



Appeal Decision

by D H Brier BA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 November 2020

Appeal Ref: APP/Q3060/X/20/3250852

93 Radford Boulevard, Nottingham NG7 3BS

- 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 Shehzad Akram Khan against the decision of the City of Nottingham Council.
 - The application Ref 19/02716/PCLE, dated 2 December 2019, was refused by notice dated 13 January 2020.
 - 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 a house in multiple occupation (Use Class C4).
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Decision

1. The appeal is dismissed.

The Appeal Property and Background

2. The appeal property is a semi-detached house said to be a 4 bedroom house in multiple occupation (HMO) which has shared kitchen, bathroom and living accommodation. The property lies within an area that is subject to a direction made under Article 4(1) of the Town and Country Planning (General Permitted Development) Order 1995 (GPDO) (Article 4 Direction) which came into force in 2011. The effect of the direction is that the permitted development rights which would ordinarily allow uses falling within Class C3 (dwellinghouses) of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (UCO) to uses falling within Class C4 (houses in multiple occupation) do not apply.

The Relevant Time Period

3. The notice of refusal indicates that the relevant period for determining lawfulness in this instance is 4 years and the appellant's appeal submissions were also made on this basis. By letter dated 7 September the Inspectorate queried this, indicating that as the case does not involve the change of use to use as a single dwellinghouse, it lies outside the ambit of section 171B(2) of the 1990 Act as amended and that the relevant period in this instance is 10 years in accordance with the provisions of section 171B(3).
4. The appellant responded by providing additional evidence regarding the occupancy of the appeal property going back to 2009. The Council, however, maintain that the relevant period for a C4 use is 4 years. Citing *Gravesham BC*

v SSE & O'Brien [1982] 47 P&CR 142, and referring to the UCO which describes a Class C4 use as "*Use of a dwellinghouse...*", it is submitted that to suggest that the phrase "*dwellinghouse*" has a different meaning in the Act to the UCO appears perverse. The use of a property as a HMO is a use as a single dwellinghouse, albeit one occupied by multiple households. The term dwellinghouse does not solely refer to a C3 use.

5. I accept that in terms of the accommodation at the property, the appeal property would appear to meet the test set out in the *Gravesham* judgement and still has the physical characteristics of a dwellinghouse. But, as I see it, the functional characteristics of the use, in particular the nature and pattern of occupancy, is markedly different from a typical single family or single household dwelling. Indeed, this distinction would appear to have been acknowledged in that HMOs such as the appeal property have been adjudged to fall within a different use class to a C3 dwellinghouse. In the light of this, I consider it reasonable to assess the question of lawfulness in this instance in the context of section 171B (3), in which case 10 years, as opposed to 4 years, is the relevant period. I shall therefore determine the appeal on this basis.

Reasons

6. The question of lawfulness is distinct from any planning merits. The test for the evidence is the balance of probability, and the Courts have held that in cases such as this, the onus on proving it lies with the appellants. In the light of my conclusion in the preceding paragraph, in order for the appeal to succeed, it has to be shown that the use in question commenced more than 10 years before the date of the LDC application, and that it continued actively throughout the subsequent 10 year period. In the light of this, the relevant date is 2 December 2009.
7. The interpretation section of Class C4 in the UCO notes that a HMO such as No.93 has the same meaning as section 254 of the Housing Act 2004¹. As the Council point out though, section 254(5) indicates that a building is not a HMO if it is listed in Schedule 14 of the Housing Act. Paragraph 7 of Schedule 14 expressly refers to "*Any building which is occupied only by two persons who form two households*".
8. According to the appellant, the property was bought in 2004, since when it has been operating as a HMO² with 4 rooms, each let individually. While the appellant's supporting evidence does not go back as far as 2004, it includes copies of tenancy agreements date from 31 August 2009, that is prior to the relevant date. The agreements are accompanied by schedules of the tenancies, presented in the form of annotated 'timelines', which span a period from the beginning of 2010 up to August 2020. In addition, 2 affidavits, both signed by the appellant, which chronicle the manner in which the property has been occupied, together with other matters concerning No.93, have been put forward. Another affidavit from a former tenant provides more information about the pattern of occupancy during his tenancy from September 2014 to June 2018. There are further affidavits from parties involved in the letting of the property, together with associated documents.

¹ The interpretation also specifically excludes a converted block of flats to which section 257 of the Housing Act applies, but there is nothing to indicate that this is applicable to the appeal property.

² The appeal statement refers to Use Class C4, but Class C4 'Houses in Multiple Occupation' only came into being on 6 April 2010 under SI 2010 No.653 The Town and Country Planning (Use Classes) (Amendment) (England) Order 2010.

9. All this evidence tends to paint a helpful picture of the nature and manner in which the appeal property has been occupied in the years prior to the LDC application. Indeed, none of it has been called into question by the Council. Instead, the Council's concern focuses on 2 periods, the first between March 2015 and September 2015, and the second between March 2017 and August 2018, when the appellant's information shows that the property was either occupied by 2 people living as 2 households, or by only one person. In addition, there are 2 months, July and August 2018, when no-one is recorded as having been in residence. Seemingly the latter was due to refurbishment work prior to the property being let to students.
10. The appellant refers to having experienced difficulties in letting the property prior to 2015, and the tenant at the time refers to it having been under-occupied at times. He also confirms that from March 2015 to July 2015 there were only 2 tenants and for 2 months afterwards he was the sole tenant. He also describes a similar situation from February 2017 until his departure in June 2018. A property agent refers to the property having been put up for sale in April 2017 and a prospective sale to a purchaser who wanted a vacant property falling through in August 2017 due to the discovery of a problem with knotweed - something that appears to have been rectified subsequently.
11. It may be that available rooms were being marketed for much of the 2 periods referred to, and what has been termed the under-occupation of the property appears to have come about as a result of a number of factors; the discovery of knotweed was a perhaps unfortunate and unforeseen problem that appears to have necessitated remedial action. I am also mindful that another prospective tenancy which had been the subject of a signed management agreement fell through in the latter part of 2017. But, despite all this, and even though I have read that remaining tenants did not have access to the vacated rooms which were kept locked, the undisputed evidence points to lengthy, and in my view, very significant periods when the property could not reasonably have been regarded as a HMO.
12. In my experience, relatively brief spells of vacancy between different tenancies are fairly commonplace and perhaps almost inevitable in an instance such as this where a number of rooms let on an individual basis are involved. However, as the evidence in this case points to one period of some 5 to 6 months, and another in the order of 18 months, when the property was not in active use as a HMO, these breaks in continuity are scarcely de minimis. As a matter of fact and degree, I find the apparent absence of physical occupancy as a HMO for such long periods constitute a significant and material interruption in the use of the property as such.
13. The appellant contends that a 'temporary' reduction from 3 person occupancy to 2 person occupancy does not constitute development as such a change would not be material. This, however, is not a matter to which I attach much weight as I regard the breaks in the continuity of the HMO use and the resultant periods when the use was not active as the key factors in this instance. In particular, it seems to me that the magnitude of each interruption of the use was such that no enforcement action could reasonably have been taken against it during the periods concerned, and the subsequent resumption of the HMO use at the end of these periods would have restarted the 'ten year clock' from zero.

14. I acknowledge that an appellant is often best placed to provide evidence concerning the nature, extent and manner in which activities have taken place over the years. I am also mindful that the Council have produced no evidence of their own that serves to contradict or otherwise call the appellant's factual evidence into question. Be that as it may, the circumstances of this case are such that I find the appellant's evidence falls short of demonstrating that, on the balance of probability, the use in question commenced more than 10 years before the date of the LDC application and continued actively throughout the subsequent 10 year period. The burden of proof that lies with the appellant has not been discharged.
15. For the reasons given above, and having regard to all the other matters raised, I am satisfied that the Council's refusal to issue a LDC in respect of a house in multiple occupation (Use Class C4) at 93 Radford Boulevard, Nottingham NG7 3BS was well-founded. I shall therefore exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

D H Brier

Inspector