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# Appeal Decision

**by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC**

**an Inspector appointed by the Secretary of State**

**Decision date: 16 July 2020**

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**Appeal Ref: APP/J0405/X/19/3230594**

**35 Bicester Road, (Flats 1, 2, 3, 35a and 35b), Aylesbury, Bucks HP19 9AG**

- 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 Miss Zeba Jahngir against the decision of Aylesbury Vale District Council.
  - The application Ref 18/04286/ACL, dated 23 November 2018, was refused by notice dated 2 April 2019.
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
  - The use for which a certificate of lawful use or development is sought is the use of the building as five flats.
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## Decision

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

## Preliminary Matters

2. The description of the development, in the banner heading above, is taken from the application form. However, I have deleted the references to the addresses and the time period as these are not acts of development.
3. For the avoidance of doubt, the planning merits of the development are not relevant in this appeal which relates to an application for an LDC. My decision rests on the facts of the case, on relevant planning law and judicial authority. Based on the evidence before me, the appeal can be determined without a site visit and both main parties were advised of this. The burden of proving relevant facts rests on the appellant and the test of evidence is made on the balance of probability. If there is no evidence to contradict or make the appellant's version of events less than probable and the appellant's evidence alone is sufficiently precise and unambiguous, a LDC should be granted.

## Main Issue

4. The main issue is whether the Council's decision to refuse the grant of an LDC was well-founded. That turns on whether the appellant can demonstrate, on the balance of probability, the change of use to 5 flats took place more than four years before the date of the application and continued without significant interruption thereafter so as to be immune from enforcement action. The

relevant date in this instance being 23 November 2014 and the test applies to each flat.

5. Having regard to case law, a consideration is whether this building had been used as five self-contained flats throughout the whole of the four years, so that the planning authority could at any time during that period have taken enforcement action.
6. Furthermore, the change of use does not need to have been in the four-year period immediately preceding the date of the LDC application, provided that there has been no subsequent change of use since that use became lawful.

## **Reasons**

7. The appeal relates to a 3-storey building and the plans submitted with the application indicate that it has been subdivided into 5 flats, each flat having one bedroom. The flats identified as Flats 1, 2 and 3 appear to be accessed from the front door that faces Bicester Road, the flat identified as 35a from an external staircase on a side elevation and 35b from a doorway close to the rear of the property.
8. The appellant has submitted a witnessed affidavit which states that she has owned the appeal property since October 2013, that it was converted into 5 flats when she bought it and that no additional building works have been carried out in the intervening years. She has provided evidence in the form of tenancy agreements, Council Tax documents and witness statements. In addition, some documents from an energy supplier and the land registry have been submitted.
9. The Council have stated that a number of enquiries and a pre-application request in 2010 and 2011 queried whether the use of the building as 3 flats was lawful or required planning consent. As there is no reference to 5 flats in any of the enquiries or the pre-application request the Council considers that this indicates that the appellant's evidence is not sufficiently precise and unambiguous. This is because that evidence is contradictory to the witness statement of Mr I Khan of 11 Bicester Road which states that in the 21 years he lived at 11 Bicester Road the appeal building was in use as 5 flats.
10. Nevertheless, even if the building was only in use as 3 flats in 2010/2011 and has been subsequently subdivided into 5 flats, as stated above, the appellant has to demonstrate that, on the balance of probability, the change of use to 5 flats took place more than four years before the date of the application and continued without significant interruption thereafter so as to be immune from enforcement action. In addition, it is reasonable given the addresses of the 5 flats that there could have been confusion over the number of flats in the whole building. Moreover, within the correspondence submitted by the Council there is reference to an enforcement investigation commencing about the use of the building. However, I have no evidence to indicate what the conclusion of that investigation was or whether the building was inspected at that time.
11. Correspondence from an energy supplier, Eon, indicates that 5 flats within the appeal property have been supplied with electricity from that supplier since 19 February 2014. Tenancy agreements have been submitted for various periods within 2013 and 2014 for a number of the flats. There are also witness statements from former tenants of the flats that indicate when they lived in the

flats, which flat/s they lived in, who else they knew in the adjacent flats and how many flats there were. An estate agent has also stated that he visited the appeal building in the early 2000's and again in the early 2010's in connection with the estate agency and at both of those instances the building was formed of 5 flats with 3 accessed from the front door and 2 externally from the side.

12. I acknowledge that there are only Council Tax records provided for 3 of the flats and that the Council's Electoral Register only has entries for 3 flats. However, the tenancy agreements make it clear that the tenant is responsible for payment of the Council Tax and each occupant would also have been responsible for completing the electoral register. Furthermore, a number of the tenancy agreements that relate to the agreements between the former owner of the property and tenants state that the properties are one-bedroom flats. The former owner of the property has written a letter stating that the property has not been extended or structurally altered since it was owned by them in 2012/13. The flats as shown on the layout plans are one-bedroom properties.
13. The submitted tenancy agreements do not cover a 4-year period for any of the 5 flats. However, there is corroborating evidence in the form of witness statements from former tenants including those named in the tenancy agreements. Whilst, these have not been submitted as statutory declarations I consider that they appear to be consistent with each other whilst being written in what appears to be the own words of each witness. Moreover, the Council has not provided any evidence to the contrary for the years covered by these witness statements. As such, I consider that it is reasonable to give them significant weight.
14. These witness statements indicate that the use of the property as 5 flats was apparent to them as tenants from July 2013 through to May 2018. Furthermore, these statements indicate that 4 of the flats were in occupation without significant interruption for the majority of that period. However, I acknowledge there is little specific evidence to show the continuous occupation of Flat 3 through this period as the tenancy agreement for Donald Jeffrey is for 6 months from 1 August 2013 and the only other reference to that flat is in the witness statement of Laurentieu Marin who states that it was lived in by Martha and her husband.
15. However, given the circumstances of this case, that would not necessarily mean that the local planning authority would not have been able to take enforcement action. Relevant factors in this case would be the physical evidence that the property has been converted to five separate and clearly identifiable living units and their individual occupation. Consequently, I am mindful that even if one of the flats was not occupied during a Council site inspection, it would still be possible to identify the use to which the premises were being put and, if expedient, to initiate enforcement action against it.
16. Consequently, I am satisfied that the evidence when taken in the round, is sufficiently precise and unambiguous. Bearing in mind the relevant test of the evidence is on the balance of probability, with no evidence from the Council that would contradict or otherwise make the appellant's version of events less than probable, I consider that the appellant has demonstrated that the development would have been lawful at the date of the application and was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

## **Conclusion**

17. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a LDC 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.

*D. Boffin*

INSPECTOR

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## Lawful Development Certificate

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

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

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**IT IS HEREBY CERTIFIED** that on 23 November 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

On the balance of probability the use commenced more than four years prior to the date of the application for the Lawful Development Certificate and continued substantially uninterrupted thereafter throughout the relevant period.

Signed

*D. Boffin*

INSPECTOR

Date: 16 July 2020

Reference: APP/J0405/X/19/3230594

### **First Schedule**

Use of the building as five flats.

### **Second Schedule**

Land at 35 Bicester Road (Flats 1, 2, 3, 35a and 35b), Aylesbury, Bucks HP19 9AG

## 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 use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /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: 16 July 2020

by **D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC**

**Land at: 35 Bicester Road, (Flats 1, 2, 3, 35a and 35b), Aylesbury, Bucks  
HP19 9AG**

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Scale: Not to Scale

