The Planning Inspectorate

Appeal Decision

Site visit made on 24 April 2018

by Debbie Moore BSc (HONS) MCD MRTPI PGDip

an Inspector appointed by the Secretary of State

Decision date: 25 May 2018

Appeal Ref: APP/T5150/X/17/3180479
66 Noko, 3-6 Banister Road, London W10 4AR

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) 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 Ben Lassman against the decision of the Council of the London Borough of Brent.
- The application Ref 16/4765, dated 2 November 2016, was refused by notice dated 23 January 2017.
- 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 a self-contained flat - Class C3 dwellinghouses[1].

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The property forms one unit within a four storey building that was erected in 2005, pursuant to a planning permission for 57 live/work units and 20 residential flats[2]. The property was intended as one of the live/work units. I saw from my site visit that unit 66 is being used as a two-bedroomed self-contained flat, with two ensuite bathrooms and a kitchen/living area.

3. The internal layout differs from the approved plan, supplied by the Council 'Typical Third Floor Layout' Ref 214F, amendment dated 4 November 2003. The appellant has supplied what appears to be a later version of the floor plan Ref 203M, amendment dated 19 May 2004, which has a floor layout the same as currently existing. This layout accords with the plan included in sales particulars, printed from a website in September 2011. Although this does not identify the property by address, the shape of the unit and the floor plan corresponds with the appeal property. As the later floor plan pre-dates the build date, it appears that the unit was constructed in accordance with the layout shown on that plan. However, there is no evidence that this was formally approved.

4. The planning permission is subject to conditions restricting the use of the live/work units (conditions 3, 4 and 6). The conditions prevent the units from:

[1] This refers to Class C3 of The Town and Country Planning (Use Classes) Order 1987, as amended.
[2] Ref 02/2218 dated 4 March 2004.

(No 3) being sub-let, sub-divided or used or occupied other than as a single live/work unit; (No 4) used for any other purpose than combined residential and business use (that being equivalent to a B1 use, as defined in The Town and County Planning (Use Classes) Order 1987) and; (No 6) the internal layout of the building and the areas designated for each purpose shall not be altered or modified, or sub-divided or disposed of without approval. The work area identified in each unit being used for work proposes only and not as residential accommodation. The reasons for the conditions are: (No 3) to avoid traffic congestion and to protect residential amenity and; (Nos 4 and 6) to control the use of the premises. The effect of the conditions is that the units must be occupied and used for the purposes for which they were built, without subdivision. The use of the units for solely residential purposes is prevented by the conditions, but this was not their only purpose as they have a wider effect. The use of unit 66 as a single dwelling is in breach of conditions 3, 4 and 6.

5. The carrying out of development without the required planning permission, or failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control. A use is lawful[3] at any time if no enforcement action may be taken in respect of the use due to the passage of time. Where there has been a breach of control consisting in the change of use of any building to use as a single dwelling-house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. In the case of any other breach no enforcement action may be taken after the end of the period of 10-years beginning with the date of the breach[4]. Notwithstanding the reference to the four-year time limit in its formal decision, the Council's opinion is that the relevant period of immunity is 10 years.

6. As set out above, the conditions prevent the use of unit 66 as a single dwelling, but that is not their only purpose. *In FSS v Arun DC and Brown*[5], the Courts have held that the four-year immunity period applies where there has been a breach of condition for use as a dwellinghouse, where the condition has the effect of preventing such use. In relation to this appeal, it is clear that the breach of control is the failure to comply with conditions subject to which planning permission has been granted, but these conditions have a wider effect than simply preventing a residential use. Thus, the relevant immunity period is ten years beginning with the date of the breach.

7. For the avoidance of doubt, the planning merits of the existing use are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act as amended. My decision rests on the facts of the case, and on relevant planning law and judicial authority. As such, any planning permission or certificate of lawfulness granted on other units within the building cannot form part of my appraisal as this would relate to the planning merits of the use.

[3] Section 191(1)(2) and 171B of the Act.
[4] Section 171A and 171B(2) and (3) of the Act.
[5] FSS v Arun DC and Brown [2006] EWCA Civ 1172

Main Issue

8. I consider that the main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded.

Reasons

The evidence

9. In this type of appeal, the onus of proof is firmly upon the appellant. In *Gabbitas*[6] 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 the appellant'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. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.

10. I note that some of the evidence submitted with this appeal was not made available to the Council when the application was considered. However, if I were to consider only the evidence put to the Council as part of the application, it would deny the purpose of the LDC procedure which is to arrive at an objective decision based on the best facts and evidence available at the time the decision is taken. The appellant submitted the following documents with the appeal.

Document	**Date**
Letter from R Birkett (previous owner)	09/03/2016
Copy of pages from tenancy agreement between the appellant and three individuals for period 02/01/2012 to 01/02/2013; signed by the tenants	23/12/2011
Copy of pages from tenancy agreement between the appellant and one individual for period 04/05/2013 to 03/05/2014; signed by the tenant Copy of standing order instruction confirmation Copy of related Tenancy Deposit Scheme (TDS) protection certificate Copies of statements from property management company; dated 21/05/2013, 04/07/2013, 04/09/2013, 04/10/2013, 05/11/2013	Undated 04/05/2013 03/05/2013
Copy of pages from tenancy agreement between the appellant	Undated

[6] *Gabbitas v Secretary of State for the Environment* [1985] JPL 630.

and two individuals for period 12/12/2013 to 11/12/2014 ; signed by all Copy of related TDS protection certificate Copies of statements from property management company; dated 17/12/2013, 13/01/2014, 15/01/2014, 13/02/2014, 13/03/2014	11/12/2013
Copy of pages from tenancy agreement between the appellant and two individuals for period 31/08/2014 to 30/08/2015; signed by the tenants	29/08/2014
Copy of pages from tenancy agreement between the appellant and two individuals; signed by all Screen shot of extension of tenancy for period 02/12/2016 to 01/02/2018; signed by all	25/09/2015 31/10/2016
Copy of Council Tax Bill 2012-2013 addressed to the appellant covering period 31/01/2013 to 31/03/2013 Copies of Council Tax Bill 2013-2014 addressed to appellant covering period 01/04/2013 to 03/05/2013	11/03/2013, 08/05/2013
Copies of pages from 5 x shorthold tenancy agreements including a clause that the property should only be used as a private residence for the occupation of the tenant[s]	
Copy of agreement with estate agent (unsigned)	11/03/2013
Email from Business rates Department of Brent Council	20/03/2017

Assessment

11. It is necessary for me to consider whether the change of use of unit 66 occurred on or before 2 November 2006 and has continued without material interruption thereafter.

12. The property was purchased by the appellant in December 2011. It is claimed that unit 66 has been used a single dwelling since it was built in 2005 and a letter to that effect from the previous owner has been submitted. However, the evidence presented does not show when the use of the unit as a live/work unit actually ceased and the self-contained residential use commenced. I attach it limited weight because the information is unclear and ambiguous.

13. The appellant has submitted copies of tenancy agreements in support of his contention that self-contained residential use of the unit continued when he acquired the property. However, not all the tenancy agreements were signed and dated by relevant parties, and duly witnessed. There is no information from the tenants corroborating their residence and no record of any utilities or Council Tax payments. The appellant has also supplied supporting information in the form of TDS protection certificates and statements from the property management company. None of these show when the unit became a self-contained dwelling and how it was occupied and used as such.

14. The Council points out that there are gaps in the tenancy between February and May 2013. The appellant explains that this was a void period, when the property was unoccupied but a tenant was being sought. During that time, the appellant was responsible for Council Tax and copies of relevant bills have been submitted that cover the void period. There was a further void period in September 2015, which was relatively short and would correspond with a change of tenants. Nonetheless, there has been a break in occupancy and residential use. The evidence needs to show the reasons for that break but also what had been done to support the claim that this was a void period. The bills show that Council Tax was being paid, but not how the property was being used during the void period. There is an email from the Council confirming that no business rates were liable. However, it is not sufficient to show that no business was being operated from the unit.

15. Overall the evidence presented in support of the appellant's claim is incomplete and ambiguous.

Conclusion

16. The totality of the evidence presented does not show, on the balance of probabilities, when the material change of use occurred and how unit 66 has been used for a continuous period of at least 10 years.

17. Even if an alternative view prevails and the four-year time limit applies to the facts of this case, the evidence presented does not show that the unit's self-contained residential use started on or before 2 November 2012. This is because the evidence is incomplete and ambiguous.

18. For the reasons given above, I conclude on the evidence now available that the Council's refusal to grant a certificate of lawful use or development in respect of Class C3 dwellinghouses was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

Debbie Moore

Inspector