



Appeal Decision

Site visit made on 14 January 2020

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 February 2020

Appeal Ref: APP/D5120/X/19/3230123

25 Eastcote Road, Welling DA16 2SS

- 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 refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr & Mrs Saifu and Jesmeen Rahman against the decision of the Council of the London Borough of Bexley.
 - The application Ref 19/00245/LDCP, dated 31 January 2019, was refused by notice dated 24 May 2019.
 - The application was made under section 192(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 described as follows *'the home kitchen will be used to cook food for sale off site on the following week days and hours: Monday to Saturday 15:00-17:00 only cooking with no inward deliveries, and no more than 5 outward trips evenings to 21:30; NB no use Sundays or bank holidays.'*
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use describing the proposed use which is found to be lawful.

Application for costs

2. An application for costs was made by Mr & Mrs Saifu and Jesmeen Rahman against the Council of the London Borough of Bexley. This application is the subject of a separate Decision.

Preliminary Matters

3. The Council has described the proposal as 'use of dwelling for home cooking and delivery service' in its decision notice. However, there is no power to modify the terms of the application under s192 of the Act, and this can only be done by the applicant or the local planning authority/Secretary of State where the applicant agrees. The applicant has not agreed to the revised description and I have determined the appeal on the basis of the proposal as applied for.
4. I saw on my site visit that the ground floor of the building is larger than shown on the submitted drawings, and I note that prior approval was granted for a single storey rear extension¹. To the rear of the kitchen indicated on the submitted drawing is a further kitchen, with an additional room beyond it to the rear. I have dealt with the appeal on this basis of the ground floor layout that I saw on site.

¹ Ref 18/02462/GPDE

Main Issue

5. The certificate seeks to establish whether the proposed use of the home kitchen to cook food for sale off site on specified days and hours, with a limited number of outward trips per day, is lawful. The Council has refused the application on the basis that it would result in a change of use to a mixed use as a dwelling (class C3) and hot food takeaway (class A5), and that this change of use is not permitted development. The main issue is therefore whether the proposal would result in the material change of use of the dwelling.

Reasons

6. In an application for an LDC, the onus is on the applicant to provide all the relevant information and evidence to support their case. On appeal, the Inspector's role is to decide whether, on the evidence, the Council's refusal to issue an LDC was well-founded or not. The case must be considered solely on the relevant legal tests, and its planning merits are of no relevance. However, the planning consequences of a change in use must be considered, in order to determine whether a material change of use and thus development is involved. The burden of proof lies with the appellant. The appellant must show, on the balance of probabilities, that the development proposed would, at the date of application, be lawful.
7. The concept of a material change of use is not defined in statute or statutory instrument. It is a question of fact and degree in each case. For there to be a material change of use, there needs to be some significant difference in the character of the activities from what has gone on previously.
8. Section 55(2)(d) of the Town and Country Planning Act states that '(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land – (d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such'. The Planning Practice Guidance (PPG) provides guidance on whether planning permission is normally needed to home work or run a business from home².
9. The appellant refers to relevant case law. The judgement of *Emin*³ is helpful in establishing that the test is whether the nature and scale of the use would be ancillary or subordinate to the main use of the property as a dwellinghouse. In *Wallington*⁴ the Court of Appeal found that the keeping of 44 dogs as a hobby was not incidental to the use of a dwelling, due to the intensity of the use which had resulted in a substantial alteration to the character of the use to the point that a material change of use had taken place. The case of *Uttlesford*⁵ relates to the use of a detached garage within a residential curtilage as a granny annexe. Although it was not incidental to the enjoyment of the dwellinghouse, it would remain part of the same planning unit.
10. The parties agree that the planning unit is the single dwelling and its curtilage, which is in residential use. It is an end of terrace dwelling in a built up suburban area and is fairly modest in size. The kitchen shown on the floor plans has the appearance of a conventional domestic kitchen, with a double

² Paragraph: 014 Reference ID: 13-014-20140306 Revision date: 06 03 2014

³ *Emin v SSE & Mid Sussex DC* [1989] JPL 909

⁴ *Wallington v SSE & Montgomeryshire DC* [1990] JPL 112; [1991] JPL 942

⁵ *Uttlesford DC v SSE & White* [1992] JPL 171

oven, gas and electric hobs, refrigerator and sink. The hob has a conventional extractor unit. The additional kitchen contains stainless steel cooking equipment, including ovens, hobs and other food heating equipment, as well as two refrigerators and an extractor hood. It has the appearance of a small commercial kitchen. There is a further room to the rear of this which contains freezers and appears to be used for storage, amongst other things.

11. The appellant states that the activities that would be carried out in the kitchen are no different to those undertaken in a typical domestic kitchen, and are unlikely to result in abnormal noise or smells. There would be no visits to the house by customers, and food would be delivered to customers in no more than 5 trips a day, no later than 21:30 hours, with ingredients being brought to the house once a week. The main constraint on the extent of the use is that it would only take place between 15:00 and 17:00 hours, Mondays to Saturdays. I consider that this would be a significant restraint on the level of cooking that could take place. The limited number of deliveries to and from the property would not result in a significant increase in activity at the site, when compared with the normal comings and goings of a family. As a matter of fact and degree, it seems to me that the use described would not be significant enough to be a material change of use from a single dwelling to a mixed use as a dwelling and business.
12. The Council and its Environmental Health Officer have concerns that a commercial catering business would give rise to odour and smells, as well as additional traffic generation and associated noise and disturbance, and that the extraction equipment would be inadequate. I note the concerns expressed by a neighbour, which focus on a previous use of the site. However, the scale of activities would be similar to those undertaken in a typical domestic kitchen, and are unlikely to result in abnormal levels of noise, disturbance and odour. If the business grows in the future, it is possible that planning permission would be required, but the appellant is entitled to a lawful development certificate for the use described in the application.
13. For the reasons given above I conclude, on the evidence available, that the Council's refusal to grant a certificate of lawful use was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

N Thomas

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 31 January 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed use of the kitchen for the preparation of food for sale off site would not amount to development, because, as specified, it would not be a material change of use of the property.

Signed

N Thomas

INSPECTOR

Date: **12 February 2020**

Reference: APP/D5120/X/19/3230123

First Schedule

The use of the home kitchen to cook food for sale off site on the following weekdays and hours: Monday to Saturday 15:00-17:00 only cooking with no inward deliveries, and no more than 5 outward trips evenings to 21:30, and no use Sundays or bank holidays.

Second Schedule

Land at 25 Eastcote Road, Welling DA16 2SS

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



The Planning Inspectorate

Plan

This is the plan referred to in the Lawful Development Certificate dated: **12 February 2020**

by N Thomas MA MRTPI

Land at: 25 Eastcote Road, Welling DA16 2SS

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