

Appeal Decision

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 31 August 2017

Appeal Ref: APP/A5270/X/16/3163718

20 Alfred Road, Acton, W3 6LH

- 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 164316CPE, dated 22 August 2016, was refused by notice dated 9 November 2016.
 - The application was made under section 191(1)(a) of the Act¹.
 - The use for which a LDC is sought is described in the following terms: *‘We have a large semi detached 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 10/5/01. We have the relevant HMO certificates that have been issued by the Council during the course of this period’*² [sic].
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Procedural matter

1. The written representations include grounds of appeal, supporting documents and existing layout drawings of the property. The application relates to the use of the property as a large house in multiple occupation [for convenient shorthand, I will refer to the term ‘house in multiple occupation’ as ‘HMO’]. In my header above, the existing use is taken from the application form but that description is imprecise. The Council’s refusal notice described the use in the following terms: *‘Continued use of property as HMO (Use Class sui generis)’* [sic], and referred to the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended [‘the UCO’]. Mr Lakhani seeks a declaration that the existing use of the property as a large HMO was lawful at the date of the LDC application. I will proceed on this basis.

Decision

2. The appeal is dismissed.

Inspector’s reasons

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

¹ 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.

² I have taken this description from section 8 of the LDC application form submitted to the Council on 22 August 2016.

³ *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).

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 Council refused to grant an LDC because it maintains that insufficient and unsatisfactory evidence had been submitted to demonstrate that the large HMO use of no. 20 Alfred Road is lawful. 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 this case no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach⁴. The relevant date is 22 August 2006. I consider that the main issue is whether the use of the appeal building as a large HMO was lawful on the date of the application.
5. The UCO defines Class C4 as use of a dwelling-house by not more than six residents as a HMO⁵. 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 2004⁶ applies, but otherwise has the same meaning as in s 254 of the same Act. Thus, a building⁷ 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 exceptions⁸ 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.
6. 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* use (of their own kind). Usual development control practise 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.
7. The Council's unchallenged record of the planning history is that permission was granted for a hostel use in 1985. In 2007 planning permission was granted for the property's conversion into five self-contained. There is nothing to show that the latter had not been implemented actually. Nonetheless, the nub of Mr Lakhani's case is that the property was occupied and used as a large HMO when he acquired it on 10 May 2001. He submits that the HMO use continued without significant interruption for a period of 10 years. Thus the argument is that use had achieved immunity from enforcement action by 22 August 2016, due to the passage of time.
8. Mr Lakhani states that '*...we have used the property as an HMO since... the date we bought the property (10/05/01) up to the present time... the property was... registered with the Council as such*'. In correspondence⁹ with the Council the

⁴ Section 191(1)(2) and 171B of the Act.

⁵ 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.

⁶ As amended by the Housing Act 2016.

⁷ A 'building' is defined as including any structure or erection and any part of a building.

⁸ 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.

⁹ Letter dated 17 August 2016.

existing use is described as follows: *'The property...includes the basement, ground floor, 1st and 2nd floor... comprises of ten bedrooms some of which are en-suite together with communal kitchen which is for use by all the residents. In addition, there is also a studio flat within the building... has always been used as a house in multiple occupation (since acquisition) whereby the rooms are let out individually to different households'.* He says that *'...the Council as part of their due diligence visited our property on a regular basis to check that the property is adhering to all the HMO Rules and Regulations on the basis of which these certificates were issued'* [sic].

9. Apart from mere assertion, I have found an absence of precise information supporting the claim that the building had been converted into a large HMO on 10 May 2001. This is because the proof does not unambiguously set out a clear sequence of past events in a logical format, nor show a precise chronological order explaining when the material change of use actually occurred. There is a lack of detail about any works of conversion, adaptation or how the property had been laid out in 2001 – when was the building physically converted? In addition to all of that, there is no plausible explanation as to when the HMO use was actually instituted because no specific date is given; there is no discussion about timescale. Further, there is an absence of evidence to corroborate Mr Lakhani's claim that the building provided shared amenities in 2001. Therefore, given the lack of clear, precise and specific factual evidence, it is difficult to conclude that the building was converted into a large HMO by the time the appellant had purchased it in 2001.
10. I consider that the evidence about the nature and scale of the HMO use is unclear. Licenses for the period 5 October 2004 and 21 June 2016 have been submitted¹⁰. The certificate, dated 5 October 2004, refers to a basement, ground and first floor and restricts occupancy to seven individuals at ground floor, one individual for rooms 5 to 7, and two individuals in room 4 at first floor. The licence dated 6 April 2006 allows the property to be occupied by a maximum of 12 persons. The document dated 23 September 2010 refers to a maximum of 11 households comprising no more than 12 persons. The document dated 21 June 2016 refers to maximum of 10 households comprising no more than 14 individuals and one small household in the ground floor rear flat. In my assessment this type of information does not prove the character of the property's use as a large HMO, because it does not demonstrate the building had been occupied and used continuously by people who did not form a single household who shared basic amenities. I attach limited weight to this evidence.
11. The added complexity is that part of the building had been physically subdivided into a self-contained studio flat. It is more likely than not that the flat contained facilities for day-to-day private domestic existence behind a lockable door, because it was occupied by different households. There is nothing to indicate a functional link between the use of the main house and the studio flat. In all probability, I consider that the building had been subdivided into two physically and functionally separate residential planning units before the date of the LDC application¹¹. The evidence points in the likelihood that the flat formed a self-contained dwelling-house while the main house comprised bedrooms and communal kitchen. In order to facilitate such a change of use, it was necessary to subdivide the building into at least two separate dwelling-houses.

¹⁰ Documents were submitted in the bundle of evidence.

¹¹ Applying the principles established in *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

12. In my judgement, the subdivision and subsequent use of the building as two separate residential planning units was materially different in character to its previous use. That change would have required express planning permission as a matter of law¹². There is nothing before to suggest the latter had been obtained or when it occurred in breach of planning controls. Unfortunately for Mr Lakhani, the evidence presented 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) application.
13. Pulling all of the above points together, I am therefore of the firm opinion that an LDC certifying the existing use of the property as a large HMO cannot be granted, because the facts do not sufficiently show such a material change of use actually occurred on or before the relevant date and subsisted for a period of 10 years.
14. Even if an alternative view prevails and the building constitutes a single residential planning unit, there is no contemporaneous evidence showing when and how the HMO use actually started. For instance, the proof about the nature of the building's use is unclear. There is a lack of evidence showing who occupied and used the rooms; the extent and scale of the 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. Supporting documents lack specificity for instance the letter from Forum Insurance states that the property was acquired by Goldlodge Ltd on 10 May 2001, but there is no explanation about its role. The firm claims that the building had been insured as a HMO yet certificates have not been provided, which would have assisted in making comparisons. Chartered Accountants Lake & Company state that from 10 May 2001 the property had been used as a HMO and certified accounts are available for each year, but these have not been submitted for consideration. CBS Showroom Ltd state it provided plumbing services since 2001, but there is very little detail as to the layout or arrangement of the building. There is therefore a significant issue with this type of evidence as it does not clearly show when a material change of use occurred. In any event, none of this evidence is submitted in the form of statutory declaration. I give it little weight.
16. 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 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 with sufficient clarity that the claimed material change of use was instituted on 10 May 2001, or on or before 22 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 probabilities¹³.

¹² 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.

¹³ 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.

17. 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. I do not consider that an LDC can be issued in a modified form describing the existing use of the property as a large HMO with a communal kitchen and a self-contained studio flat at ground floor level as being lawful at the date of the application. This is because sufficient evidence has not been tendered to precisely show that change of use occurred on or before the relevant date and subsisted for a period of 10-years without significant interruption.

Conclusion

18. 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 proof¹⁴.
19. I therefore find that, in part at least, the Council's refusal to issue the LDC was well-founded.
20. For all of the reasons given above and having regard to all other matters, I conclude that the appeal should be dismissed in accordance with the powers transferred to me in section 195(3) of the Act.

A U Ghafoor

Inspector

¹⁴ The Department's Planning Practice Guidance, published online, advises on LDC applications from Paragraph: 001 Reference ID: 17c-001-20140306 onwards.