



Appeal Decision

Site visit made on 4 July 2017

by **D H Brier BA MA MRTPI**

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

Decision date: 28 July 2017

Appeal Ref: APP/P1805/X/17/3168680

68-70 Melbourne Road, Bromsgrove, Worcestershire B61 8PF

- 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 A Hawkes against the decision of Bromsgrove District Council.
 - The application Ref 16/0635, dated 8 June 2016, was refused by notice dated 22 August 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 the use of 68 and 70 Melbourne Road as 5 separate residential units.
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Decision

The appeal is dismissed.

Preliminary Matters

The Appeal Property and the LDC Application

1. The appeal property has been subdivided into 5 flats. According to the appellant, there are 3 flats in No.68 and 2 in No.70. It is also stated that there are 2 further units, formerly garages, within the curtilage of the property which are already certified as being lawful self-contained dwellings.
2. The description of the use in the preamble above is paraphrased from the use as described on the Council's notice of refusal. However, while the copy of the LDC application submitted with the appeal contains information about 3 of the flats, it appears to be silent insofar as the precise use for which the LDC was sought is concerned.
3. On the appeal form, the use at the time of the application is stated as, "68 and 70 had been used for five units for over four years". The appellant's statement is somewhat different as it indicates that the LDC application was for "three self-contained units within No.68 Melbourne Road and two units within No.70". In the light of all this, it seems to me that the description outlined in the preamble is an accurate reflection of the use. I will therefore proceed to make my decision on this basis.

The Appeal

4. In order for the appeal to succeed it has to be shown that the use in question commenced more than 4 years before the date of the LDC application and has continued actively throughout the subsequent 4 year period. The LDC

application form is dated 8 June 2016, whereas the date given on the notice of refusal, and repeated in the appellant's appeal statement, is 13 June 2016. It may be that the apparent discrepancy is down to when the application was formally registered, but my view is that the 4 year period prior to and up to 8 June 2016, as indicated on the application form, is the appropriate one for assessing lawfulness in this instance.

5. The test for the evidence is the balance of probability and the Courts have held that in cases such as this the onus on proving it lies with the appellant. In this case, as the appellant indicates, each flat constitutes a separate planning unit.

Reasons and Conclusions

Commencement of the Use

6. The appellant claims that the flats in question have existed for over 16 years, they were there at the time of the Millennium. In support of this, my attention has been drawn to copies of Assured Shorthold Tenancy Agreements relating to what are described as Flats 2 and 1, 68 Melbourne Road, dated 20 April 2000 and 1 March 2005 respectively. In addition, amongst the appeal documents there are copies of rent statements for the first floor flat (with a handwritten annotation 'Flat 2') and the ground floor flat (with a handwritten annotation 'Flat 1') at No.68 that refer to the periods 20 May 2000 to 19 June 2000 and 4 June 2000 to 3 July 2000 respectively.
7. Also included with the appellant's appeal papers are copies of an unsigned Certificate of Service under section 21 of the Housing Act 1988 referring to Flat 1, 68 Melbourne Road, dated 4 May 2000, and a signed Notice under section 48 of the Landlord and Tenant Act 1988, dated 11 December 2003, that refers to Flat 1, 70 Melbourne Road.
8. Additional documents are included in Appendix 1 to the Council's statement under the heading 'Information submitted by the Appellant with Certificate application'. This material includes copies of 3 rent statements relating to Flats 1 and 2, 68 Melbourne Road, and Flat 1, 70 Melbourne Road, dated 10 May 2000, 3 May 2000 and 8 November 2001.
9. No claim has been made that the documents referred to in the previous paragraph are anything other than genuine. However, while they are consistent with the claim that the flats have existed, and were rented out well before the relevant 4 year period, this evidence is very patchy indeed and there are long periods when there is nothing. Moreover, the documents only appear to relate to 3 of the 5 claimed flats. As a result, this evidence does not paint a particularly clear picture of the disposition of the accommodation at the property, or perhaps more importantly, the manner in which it was used, prior to the relevant date.
10. On the latter point a letter from a firm of Solicitors to the appellant dated 4 September 2008¹ refers to the property. Mention is made of a previous use as a guest house which subsequently became "*a series of sub-let units with some shared facilities*". Whether this refers to the state of the property in 2008 is not elaborated upon, but it does raise the possibility that some or all of the 'flats' may not have been self-contained in the past. The internal layout drawings submitted with the application show self-contained units, albeit only 4 flats are

¹ Appendix 1f to the Council's statement.

identified, but the word 'proposed' appears on the drawings. As the drawings are not dated, it is not possible to tell what period they relate to, but they raise the possibility that some internal re-arrangement of the property may have been contemplated at some stage. However, if this did happen, no indication of when it occurred has been given. All this tends to add to the lack of clarity concerning the accommodation in the past.

11. Moving closer to the relevant date, my attention has been drawn to certain items of correspondence from the Valuation Office Agency to the appellant. A series of 7 letters, all dated 21 June 2012, and each headed 'Council Tax: Notice of Entry in the Valuation List', relate to Flats 1 to 7 at 68 to 70 Melbourne Road indicating that they would be entered on the Valuation List from 25 June 2012. Similar information is contained in another letter dated 25 November 2014. In addition, a further letter from the Council's Revenue Services Manager dated 8 August 2014 indicates that *"each flat was brought onto the rating list with effect from 25/06/2012"*.²
12. The appellant acknowledges that the listings in June 2012 are *"not quite"* 4 years before the application date³, but refers to notes of an inspection which took place in February 2012. A copy of these notes, handwritten and bearing the date 14 February 2012, is appended to the appeal statement. The notes, the provenance of which has not been called into question, refer to 7 flats at Nos 68-70.
13. It is reasonable to assume that the references to the 7 flats at the appeal property include the 2 that have been deemed to be lawful. From the remarks in the Revenue Officer's letter, it appears that the view was taken that the flats were *"capable of separate occupation"*. But, as the appellant notes, the *"crucial question is one of use"*. Even though the Valuation Office inspection took place nearly 3 months before the relevant date, whether this capability was translated into actual occupancy at that time is far from clear. Indeed, although there is an element of hearsay in the Council's reference to verbal information from the appellant to the effect that *"residents did not start using the dwelling units independently until after the decision by the VOA on 25 June 2012"*⁴, this point has not been challenged. This raises the possibility that the use in question may not have begun until after the relevant date.

Continuity of the Use

14. The appellant has contested the accuracy of the Council's record of who occupied the flats and when⁵ and has provided a chronology of the occupancy of each of the 5 flats that spans the 4 year period prior to the LDC application. In particular, in respect of Flats 1 and 2, 68 Melbourne Road, it is contended that, irrespective of what the Council's records may show, the appellant received rent from Flat 1 throughout. Likewise, Flat 2 was occupied throughout. Although there are gaps in some of the dates, these are variously described as *"little"* or *"as short as possible"*⁶, and so are claimed not to have interrupted the 4 year immunity period. The Council, on the other hand, contend that their information points to *"significant periods of vacancy"* and refer to visits to the

² Appellant's statement, page 9.

³ Ibid paragraph 4.1.

⁴ Council's statement, paragraph 2.5.

⁵ Appellant's statement page and 20

⁶ Ibid paragraphs 4.9 & 4.10

site in April and July 2016 when it was “evident”⁷ that some of the units were not occupied.

15. Although the latter date is after the application date, the earlier one is within the 4 year period and this particular point has not been called into question. Moreover, while the appellant has criticised the accuracy of the Council’s records, I am concerned that the appellant’s information, which is claimed to “trump” them⁸, is mainly based on his own recollections. I accept that an applicant or appellant is often best placed to produce information about previous activities at a property. Nevertheless, in this instance, where a good number of different tenants are said to have occupied the 5 flats at various times and for varying durations, the possibility that this, together with the passage of time, may have dimmed the memory somewhat, cannot be discounted.
16. Documentary evidence, which could have helped shed more light on the matter, is very sparse. There is a copy of an agreement in respect of a tenant of Flat 2, 68 Melbourne Road indicating that a sum was paid as rent on 1 November 2014. In addition, an email from a housing charity that records 4 bonds were paid for some of the flats on various dates between February 2013 and June 2013. And, appended to the Council’s statement are copies of Shorthold Tenancy Agreements for Flat 2, 68 Melbourne Road dated 7 June 2013 and 1 November 2014, and a notice requiring possession of the flat on 1 May 2015, dated 29 November 2014⁹.
17. The names and dates in these documents tally with the information set out in the appellant’s statement. But, while this evidence provides a degree of insight into the occupancy of one of the 5 flats, namely Flat 2, 68 Melbourne Road during part of the 4 year period prior to the LDC application, there is little else in the way of documents that helps to shed light on either this matter or the occupancy of the flats at the appeal property. For instance, there is no evidence from anybody who lived in the flats, nor is there anything else, such as electoral register entries, or records of rental receipts, that might have helped show when the flats were occupied.
18. I have read that most of the tenants did not have tenancy agreements, or those that did exist have been lost. It is also stated that, due to a breakdown of the partnership that managed the flats, seemingly around the time they were assessed for Council Tax, the records, apparently held by the appellant’s then partner, are no longer obtainable. Unfortunate though this may be, the absence of this information makes it very difficult to obtain a clear picture of the nature of the use in question and more particularly whether it was continuous. The relative paucity of such information tends to make this matter somewhat inconclusive.

Overall Conclusion

19. From what is before me it seems likely that there were some flats of some kind in the appeal property a good number of years before the relevant date. However, just how many, and whether each one constituted a self-contained dwelling unit, is far from clear. The ‘proposed’ drawings suggest that some

⁷ Council’s statement paragraph 2.6

⁸ Appellant’s statement paragraph 4.32.

⁹ Council’s statement, Appendix 2d

alterations may have taken place or were being contemplated, but as they are not dated and only cover 4 of the 5 flats, this evidence is similarly unclear.

20. Things do become somewhat clearer around the relevant date, but even if the inclusion of the 5 flats on the rating list on 25 June 2012 was based on information gleaned in February of that year, this is not necessarily an indication that the flats were actually occupied then. The evidence, not only in this respect, but also regarding the continuity of the use subsequently, is somewhat thin, presumably for the reasons given by the appellant.
21. In the apparent absence of more comprehensive documentation, a great deal of reliance is placed upon the appellant's recollection. Quite how he was able to recall things with such apparent clarity has not been elaborated upon, and I have already expressed some reservations about this. Moreover, as the appellant has opted to pursue his appeal by means of written representations, this has precluded the opportunity for his evidence to be tested by cross-examination. This tends to diminish the weight to be attached to this evidence somewhat.
22. I accept that as each flat constitutes a separate planning unit it would be possible to issue a certificate in respect of one or more of them as opposed to all 5. However, the circumstances of this case are such that I am not satisfied that the evidence is sufficiently precise and unambiguous to justify the grant of a LDC in respect of all or any of the flats on the basis of the balance of probability. The burden of proof that lies with the appellant has not been discharged.
23. For the reasons given above, and having regard to all the other matters raised, I am satisfied that the Council's refusal to issue a LDC in respect of the use of 68 and 70 Melbourne Road, Bromsgrove, Worcestershire B61 8PF as 5 separate residential units was well-founded. I shall therefore exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

D H Brier

Inspector