



Appeal Decision

Site visit made on 13 August 2019

by Jean Russell MA MRTPI

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

Decision date: 23 October 2019

Appeal ref: APP/Q5300/X/18/3216654
444/446 Hertford Road, N9 8AB

- The appeal is made by Mr Zahoor Ahmed under section 195 of the Town and Country Planning Act 1990 against the decision of Enfield Council to refuse an application for a certificate of lawful use or development (LDC).
 - The application (ref: 18/01758/CEU) was dated 20 April 2018 and refused by notice dated 25 June 2018.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 for an LDC for an existing use which was described as 'use of outbuildings as two s/c [sic] residential units'.
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DECISION

1. The appeal is dismissed.

Preliminary Matters

2. The term 's/c' quoted above means 'self-contained'.
3. I shall refer to persons who are named in the evidence but not party to the appeal by their initials.
4. The appellant submitted documents named as 'Exhibits A-S' in support of the LDC application. The Council referred to these documents in its report and decision notice, and I have also had regard to this evidence from the appellant.
5. The appellant states that he sent additional letters 'to the planning officer on or around 25 September 2018' – after the application was refused – from tenants named AVL and AN, the 'adjoining' construction company and IC Properties. These letters were not submitted with the appeal and the Council has not described receiving them. To be fair to the appellant, however, I shall take account of the letters being sent when considering evidence relevant to their authors.

Background

6. 444/446 Hertford Road are semi-detached houses with back gardens where the appeal 'outbuildings' are located. The buildings are single storey and attached to each other; the appellant refers to them as one 'bungalow'. The 'residential units' in the buildings are known as 444B and 446B, and they are essentially studio flats.
7. S171B(2) of the TCPA90 states that where there has been a breach of planning 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.
8. Under s193(4) of the TCPA90, an LDC may be issued for the whole or part of the land and, where the application specifies two or more uses, for all, some or one of

them. It follows that, depending on the evidence, an LDC could be issued for both, either or none of the appeal flats.

9. The onus is on the appellant to make his case. His evidence does not need to be corroborated, but it must be sufficiently precise and unambiguous to demonstrate lawfulness on the balance of probabilities. Planning merits are not relevant.

Main Issue

10. The main issue is whether the use of the flats is lawful because no enforcement action could be taken on 20 April 2018, the date of the LDC application.

Reasons

11. The appellant purchased 444 and 446 Hertford Road in June 2007 and September 2006 respectively; he has let the houses to tenants ever since. When adjacent land was being developed, the appellant took the opportunity to get the gardens and sheds at nos. 444 and 446 cleared¹. He constructed the appeal buildings 'gradually' between 2011 and 2013 for financial reasons. This evidence is not disputed, although the appellant did not 'involve' Building Control or planning officers.
12. It is also accepted that both appeal flats are 'dwellinghouses' for the purposes of s171B(2), since each contains the facilities required for private day-to-day living. In deciding when the change of use took place, however, it is necessary to look at two factors: when the premises were capable of providing viable facilities for living, and when the residential use actually commenced.
13. On the commencement of the use, it has been held that use of a building as a dwellinghouse must be more than squatting or camping out. Moreover, for an LDC to be granted, it must be shown that the use of each flat not only began but also continued for a four year period without substantial interruption.
14. The appellant suggests that the Council accepts that 446B has been used as a dwelling since 2013. It is true that the Council's report focusses on 444B, but the Council's reason for refusing the LDC was that the evidence does not demonstrate the continuous use of 'the two self-contained flats...' It is therefore necessary for me to look at the evidence for each flat in turn.
15. Before doing so, I note that the appellant's sworn affidavit states: '*The [bungalow] has been in continuous use as two separate dwellings since November 2013. At all times the two dwellings have been occupied independently by unrelated persons*'. While that text is emphatic, it is not sufficiently detailed to demonstrate that the use of either or both flats is lawful.

Flat 446B

16. As noted above, it is accepted the building containing 446B was on the ground by November 2013. However, the appellant has not explained what he means when he says the dwelling was 'completed' by that time; specifically, he has not described when the flat contained viable facilities for living.
17. The earliest evidence as to when Flat 446B had been fitted out by is an Energy Performance Certificate (EPC), which shows that the building was assessed as an 'existing dwelling' on 15 May 2014 – after the material date. It seems unlikely that there were viable facilities for living much before then, because the appellant has said that 446B did not have a direct electricity supply until April 2014 and the first electricity bill which refers to '446B' is that dated 9 October, not 13 July 2014.

¹ I assume that the letter from the 'adjoining' construction company concerns these works.

18. Turning to when the use commenced, the appellant states that 446B was occupied from November 2013 until April 2014 by his (named) builder who was to stay on site while working on 444B. As implied above, however, the appellant's sworn affidavit does not mention the builder or indeed say who lived in 446B (or 444B) at any time. The builder did not have any tenancy agreement, and the appellant has not even said why the builder would have wished or needed to live here after December 2013, when it is claimed that the use of 444B as a flat began.
19. I do not dispute that the builder slept in 446B for some nights, but there is no precise or unambiguous evidence that he did so until April 2014. It seems more probable that the builder 'camped out' while construction works continued, not that the use of 446B as a dwellinghouse began in and continued from November 2013.
20. There is no evidence of anyone else occupying 446B until 16 May 2014 – the day after the EPC assessment – when an Assured Shorthold Tenancy agreement (AST) and Deposit Protection Certificate (DPC) show that the flat was let to AVL. I accept that AVL lived in 446B and used it as a dwelling: he was the author of one of the letters referred to in paragraph 5; it is said that he purchased wi-fi for the flat; and it is shown that he registered with the DVLA and a GP surgery from this address.
21. However, 16 May 2014 is after the material date. Furthermore, even if I assume from his writing the letter that AVL stayed in 446B until the next tenants (KZ and MAZ) moved in – on or around 23 January 2016 – there is little evidence of the continuity of the use thereafter apart from further AST agreements and DPCs. It has not been demonstrated on the balance of probabilities that the use of 446B as a dwellinghouse is immune from enforcement action.

Flat 444B

22. Again, the building containing 444B may have been constructed by November or December 2013 but there is little evidence as to when the flat was fitted out or furnished so as to provide viable facilities for living. It is only clear that the building was an 'existing dwelling' when it was assessed for an EPC on 15 May 2014.
23. The appellant has submitted an AST agreement (but no DPC) to show that 444B was let on 9 December 2013 to AP and MR. There are also AST agreements which *are* backed by DPC to show that the flat was let on 23 July 2014 to EC, on 13 October 2014 to EAN and AJN, and on 22 January 2015 to SL and ML. There are a few inconsistencies in the AST agreements, which show varied rental charges and letting terms, but that is not sufficient reason to dismiss this appeal.
24. A more serious difficulty for the appellant is that the AST agreements do not show how long any tenant lived in 444B – and four agreements were signed in just over 13 months. One of the letters described in paragraph 5 was from AJN, so I will assume that they lived in the flat more or less from 13 October 2014 to 22 January 2015, but that only gives three or four months of continuous use. The evidence overall is simply not precise enough to show that the use had begun and continued without substantial interruption for four years by the date of the LDC application.

Was there a Change of Use?

25. While this matter has not been raised by the Council, I must point out that the immunity period set out under s171B(2) only applies where there has been a *change* of use of any building to use as a single dwelling. On the appellant's own evidence, the appeal buildings were used as flats upon completion. However, it is not necessary to explore whether the appellant should be deprived of the benefit of the four year rule when he has not demonstrated lawfulness even on that basis.

Conclusion

26. I have found on the balance of probabilities that use of 446B as a dwellinghouse commenced less than four years prior to the date of the LDC application, and there is no unambiguous evidence that 444B was used as a flat for any four year period.
27. I conclude that it was not too late to take enforcement action against the use of the appeal buildings as self-contained flats on 20 April 2018. The use is not lawful and planning permission is required for it. The Council's refusal to grant an LDC was well-founded and the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the TCPA90.

Jean Russell

INSPECTOR