



Appeal Decision

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 May 2020

Appeal Ref: APP/Y5420/X/18/3219355
89 Burgoyne Road, Hornsey, London N4 1AB

- 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 Taskin Izzet against the decision of the Council of the London Borough of Haringey.
 - The application, Ref HGY/2018/3250, dated 11 October 2018, was refused by notice dated 6 December 2018.
 - 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 described as 'Residential C4 HMO use'.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The question being asked in any application for a certificate of lawfulness under section 191(1)(a) is whether any existing use of buildings or other land is lawful. That lawfulness is to be determined at the time of the application, which is the date on which it is made. The appellant states that the purpose of his application was to ascertain the lawfulness of the use of the property prior to the making of the Council's Article 4 Direction on 30 November 2013. However, the legislative framework does not permit this; it is only possible to determine lawfulness at the date of the application¹. In this case that date is 11 October 2018.
3. The use being applied for in the current application is described by the appellant as 'Residential C4 HMO (house in multiple occupation) use'. This description has been modified by the Council to 'Certificate of lawfulness for existing use as a HMO for up to six occupants (Use Class C4)'. Based on all the evidence before me, it is considered this is a more accurate description of the use to which the application relates. I will therefore proceed with the appeal on the basis of this description as there will be no injustice to the appellant.

¹ The Planning Practice Guidance states 'where an application has been made under section 191, the statement in a lawful development certificate of what is lawful relates only to the state of affairs on the land at the date of the certificate application'. ID:17c-002-20140306

Main Issue

4. The main issue is whether or not the Council's decision was well founded. That turns on two requirements:
 - Whether the appellant can show, on the balance of probabilities, that the material change of use to Class C4 occurred before the making of the Article 4 Direction (the Direction); and
 - Whether the appellant can show that the lawful use sought has continued without any other intervening uses until the date of the application, so as to be immune from enforcement action.

Reasons

5. The appellant's evidence seeks to satisfy these two requirements. He submits a copy of a Valuation Office Agency (VOA) letter dated 27 September 2013 in which it is stated that an inspection was made on 17 September 2013. At this time, it was seen that there were six rooms in the property all of which were being let separately with the occupiers having use of a shared kitchen. The appellant's search of the Council Tax Valuation List also shows six flats with effect from 12 September 2013. The previous use as five self-contained flats is shown as being deleted on 8 August 2013.
6. The Council sought to prosecute and seek a Proceeds Of Crime Order in respect of the previous unauthorised use as five self-contained flats. The appellant submits a copy of the judge's ruling in respect of that action dated 23 December 2013 in which it is stated that the judge 'understood' 'the property was being used as a small multiple occupancy' 'with no more than six occupants with shared facilities' 'at today's date'.
7. In addition, the appellant submits a copy of a HMO licence with an issue date of 24 August 2016 for six non self-contained units with a shared kitchen for up to nine occupiers. There are also copies of 12 month tenancy agreements, each signed by a single tenant, for each room as follows:

Room 1: agreements dated 19 September 2013, 21 September 2015, 2 July 2017 and 7 September 2018;

Room 2: agreements dated 19 September 2013, 19 October 2015, 22 October 2016 and 25 September 2017;

Room 3: agreements dated 19 September 2013, 20 November 2014 and 19 May 2017;

Room 4: agreements dated 19 September 2013, 22 June 2016, 27 November 2017 and 8 October 2018;

Room 5: agreements dated 19 September 2013, 26 April 2016 and 22 September 2018; and

Room 6: agreements dated 19 September 2013, 10 December 2016 and 25 September 2018.

Assessment

8. In an appeal relating to a LDC, the burden of proving relevant facts rests with the appellant and the test of the evidence is the balance of probabilities. The appellant's own evidence does not have to be corroborated by 'independent' evidence. If there is no evidence to contradict or otherwise make the appellant's version of events less than probable, the appellant's evidence alone may be sufficient to justify the grant of a certificate. This is on the basis that it is sufficiently precise and unambiguous.
9. The appellant's first requirement is to demonstrate that a material change of use to Class C4 occurred before the Council's Direction was made on 30 November 2013. This is because prior to that date no express planning approval was required for this development. A material change of use to Class C4 purposes, without the need for express planning approval, was permitted by the Town and Country Planning (General Permitted Development) Order 1995, as amended by the Town and Country Planning (General Permitted Development) Amendment No 2 Order 2010.
10. I am satisfied on the basis of the evidence provided that the use of the property for Class C4 purposes began in September 2013 before the Direction was made. However, the permitted development is expressed as 'Development consisting of a change of use of a building – (b) to a use falling within Class C4 of that schedule *from a use falling within Class C3*'. (my emphasis)
11. Use Class C3 is defined as
 - a single person or people living together as a single household, as defined by the Housing Act 2004;
 - not more than six people living together as a single household and receiving care; and
 - not more than six people living together as a single household with no care provided and who do not fall within the C4 definition of a house in multiple occupation.
12. It is not clear from the appellant's evidence that the property was used for Class C3 purposes before the change of use to Class C4. From the judge's ruling it would appear that the use of the property as five self-contained flats ceased in April 2013. However, from the Council Tax Valuation List, use as five self-contained flats was only deleted on 8 August 2013 before the Class C4 use began on 12 September 2013. Although the appellant states the property was used for C3 purposes in August 2013, there is no documentary evidence to support this statement.
13. The Council's evidence relating to this point is that a LDC application for the proposed change of use of the property from Class C3 to Class C4 was received on 30 May 2013. This was refused in August 2013 as the Council considered that at the time of the application the property did not fall within Use Class C3.
14. The appellant relies on the judge's ruling to support his claim that there was a Class C3 use prior to the change of use. However, the judge's ruling is not directed at establishing whether the previous enforcement notice had been complied with in its entirety, only whether the unauthorised use had ceased so that he could then rule on the making of a Proceeds Of Crime Order.

15. In addition, the appellant's view that to remove the facilities that enabled the use as five self-contained flats must mean the property was restored to a single dwelling is incorrect. The building could have been refurbished and used for another purpose. In order to benefit from the permitted development to change to a Class C4 use, it is necessary for the property to be used for Class C3 purposes prior to the change of use. Even if the Class C3 use was not occurring at the time the change of use took place, the use would need to have been established and the property would have to be laid out as a single dwelling to benefit from the permitted development. In both respects there is no documentary evidence from the appellant that either state existed prior to the change of use.
16. It is therefore concluded in respect of the first requirement that, on the balance of probabilities, it has not been demonstrated that the property was in Use Class C3 before the change of use to Use Class C4. The permitted change was not therefore lawful.
17. I turn now to the second requirement, notwithstanding my finding about the lawfulness of the change of use, as to whether the Class C4 use has continued without any other intervening uses until the date of the application, namely 11 October 2018. The appellant's evidence to support this aspect of his case is largely based on the tenancy agreements. However, as the Council point out, the HMO licence granted in 2016 permitted the use of the property for up to nine occupiers. Nevertheless, it does not follow that permission for up to nine occupiers means that there are nine occupiers within the property, especially as the tenancy agreements are all signed by a single tenant for each room. In November 2016 though, the Council carried out a site visit and found that there were nine occupants at the property. There was also another visit on 18 October 2018 which found the same and after both visits it was the Council's conclusion that there had been a material change of use from a Class C4 use to a large HMO, which does not fall into any use class.
18. The appellant's only comment on this situation is that it is not relevant to the application. It is my view though, in the absence of any other evidence, that there has been an intervening use between the commencement of the Class C4 use and the date of the application. Even if that use was temporary or unauthorised, the Class C4 use had ceased by the time the LDC application was made. It is therefore not possible to answer the question posed in making the certificate application if the specific existing lawful use being sought does not exist at the date of the application.
19. Taking all these matters into account, the appellant has failed to show that the Class C4 use continued without any other intervening uses until the date of the application, so as to be immune from enforcement action.

Conclusion

20. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the existing use of the property as a HMO for up to six occupants (Use Class C4) 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.

D Fleming

INSPECTOR