover the three statements are inconsistent with each other and imprecise in nature.

14. As regards the Council Tax bill and the benefit payments, neither of these is helpful in demonstrating the number of tenants at No 32 during the period May 2006-May 2016.
15. The Council say that an HMO license was issued in 2008.
16. As with No.30, the only evidence that points to the use of No.32 as a large HMO for at least 10 years is the statutory declaration made by the appellant. In the light of the inconsistent evidence, the lack of tenancy agreements, similar contemporaneous documentation, or evidence from the previous owners, I do not find that the appellant's evidence is sufficiently precise and unambiguous. Consequently and on the balance of probability No.32 was not in use as a large HMO as at 12 May 2006 or for any other continuous period of 10 years.

Conclusion on first issue

17. For the reasons I have given, I find that the appellant's evidence is inconsistent and lacks cogency. It has not demonstrated, on the balance of probabilities that Nos. 28, 30 and 32 Kings Prospect have been used for at least 10 years as large HMOs

Is planning permission required for the use as a large HMO?

18. Part C of The Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO) says that the following use falls into Class C4: Houses in Multiple Occupation.

"Use of a dwellinghouse by not more than six residents as a 'house in multiple occupation'."
19. However the subject appeals are seeking a lawful development certificate for use of the three premises for 8 or 7-8 persons respectively and not a C4 use. Indeed the appellant concedes that all 3 properties have been used as 'large HMOs, because they are each occupied by 7 or 8 people. Thus the use subject of the appeals does not fall within UCO Class C4 or any other class. In these circumstances it is a 'sui generis' use which means that the use falls within a class of its own and thus does not benefit from the deemed planning consent granted by the General Permitted Development Order which enables the change of use from a single dwellinghouse to a Class 3 HMO (and vice versa) without the need for an express planning permission³.
20. Notwithstanding this he says that planning permission is not required because, he says, the change of use to a large HMO is exempt from the legislative changes that came into force in 2010. But these changes only applied to HMOs of not more than 6 persons and thus are irrelevant to the appeals before me.
21. The Council made an Article 4 Direction in 2012 and the effect of this is that change of use from a use within Class C3 (dwellinghouses) to a use falling within Class C4 (House in Multiple Occupation) requires planning permission. The area subject to the direction includes the appeal site. However, because the use is for which an LDC is sought is a 'large HMO' this Direction did not and does not alter the legislative context relevant to these appeals. Thus planning

³ Unless such rights have been taken away by an Article 4 Direction

permission is required⁴ for a change of use from a dwelling house (C3) to a large HMO and is also required for a change of use from a C4 HMO to a large HMO.

Conclusion on second issue

22. Section 55(1A)(d) of the Act says that development includes the making of any material change in the use of any buildings or other land. Section 57(1) says that planning permission is required for any development of land other than in respect of specified exceptions, none of which are pertinent here. In these circumstances the change of use of Nos 28-32 Kings Prospect to large HMOs from use as C3 (dwellinghouses) or C4 (HMOs) requires planning permission and no such permission has been applied for or granted.

Formal Decisions

Appeal A: APP/E2205/X/16/3154001

23. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the property as an HMO for 8 people was well-founded and the Appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended and uphold that decision.

24. Consequently Appeal A is dismissed.

Appeal B: APP/E2205/X/16/3154042

25. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the property as an HMO for 7-8 people was well-founded and the Appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended and uphold that decision.

26. Consequently Appeal B is dismissed.

Appeal C: APP/E2205/X/16/3154041

27. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the property as an HMO for 7-8 people was well-founded and the Appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended and uphold that decision.

28. Consequently Appeal C is dismissed.

Sukie Tamplin

INSPECTOR

⁴ In circumstances where a material change of use is considered to have taken place; neither party has suggested that the change of use in these appeals is not material.