
Appeal Decision

Site visit made on 26 February 2020

by John Whalley

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

Decision date: 5th March 2020

APP/A5840/X/19/3228751

Flat 3, Glenrose Court, 217 Long Lane, London SE1 4PA

- 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 by the London Borough of Southwark Council to grant a certificate of lawful use or development.
- The appeal was made by Mr Sushant Gupta.
- The application, reference 18/AP/3896, dated 27 November 2018, was refused by a notice dated 6 March 2019.
- The application was made under section 192(1)(a) of the Act for a certificate of lawfulness for the proposed use of the property.
- The development for which a certificate of lawful use or development was sought was for the use of the existing live/work unit as a residential flat.

Summary of decision: A certificate of lawfulness is not issued.

Appeal property

1. Glenrose Court, 217 Long Lane, is a part 4, part 5 storey building. The appeal property, Flat 3, is a 3rd floor unit consisting of 3 rooms and a bathroom. One room has been divided by a partition into a bedroom and a utility or work room. Planning permission 01/AP/0631 was issued on 1 August 2001 for the re-development of the building to provide B1 offices from ground to 3rd floors, 10 live/work units, 6 no. 2 bedroom flats and 7 no. 1 bedroom flats. Flat 3 was to be one of the live/work units.

Application

2. The Appellant, Mr Sushant Gupta, had applied for a certificate of lawfulness for the use of his home, Flat 3, solely for residential purposes. He had lived in the flat for 2 years. He said the previous occupier had divided the space allocated for work use into 2 rooms, intent upon using the entire flat for residential purposes. Mr Gupta's discussions with the managing agents confirmed that the premises were previously let as a 3 bedroom property between 2011 up to 2016. Mr Gupta said he was currently using the flat for work and living space in line with the 2001 planning permission, even though Council Tax for residential use only had been paid. He asked that the permission should be changed to allow just a residential use of the flat.

Inspector's considerations

3. ODPM Circular 03/2005 - CHANGES OF USE OF BUILDINGS AND LAND The Town & Country Planning (Use Classes) Order 1987 at para. 79 said:

Live/work units are often purpose-built premises, or purposely converted into such units. They are clearly a mix of residential and business uses which cannot be classified under a single class within the Use Classes Order and would therefore be sui generis, (sui generis - a use by itself).

4. That Circular, 03/2005, was withdrawn on 7 March 2014 and replaced by the National Planning Policy Framework, (NPPF). The revised version was published in February 2019. The NPPF does not define a live/work unit. It refers at para. 81, to: "Planning policies should: (amongst others), *d) be flexible enough to accommodate needs not anticipated in the plan, allow for new and flexible working practices (such as live-work accommodation), and to enable a rapid response to changes in economic circumstances.*"
5. A live/work unit is a combination of living accommodation, (Use Class C3, The Town and Country Planning (Use Classes) Order 1987 (as amended)), with workspace, (Use Class B1), within a single self-contained unit. It is a mixed C3/B1 use and therefore sui generis.

Change of use from composite C3/B1 use to C3 use – lawful?

6. Mr Sushant Gupta said the 01/AP/0631 2001 planning permission suggested that one third of the Flat 3 floor space had been designated for work purposes. If that was right, and the 2001 planning permission had been implemented, rather than having been used only for residential purposes up to 2016, I would regard the flat as a 'composite' unit where two uses occupied the same planning unit. Such a unit would be one where the live and work elements are not fully separate and distinct and neither the live or work element is incidental or ancillary to the other. That would be a composite C3/B1 use.
7. Mr Gupta said that as his flat was on the 3rd floor, the work element could only be for office/studio purposes. Noting that a change of office use to a residential use was permitted development, he said that concession should be available to his flat.
8. Class O – entitled *Offices to dwellinghouses* of Article 3, Schedule 2, Part 3 of The Town and Country Planning (General Permitted Development) (England) Order 2015 says: Permitted development - *Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwellinghouses) of that Schedule.* However, development is not permitted by limitation C.1 if - O.1(b) - *the building was not used for a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order –*
 - (i) *on 29th May 2013, or*
 - (ii) *in the case of a building which was in use before that date but was not in use on that date, when it was last in use;*
9. Mr Gupta said Flat 3 was not used as a work place by the previous occupier between 2011 and 2016. If that is right, limitation O.1(b) would apply and the concessions in Class O would not be available.
10. Also, Condition O.2 says: Development under Class O is permitted subject to the condition that before beginning the development, the developer must

apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to — (a list follows). Therefore, prior approval would have to be sought from the Council to establish if the permitted development Order's concessions were available.

Residential use (C3) of Flat 3 lawful? – s.171B(2) of the Act

11. Mr Gupta's second point was that residential only use of Flat 3 had become immune from enforcement action by the passage of time, (s.171B(2) – 4 year rule). That was because the previous occupier used the flat only for residential purposes from 2011 to 2016.
12. However, Mr Gupta's application to the Council was for a proposed use under s.192(1)(a) of the Act. If he intended to pursue an assertion that Flat 3 had acquired lawfulness for residential purposes only, as would have been appropriate for a 4 year residential use claim, an application should have been made under s.191(1)(a) of the Act for an existing use.
13. Nevertheless, I deal briefly with the matter. In the case of *Swale BC v FSS & Lee [2005] EWCA Civ 1568, [2006] JPL 886*, it was held there is a difference between an established dwellinghouse when an occupier does not have to be continuously or even regularly present in order for it to remain in use as a dwellinghouse and where there is no established use. At the start of the material period the use has to be "affirmatively established" over the 4 year period. It had to be asked whether there was any period during the 4 years when the building was not physically occupied, even though available for occupation, when the local planning authority could not have taken enforcement action against the use.
14. In the present instance, there was little more than Mr Gupta's assertion to support the claim that the 4 year period for the purposes of s.171B(2) of the Act had elapsed. It was not shown that a continuous use of Flat 3 for residential purposes only had persisted for a 4 year period without interruption between 2011 and 2016, such as to pass the *Swale BC v FSS & Lee* test.
15. Where a lawful development certificate is sought, the onus of proof is on the appellant. The standard of proof is the balance of probabilities. In this instance it was not shown that the use of Flat 3 at Glenrose Court as a residential flat had become lawful.

FORMAL DECISION

16. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful development for the proposed use of the existing live/work unit as a residential flat at Flat 3, Glenrose Court, 217 Long Lane, London SE1 4PA was correct and that the appeal should fail. I exercise the powers transferred to me in section 195(3) of the 1990 Act as amended.

John Whalley

INSPECTOR