
Appeal Decision

by D H Brier BA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 April 2020

Appeal Ref: APP/Y0435/C/19/3223756

5 Rowton Heath, Oakhill, Milton Keynes MK5 6NA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr M Johnson against an enforcement notice issued by Milton Keynes Council.
 - The enforcement notice was issued on 1 February 2019.
 - The breach of planning control as alleged in the notice is the material change of use of the premises from a single dwelling house to a house in multiple occupation. [HMO]
 - The requirement of the notice is cease the use of the premises as a house in multiple occupation.
 - The period for compliance with the requirement is 5 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (c) and (d) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

Procedural Matters

2. In response to the travel restrictions currently in place due to the COVID-19 pandemic, I consider that this appeal can be determined without the need for a physical site visit. This is because of the particular nature of the appeal and the information provided by the main parties. Both the appellant and the Council were advised of this intended course of action by letter dated 17 March 2020 and no objection has been raised to the appeal proceeding on this basis.
3. As well as the submissions made by the main parties, a petition signed by 20 local residents objecting to the use in question and referring to its perceived effects has been received. Although the points raised are not to be set aside lightly, they essentially concern the planning merits of the use. Due to the particular grounds of appeal, these matters lie outside the ambit of the current appeal. Accordingly, therefore, regardless of the validity or otherwise of the concerns voiced, they do not bear upon the considerations involved in the appeal before me and I shall refrain from commenting on them.

Background

4. The appeal property is a 3 storey house. On 26 April 2010 planning permission was refused for what, according to the description of the proposed development on the Council's notice of refusal, was the "*change of use from a residential dwelling to a house in multiple occupancy with 7 lettable rooms*"

(retrospective).”¹ However, on the planning application form, which is dated 26 February 2010, the proposal is described as “*change of use from residential property to HMO*”. At section 15 of the form, the current use is stated to be “HMO”.

Appeal

Preamble

5. Although 3 separate grounds of appeal have been pleaded, the matters involved in this case are so intertwined that it is opportune for me to deal with them jointly. In order for each of the 3 grounds of appeal to succeed it has to be shown that: the use in question has not occurred as a matter of fact – ground (b); there has not been a breach of planning control – ground (c); and, at the time when the notice was issued it was too late for enforcement action to be taken – ground (d). These grounds of appeal are legal grounds, distinct from any planning merits, and the Courts have held that the onus on proving them lies with the appellant. The relevant test for the evidence is the balance of probability.

The Parties’ Cases – Main Points

6. Indicating that the appeal property has been occupied by 4 to 6 tenants for the last 15 years, the appellant submits there has been no material change of use, and the use in question is immune from enforcement action. The appeal property was purchased in November 2005 as a new-build dwelling, it was then let out to an unrelated group of people, and has only ever been occupied in this manner. The property, which is currently occupied by 6 unrelated people, has never been used as a single dwelling house.
7. It is further stated that the property continued to be occupied by 4 or 5 people within Class C3 of the Town and Country Planning (Use Classes) Order 1987 (UCO) from 2005. When Use Class C4 came about on 6 April 2010², 4 unrelated people were in occupation, and the property became a Class C4 HMO. On 1 October 2010 the change of use from Class C3 to Class C4 became permitted development³. On 27 October 2010 the Council issued a HMO licence for 6 people; the licence was renewed in January 2016. The Council’s description of the 2010 planning application as ‘retrospective’ was erroneous; the proposed use by 7 persons never took place.
8. Referring to the ‘retrospective’ nature of the 2010 planning application, the Council acknowledge that this indicates that the property was in use as a HMO then, but maintain that 7 rooms were available. Referring to the UCO, which permits up to 6 unrelated occupants within Use Class C4, it is contended that a HMO with 7 lettable rooms would have been an unauthorised sui generis use. While the HMO use was in being on 26 April 2010, the breach of planning control had not exceeded the statutory period set out in section 171B of the 1990 Act, in which case the use in question is not immune from enforcement action.

¹ Reference 10/0433/FUL.

² An amendment to the UCO which came into force on 6 April 2010 introduced a new Class, C4 ‘Houses in Multiple Occupation’. SI 2010 No.653 The Town and Country Planning (Use Classes) (Amendment) (England) Order 2010.

³ SI 2010 No.2134 The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010.

Reasons

9. The Council acknowledge that the appeal property has been in use as a HMO for a considerable period and was used as such when planning application ref 10/0433/FUL was determined in April 2010⁴. While these concessions alone are not sufficient to demonstrate that the use in question has achieved immunity from enforcement action by virtue of the passage of time, I am inclined to attach a good deal of weight to the Council's assessment nonetheless.
10. In particular, the Council's conclusions regarding the past use of the property are consistent with, and supported by, the documentary evidence put forward by the appellant, which includes a comprehensive schedule of individual tenants from late 2005 onwards. Tenancy agreements, which the schedule appears to have been compiled from, are not necessarily synonymous with actual occupancy. But, as the majority of the agreements are accompanied by tenants' deposit protection certificates, in this instance it seems highly probable that the agreements do provide a reliable guide to the nature and pattern of occupancy of the property over the years. I am therefore inclined to attach a good deal of weight to this evidence.
11. I accept that save for items of email correspondence between the appellant and a couple of the tenants, the 2010 and 2016 HMO licences, and a letter from the Council referring to a HMO inspection in October 2015, other evidence that could help to shed light on the matter is somewhat thin. For example, there are no bank statements and suchlike, no electoral register entries, and no statements from anyone who lived in the property. That said, I am also mindful that none of the evidence that has been put forward by the appellant has been challenged or disputed by the Council. I regard this as another very weighty consideration.
12. No evidence that tends to call into question that put forward by the appellant has been adduced by the Council. Instead, support for their stance appears to be based primarily, if not exclusively, on conclusions derived from the 2010 planning application. In particular, it is contended that a change of use to a HMO with 7 lettable rooms [as indicated on the description of the proposed development refused in April 2010], would have broken any previous continuity of HMO use.
13. While I can understand why the Council have arrived at their conclusions, I have reservations about the soundness of the approach taken in this instance. Firstly, the term 'retrospective' used in the 2010 notice of refusal does not appear on the proposal as set out in the planning application, namely, "*Change of use from residential property to HMO*". Secondly, as 'retrospective' does not constitute an act of development, I am not inclined to place much reliance upon this term. Thirdly, while the answers to question 18 on the planning application form refer to 7 bedrooms and 7 residential units, these figures appear in the columns under the heading 'Proposed'. In other words, at most, the reference to '7' rooms at the time the application was made seems to have been no more than a proposal. Indeed, the responses given under the heading 'Existing' in question 18, are 5 bedrooms and 5 residential units.
14. Furthermore, while the Council persist in referring to 7 bedrooms, as the planning application was refused in any event, it seems to me that in all

⁴ The planning application form is dated 26 February 2010.

probability that would have been the end of the matter. In particular, there is nothing to indicate the property has ever been occupied by more than 6 individuals or that 7 rooms have ever been made available to let. Indeed, the appellant's explanation of the practical difficulty the latter would entail has not been called into question. This is another factor to which I attach some weight.

15. In the light of the foregoing, I am not satisfied that the 2010 planning application provides a reliable, robust or weighty basis for concluding either that there had been a break in the continuity of the HMO use at the time, or that it marked the commencement of a new chapter in the planning history of the appeal property.
16. As regards the question of whether or not there has been a change of use, the appellant's evidence only points to there having been one tenant as at 8 December 2005. As the next tenancy recorded is dated 1 February 2006, this evidence does not sit comfortably with the indication that the property was let out to a group of individuals from the outset. It may be that this was what the appellant intended, but this is not supported by his own evidence.
17. The evidence strongly suggests to me that prior to the onset of the multiple occupancy of the property by a seemingly unrelated group of people, there was a period, albeit relatively brief, when it was initially occupied as a single person dwelling house. In the light of this, as a matter of fact and degree, I consider that the use of the property for multiple occupancy as described by the appellant would have amounted to a material change of use. Moreover, the undisputed evidence regarding occupancy leads me to the almost inescapable conclusion that the matters alleged in the notice have occurred as a matter of fact.
18. As to the amendment to the 1995 GPDO referred to in paragraph 7, Article 3(5)(b) of the Order indicates that the permission granted by Schedule 2 does not apply to an existing use if that use was unlawful. The provisions would not have applied retrospectively.

Overall Conclusions

19. In the light of the foregoing, I conclude that the matters alleged in the notice have occurred as a matter of fact and there has been a material change of use. Accordingly, therefore, the appeal on grounds (b) and (c) fails.
20. As to ground (d), the undisputed evidence regarding the nature of occupancy of the appeal property indicates to me that the use in question probably began in early 2006 and has continued ever since. Given the length of time that the use has been in being, this leads me to conclude that on the balance of probability, at the time the enforcement notice was issued, it was too late to take enforcement action. In this respect, I am satisfied that the burden of proof which rests with the appellant has been discharged.
21. For the reasons given above, I conclude that the appeal should succeed on ground (d). Accordingly, therefore, the enforcement notice will be quashed. I have taken into account all the other matters raised, but none are sufficient to outweigh the considerations that have led me to my conclusions.

D H Brier Inspector