



Appeal Decision

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 May 2020

Appeal Ref: APP/Q1445/X/19/3233912
33 Hillside, Brighton BN2 4TF

- 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 Oliver Dorman of Rivers Birtwell against the decision of Brighton & Hove City Council.
- The application Ref BH2018/03404, dated 2 November 2018, was refused by notice dated 21 May 2019.
- The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is an existing loft conversion incorporating hip to gable roof extension, rear dormer and 2 no. front rooflights and a single-storey rear extension.

Summary Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Preliminary Matter

1. Following a review of the evidence presented in this case and consultation with the appellant and Council, I decided that a site visit was not necessary. Consequently, I have based my decision on the written evidence provided by the appellant and Council.

Reasons

2. This LDC application seeks to ascertain whether the roof extension and extension to the rear of 33 Hillside are lawful. Section 191 of the Act states that operations are lawful if no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason). The burden of proof is on the appellant, with the relevant test of the evidence being on the balance of probability.
3. The main issue in this case is whether the decision of the Council was well-founded, particularly with regard to whether the extensions benefit from a planning permission granted by the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).
4. Part 1 of Schedule 2 of the GPDO is titled 'development within the curtilage of a dwellinghouse.' Classes A, B, C and G all refer to alterations to a dwellinghouse. This part of the regulations does not refer to the intended use

of the building following development, nor do they grant planning permission for a change of use.

5. I understand that the use of the property fell within either use class C3 (dwellinghouse) or use class C4 (use of a dwellinghouse by not more than six residents as a house in multiple occupation (HMO)) of the Town and Country Planning (Use Classes) Order 1987 as amended prior to work commencing on the extensions. If that were the case, the extensions would be to a dwellinghouse. In which case, they would fall within Classes A, B, C and G, Part 1, Schedule 2 of the GPDO. An LDC for the extensions on that basis was granted on appeal¹ on 28 March 2017. The evidence before me suggests that the physical arrangement of the extensions is in accordance with the details submitted with that application. According to the appellant, the extensions were completed by March 2017 and this is not disputed by the Council.
6. The Council suggest that the extension was constructed in order to facilitate the use of the property as a large HMO for occupation by more than 6 persons. If the use had changed to become a large HMO before or during construction of the extensions, the use would not fall within any use class, such that they would not benefit from the planning permission granted by that part of the GPDO.
7. I note that a subsequent application for the change of use of the property to a nine bedroom HMO was submitted to the Council on 26 April 2017 and refused on 21 July 2017 and dismissed on appeal² on 5 March 2018. In the Council's assessment of that application, they state that the property was occupied by 4 people. In the appeal decision, the Inspector noted that he saw 9 bedrooms in the property. The appellant has confirmed that the property was unlawfully occupied by 9 persons between September 2017 and August 2018. The Council appear to accept that the property was occupied by 4 people between completion of the extensions and September 2017. I understand that it has since reverted to use as a dwellinghouse.
8. It is clear from the evidence that the property was in use as a dwellinghouse before the extensions were carried out and during assessment of the subsequent planning application for a change of use. I accept that the use was subsequently unlawfully changed and, as the Council suggest, that it is likely it was the intention of the appellant to change the use at the time of doing the works, although that is disputed by the appellant. The Council suggest there is little commercial sense investing in the extension without there being a financial incentive or return, such as the rent arising from occupation by a greater number of people. Nevertheless, whatever the intention of the appellant, the use did not change until some months after the extensions were constructed. The Council acknowledge in their officer report that there was a delay between the extensions being constructed and the use as a large HMO starting.
9. For these reasons, the building was a dwellinghouse during and for several months after construction of the extensions, such that the extensions and change of use to large HMO were separate acts of development. Therefore, the extensions benefit from the planning permission granted by Classes A, B, C and G, Part 1, Schedule 2 of the GPDO.

¹ Appeal reference APP/Q1445/X/16/3164675

² Appeal reference APP/Q1445/W/17/3183594

10. The Council suggest that their view that the extensions are unlawful was supported by the appeal decision relating to the proposed change of use of the property to a large HMO². However, the Inspector in that case stated that there was no certificate of lawfulness for what has been built. I note that Inspector had some doubt that the extensions may be lawful but, as they acknowledge, they were not able to make that judgement. For that reason, this does not alter my conclusion on this case.
11. My attention has been drawn to a number of other appeal decisions³ elsewhere in Brighton. In these, two related to changes of use where the Inspectors considered the use changed at the same time as extensions were carried out. The third had not been occupied between completion of the extensions and determination of the appeal. They were all appeals under section 78 of the Act rather than section 195 of the Act as in this case. As such, I consider the circumstances of those developments are materially different to this case.
12. A number of judgements have been drawn to my attention, in particular *Kestrel Hydro v Secretary of State for Communities and Local Government & Spelthorne Borough Council* (SSCLG) [2016] EWCA Civ 784, *Bowring v SSCLG* [2013] JPL 1417, *Somak Travel Ltd v Secretary of State for the Environment* [1988] 55 P&CR 250 and *Murfitt v Secretary of State for the Environment & East Cambridgeshire District Council* [1980] 40 P&CR 254. These decisions related to appeals against enforcement notices and it is unclear why the Council has drawn them to my attention. I note that they involved breaches of planning control including changes of use and operational development, but do not appear to be directly comparable to this case.
13. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of an existing loft conversion incorporating hip to gable roof extension, rear dormer and 2 no. front rooflights and a single-storey rear extension 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.

Formal Decision

14. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing operation which is found to be lawful.

AJ Steen

INSPECTOR

³ Appeal references APP/Q1445/W/17/3166975, APP/Q1445/W/17/3180711 and APP/Q1445/W/17/3184922

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by section 10 of the Planning and Compensation Act 1991)

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

IT IS HEREBY CERTIFIED that on 2 November 2018 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in black 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 loft conversion incorporating hip to gable roof extension, rear dormer and 2 no. front rooflights and a single-storey rear extension as shown on the plans accompanying the application is development permitted by the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 as the operations fall within Classes A, B, C and G, Part 1, Schedule 2 of the Order.

Signed

AJ Steen

INSPECTOR

Date: 12 May 2020

Reference: APP/Q1445/X/19/3233912

First Schedule

A loft conversion incorporating hip to gable roof extension, rear dormer and 2 no. front rooflights and a single-storey rear extension.

Second Schedule

Land at 33 Hillside, Brighton BN2 4TF

NOTES

This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 as amended.

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule was 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 operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any operation 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.



Plan

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

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Not to scale

