



Appeal Decision

Site visit made on 15 October 2019

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 November 2019

Appeal Ref: APP/U5930/X/19/3220133

469-471 High Road, Leytonstone E11 4JU

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr A Chaudhry against the Council of the London Borough of Waltham Forest.
 - The application Ref: 170611 is dated 27 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 six one bed flats.
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Decision

1. The appeal is dismissed.

Procedural Matters and Background

2. The application relates to the lawfulness of six one bed flats that have been formed by the subdivision of the upper two floors of 469-471 High Road. Access to the flats is via an external staircase and walkway that has been constructed at the rear of the premises.
3. The appeal submission advises that the date of the original application was 27 April 2017. However, the application form is dated 27 January 2017. I have therefore determined the appeal on the basis that the application was made on 27 January 2017.
4. This appeal is against the failure of the Council of the London Borough of Waltham Forest to give notice within the prescribed period of time for a decision on an application for a certificate of lawful use as set out in the banner heading above. The Council has subsequently indicated that had it been in a position to make a decision, it would have refused the application for the following reasons:
 1. *The development, which is the subject of the Lawful Development Certificate (LDC) application, cannot be lawful. This is because there is in force an extant Enforcement Notice (that of 21 September 2009), striking at the same development. Section 191(2)(b) therefore applies to the operations the subject of the LDC application. Similarly, section 285(1) also applies so that the validity of an Enforcement Notice shall not, except by*

way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought. The Local Planning Authority (LPA) contends that the application cannot in law serve to challenge or undermine an extant Enforcement Notice and therefore fails in this regard.

- 2. The submitted evidence taken as a whole reveals an unacceptable degree of ambiguity. There is a lack of precision and necessary detail which makes the applicant's version of events less than probable. The totality of the Appellant's evidence, on its own, is insufficient; not precise and not reliable to support the existence of a continuous separate residential use.*
5. Section 191 (4) of the Town and Country Planning Act 1990 as amended (the Act) indicates that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The planning merits of the development are not relevant in this appeal and the main issue is whether the Council's deemed refusal was well-founded.

Reasons

6. An enforcement notice dated 13 August 2009 was issued in relation to the property which alleged the following breach of planning control: "Without planning permission, the erection of an additional storey; the erection of a rear first floor extension with the installation of an extract duct on its rear elevation; the erection of a structure with steel girders held up by supporting walls to the rear of the property." No appeal was submitted under Section 174 of the Act. However, a subsequent prosecution brought by the Council for failure to comply with the enforcement notice was dismissed by the Magistrates' Courts on 18 December 2014.
7. The flats which are the subject of this appeal have been created within the additional storey and rear first floor extension which are the subject of the notice served in 2009. The Council considers that having regard to Section 191(2)(b) of the Act, the development cannot be lawful as it constitutes a contravention of the requirements of the 2009 notice, which they consider to be in force. The appellant disagrees with the Council, given that the prosecution proceedings were dismissed in 2014.
8. The dismissal of prosecution proceedings relating to a failure to comply with the requirements of the 2009 notice does not necessarily mean that the notice should be regarded a nullity or invalid or that it was quashed. Consequently, given the matters under appeal in this case, and the evidence before me, it is not for me to determine the status of the 2009 enforcement notice.
9. That said, it seems to me that the development the subject of the LDC, namely, an existing use as six one bed flats, would not in my view constitute a contravention of the requirements of the 2009 notice. The requirements of that notice relate specifically to the removal of the unauthorised operational development, whilst the LDC is sought for an existing use. For that reason, I am satisfied that the development for which the LDC is sought in this case would not constitute a contravention of the requirements of the 2009 notice.

On the other hand, any LDC granted for the use as six bed flats would not make the operational development lawful.

10. In order for this appeal to succeed it has to be shown that the use in question commenced more than four years before the date of the LDC application, the relevant date in this instance being 27 January 2013, and has continued without significant interruption throughout the subsequent four year period. The test for the evidence is the balance of probability, and the Courts have held that in cases such as this the onus proving it lies with the appellant.
11. The appellant has submitted evidence to support his case through a combination of Council Tax receipts, rent receipts, short term tenancy agreements and possession notices. Energy performance certificates have also been submitted, although an energy performance certificates does not provide any proof of occupancy of the flats.
12. The application form states that the use began on 12 October 2010. That date postdates and is consistent with the physical extension works to this property that were the subject of the 2009 enforcement notice. However, although there are some Council Tax bills which date from 2010, there are no tenancy agreements or rent receipts which would show that there were tenants occupying the flats from October 2010. Indeed, for none of the flats is there a relatively unbroken run of tenancy agreements with corroborating documents (such as rent receipts, Council Tax records or utility bills up until 27 January 2017 (date of LDC application)), which would be necessary to demonstrate occupancy for the relevant four year continuous period.

Flat 1

13. There is a significant gap in the tenancy between 28 February 2012 and 27 March 2013. Furthermore, after the one year tenancy agreement dated 5 January 2015, there are no tenancy agreements relating to this flat, although rent receipts have been provided for the period 5 September 2015 until 4 January 2017.

Flat 2

14. There is a gap in the evidence provided in support of the occupancy of Flat 2. The tenancy agreement dated 28 December 2011 was only for a six month period and the next agreement that has been provided is dated 28 January 2016. In addition, only rent receipts dated from September 2015 have been provided.

Flat 3

15. With the exception of a Council Tax bill for 2012/2013 period, the only evidence submitted in relation to the occupation of this flat is a 12 month assured shorthold tenancy agreement commencing 19 November 2012 and a similar agreement commencing 19 May 2016.

Flat 4

16. There is a gap in the tenancy agreements between 1 August 2013 and 16 June 2014 and no rent receipts relating to this flat.

Flat 5

The only tenancy agreements for this flat relate to the period between November 2011 and September 2013.

Flat 6

17. There is a gap in the tenancy agreements between 28 December 2012 and 28 April 2016. Rent receipts date only from 29 December 2015.
18. I appreciate that in the case of Flats 5 and 6, each has been occupied by a single tenant and therefore a new tenancy agreement may not have been issued for continuing periods of occupancy. However, there is no corroborating evidence in the form of rent receipts or other relevant information which would support that proposition and demonstrate continuous occupancy for the required four year period.
19. Overall, therefore, I consider that the information submitted with the LDC application is not sufficiently precise and unambiguous to demonstrate, on the balance of probability, that the property has been in continuous residential use for a four year period as six one bed flats (that is without significant gaps) for a period commencing on or before 27 January 2013.

Conclusion

20. For the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of six one bed flats at 469-471 High Road was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in Section 195 (3) of the 1990 Act as amended.

Elizabeth Pleasant

INSPECTOR