The Planning Inspectorate

Appeal Decision

Site visit made on 24 July 2017[1]

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 10 August 2017

Appeal Ref: APP/A5270/X/16/3163692
Central Hotel, 48 Birkbeck Road, Acton W3 6BQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ['the Act'] against a refusal to grant a certificate of lawful use or development [LDC].
- The appeal is made by Mr Satish Lakhani against the decision of the Council of the London Borough of Ealing.
- The application Ref 164319CPE, dated 23 August 2016, was refused by notice dated 9 November 2016.
- The application was made under section 191(1)(a) of the Act[2].
- The use for which a LDC is sought is described in the following terms: '*We have a large semi detached* [sic] *property with 10 bedrooms and a studio flat which has always been used as an HMO since the date when we bought the property on 11/9/02. We have the relevant HMO certificates that have been issued by the Council during the course of this period*'[3].

Decision

1. The appeal is dismissed.

Procedural matters

2. The representations before me include the grounds of appeal, supporting documents and the property's existing layout drawings. The application relates to the use of the property as a large house in multiple occupation [abbreviated as 'HMO']. The last bullet-point in my header above describes the existing use as set out on the application form; that description is however imprecise. Section 191(4) of the Act permits the Council, by extension the Secretary of State, to modify the terms of an application so as to accord with the facts and evidence. The Council's refusal notice describes the existing use in the following terms: '*Continued use of property as HMO (sui generis) (Lawful Development Certificate for Existing Use)*' [sic]. On the papers before me it appears that Mr Lakhani seeks a certificate declaring the existing lawful use of the appeal building as a large HMO. I will proceed on that basis.

Inspector's reasons

3. In this appeal the onus of proof is firmly upon Mr Lakhani. In *Gabbitas*[4] the Courts have held that the relevant test of the evidence on matters such as an LDC

[1] LDC appeal form, received by The Planning Inspectorate on 21 November 2016, indicates it was acceptable to carry out an unaccompanied site visit.
[2] If any person wishes to ascertain whether any existing use of buildings or other land is lawful he may make an application for the purpose specifying the land and describing the use.
[3] I have taken this description from section 8 of the LDC application form submitted to the Council on 23 August 2016.
[4] *Gabbitas v Secretary of State for the Environment* [1985] JPL 630 reviewed in *Ravensdale Limited v Secretary of State for Communities and Local Government* [2016] EWHC 2374 (Admin).

application is the balance of probabilities. The applicant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make Mr Lakhani's version of events less than probable, there is no good reason to dismiss the appeal, *provided his evidence alone is sufficiently precise and unambiguous* [my emphasis]. I must examine the submitted factual evidence, the history and planning status of the building in question and apply relevant law or judicial authority to the circumstances of this case. Planning merits therefore has no role in the determination of this appeal.

4. The main issue is whether the use of the building as a large HMO was lawful on the date of the application.

5. For the purposes of the Act, a use is lawful at any time if no enforcement action may be taken in respect of the use, due to the passage of time. In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10-years beginning with the date of the breach[5]. For the purposes of the LDC appeal, the relevant date is 23 August 2006.

6. The Council's unchallenged record of the planning history indicates planning permission was granted for a change of use of the building into three self-contained flats in 1985. Planning permission was refused for an extension and homeless accommodation in 1986; subsequently it was granted in 1987. The latter was subject to a condition limiting use to an activity falling within a residential institution classification. On the papers, it seems that was the last use of the building.

7. Mr Lakhani submits that the property was already occupied and used as a large HMO when he acquired it on 11 September 2002, which is before the material date. That use, he maintains, continued without significant interruption for a period of 10 years and accrued lawfulness by 23 August 2016. He states the following: *'The property is a large semi-detached property which includes the basement, ground floor, 1st floor and 2nd floor. The property comprises of ten bedrooms some of which are en-suite together with a communal kitchen which is for use by all the residents. In addition, there is a studio flat within the building'*[6]. This description is broadly confirmed in the layout plan showing the configuration at basement, ground and first and second floor level[7]. In terms of the use, Mr Lakhani describes it in the following terms: *'…the property has always been used as a house in multiple occupation (since acquisition) whereby the rooms are let out individually to different households. We have always had an HMO licence issued…'* [sic].

8. HMO licenses for the period 5 October 2004 and 21 June 2016 have been submitted[8]. The certificate, dated 5 October 2004, refers to a basement, ground and first floor and restricts occupancy to nine individuals at ground floor and 11 at first floor. The licence dated 6 April 2006 allows the property to be occupied by a maximum of 20 persons. The document dated 25 June 2010 refers to a maximum of 11 households comprising no more than 12 persons. The licenses with an issue date of 1 March 2011 and 21 June 2016 refer to self-contained units within the building. Evidence in the form of letters from an insurance company, accountants and a heating engineer has been submitted.

[5] Section 191(1)(2) and 171B of the Act.
[6] Bundle of evidence submitted with the LDC application and appeal documents. The letter referred to here is dated 17 August 2016.
[7] Document 22 and 23 of the grounds of appeal.
[8] Documents were submitted in the bundle of evidence.

9. The Town and Country Planning (Use Classes) Order 1987 (as amended) ['the UCO'] defines Class C4 as use of a dwelling-house by not more than six residents as a HMO[9]. This category is mainly concerned with accommodation lived in by persons who do not form a single household. Class C4 does not include a converted block of flats to which section 257 of the Housing Act 2004[10] applies, but otherwise has the same meaning as in s 254 of the same Act. Thus, a building[11] converted into self-contained flats is expressly excluded from the UCO definition of a HMO. It is apparent from s 254 that a building is not a HMO for Class C4 purposes if certain exceptions[12] apply, which are not relevant in this case. In addition, a HMO would not exist where at least two households in occupation did not share, or the living accommodation was lacking in, one or more 'basic amenities'. The latter is defined in subsection 254(8) as a toilet, personal washing or cooking facilities.

10. Large HMOs, for instance, those lived in by more than six people sharing basic amenities, are unclassified in the Schedule to the UCO. In land-use terms they are appropriately described as *sui generis* (of their own kind). Usual practice is that express planning permission will be required for a change of use to a large HMO, or from Class C4 to a large HMO where a material change of use is considered to have taken place.

11. The factual evidence indicates to me that the building's ground and first and second floor contained 10 bedrooms and there was a communal kitchen. The building also contained a basement with three rooms. The latter appears as a self-contained unit of accommodation because of its physical separation from the main house and its own access arrangement. It is therefore more likely than not that the studio flat contained facilities for day-to-day private domestic existence behind a lockable door, given Mr Lakhani's evidence that the property was occupied by different households. There is nothing before me to indicate a functional link between the use of the main house and the basement flat.

12. I consider that, in practice, the building had been subdivided into two physically and functionally separate residential planning units before the date of the LDC application[13]. The studio flat formed a self-contained dwelling-house while the main house comprised 10 bedrooms and communal kitchen. In order to facilitate such a change of use, it was necessary to subdivide the whole building into at least two separate dwelling-houses. The character of that type of use is significantly different to its previous use, which would have required express planning permission as a matter of law[14]. There is nothing before to suggest the latter had been obtained.

13. Mr Lakhani's evidence fails to address the potential of two separate residential planning units in existence before the date of the LDC application. This is probably because of his misunderstanding about the character of the land-use in planning terms, and his misapprehension as to what needs to be shown in the context of a s191(1)(a) at the application date. I am therefore of the firm opinion that an LDC, in terms of a large HMO use, cannot be granted because the facts do not

[9] It was inserted into the UCO by the Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (SI 2010/653) with effect from 6 April 2010. This use did not previously fall within any Class within the UCO, thus it would have been classified as a *sui generis* use before that date.
[10] As amended by the Housing Act 2016.
[11] A 'building' is defined as including any structure or erection and any part of a building.
[12] In summary, these exceptions are the following; it is occupied by persons forming part of a single household, or it is occupied by persons in a manner other than as their main residence, or occupation of the living accommodation by those persons is not the only use of that accommodation or no rent or other consideration is provided.
[13] Applying the principles established in *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.
[14] Section 55(3) of the Act - use as two or more separate dwelling-houses of any building previously used as a single dwelling-house involves a material change in the use of the building and of each part of it which is so used.

sufficiently show that change of use actually occurred on or before the relevant date.

14. Even if an alternative view prevails, and the building constitutes a single residential planning unit in use as a HMO at the date of the LDC application, I am not persuaded that such a use commenced on or before the relevant date and continued for a period of 10 years without significant interruption. There is no contemporaneous evidence showing when and how the property was converted and subsequently occupied and used as a large HMO. For example, the nature and sequence of works of conversion is unclear. The version of events does not adequately substantiate important matters such as the following: how and who occupied and used the rooms; the extent and scale of the property's use by individuals or couples; how people led their individual or collective lives; to what extent residents shared amenities; how tenants were recruited and tenancies were arranged and whether or not the responsibility for filling vacancies fell upon residents. There is also some confusion as to the use of the studio flat.

15. There is also a problem with the documentary information as it does not clearly show when a material change of use occurred. Firstly, the letter from Forum Insurance brokers conflicts with Mr Lakhani's assertion, because it suggests the property was acquired by Crownfern Ltd on 10 May 2001; there is no explanation as to the role of the latter. Secondly, the letter from Chartered Accountants Lake & Company states that Crownfern Ltd acquired the building on 11 September 2002. The accountants maintain that the property has been used as a HMO since 2002. Accounts have been prepared and submitted for each financial year since that time and submitted to the relevant authorities, but these have not been submitted for my consideration. Thirdly, CBS Showroom Ltd state it provided plumbing services since 2003 but provide very little detail as to the layout or arrangement of the building. I consider that all of this evidence is imprecise and, in any event, is not in the form of a statutory declaration; it attracts limited weight.

16. Much is made of the HMO certificates. Firstly, this type of proof is not determinative of the main issue in this case as they do not describe the character of the use. In any event, the information provided is inconsistent with Mr Lakhani's own evidence. For example, the documents dated 1 March 2011 and 21 June 2016 refer to self-contained units before 23 August 2016, which conflicts with the claim that the building was used as a large HMO before the date of the LDC application.

17. Mr Lakhani, whichever way one scrutinises the representations made, I consider insufficient evidence has been provided to corroborate and substantiate your case. Having reviewed all of the evidence presented, I find it is ambiguous and incomplete as it does not precisely show when the property's change of use from its last use to a large HMO occurred. It does not show that the claimed HMO use was instituted in September 2002, or on or before 23 August 2006. It does not show that the HMO use continued without significant interruption for a period of at least 10 years before the current LDC application, on the balance of probabilities [15].

18. I am also not content that an LDC can be issued in a modified form describing the use of the property as a large HMO comprising 10 bedrooms on the ground, first and second floors and a communal kitchen and a self-contained studio flat. This is because, on the balance of probabilities, insufficient and precise and unambiguous

[15] Applying the principles established in *Basingstoke and Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 Admin; JPL 1585 and *Swale BC v FSS & Lee* [2005] EWCA Civ 1568; [2006] JPL 886; *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226 and *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461.

factual evidence has been provided as to when such a change of use occurred and, if it did occur, that it subsisted for a period of 10-years without significant interruption.

Conclusion

19. On the material facts and circumstances of this case and the available evidence I must reject Mr Lakhani's submissions as the onus of proof has not been discharged. This does not necessarily preclude the submission of a further application if better evidence is subsequently available. Thus far imprecise evidence has been presented that does not sufficiently discharge the burden of proof[16].

20. I therefore find that, in part at least, the Council's refusal to issue the LDC was well-founded.

21. For all of the reasons given above and having regard to all other matters, I conclude the appeal should be dismissed in accordance with the powers transferred to me in section 195(3) of the Act.

A U Ghafoor

Inspector

[16] The Department's Planning Practice Guidance, published online, advises on LDC applications from Paragraph: 001 Reference ID: 17c-001-20140306 onwards.