
Appeal Decision

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 March 2021

Appeal Ref: APP/A5270/X/20/3251067

3 Blossom Close, London W5 4YE

- 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 Dr Tawfek Alaakel against the decision of the Council of the London Borough of Ealing.
 - The application, Ref 195020CPE, dated 17 November 2019, was refused by notice dated 30 March 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 described as "The house is being used as a HMO with en-suite bedrooms".
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. It has not been necessary to carry out a site visit as, in this particular case, where all the information needed is included with the application and appeal documents, a decision can be reached on the papers.
3. The Procedural Guide - Certificate of lawful use or development appeals – England, dated November 2020, states at paragraph A.9.4. "Where the appeal concerns a case, which will be decided purely on the basis of technical and/or legal interpretation of the facts, the Inspector may decide the case without a site visit." In addition, Footnote 12 within Appendix F states that a small number of appeals do not require a site visit and can be dealt with on the basis of the appeal documents.
4. The appellant initially failed to submit a copy of his application form and a copy of an email from one of his tenants with his appeal submissions. As these were before the Council, it was necessary that they be included with the appeal, in the interests of fairness. After contacting the appellant and the Council, copies were duly supplied and I have had regard to the information contained therein in my determination of this appeal.
5. The Council changed the description of development to "Continued use of the dwellinghouse as a five bedroom HMO (Lawful Development Certificate for an Existing use)". Whilst five bedrooms are shown on the submitted plans, the appellant states that he has only used the property as a house in multiple occupation (HMO), to provide accommodation for four tenants, who are all

single professional people with full-time jobs. His written evidence also seeks to demonstrate use by four individuals. This type of use falls within Use Class C4¹, which is the use of a dwelling by not more than six residents, informally known as a small HMO. As such, the use for which a certificate is being sought is best described as use as a small HMO for up to four residents, being a use falling within Use Class C4. I shall proceed on the basis of this description as there would be no injustice to either party.

Main Issue

6. The appellant is seeking to establish that the claimed small HMO use is lawful. That turns on whether he can show that there was a material change of use from Use Class C3 to Use Class C4 and that the C4 use has continued without any other intervening uses to the date of the application, so as to be immune from enforcement action.
7. The Council refer to the requirement to show that the use has continued for four years within their reason for refusal but that is not relevant in this case. This is because in order to demonstrate lawfulness, the appellant only has to show that he benefits from permitted development and that he has exercised that permitted development. Provided he has implemented a lawful use and it has continued without any other intervening uses to the date of the application, it would be lawful. The Class C4 use does not need to have operated for four years in order to be found lawful in this case as the use is permitted by Part 3, Class L of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).

Reasons

The Site

8. The appeal property comprises a mid-terrace dwelling with three floors of accommodation. The original integral garage has been converted into an en-suite bedroom by the appellant.

The evidence

9. The appellant has submitted the following documentary evidence:
 - A copy of a tenancy agreement dated 25 June 2013 signed by Tenant 1,
 - A copy of a tenancy agreement dated 10 May 2014 signed by Tenant 2,
 - A copy of a tenancy agreement dated 1 July 2014 signed by Tenant 3,
 - A copy of a tenancy agreement dated 6 April 2017 signed by Tenant 4,
 - A copy of a letter dated 22 November 2019 from Tenant 2,
 - A copy of an email dated 22 November 2019 from Tenant 1, and
 - Copies of the floor plans as they were when the property was purchased by the appellant and after he had carried out internal alterations.
10. There is no evidence from the Council.

¹ Town and Country Planning (Use Classes) Order 1987 as amended, Schedule 1: Class C3: Dwellinghouses, Class C4: Houses in multiple occupation.

Assessment

11. In an appeal relating to an 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.
12. The appellant's first requirement is to demonstrate that there was a material change of use. The change of use from Class C3 to C4, as I have stated, is permitted by Class L of the GPDO but some Councils have introduced Article 4 Directions to remove such permitted development rights. This is in order that they can control the numbers of HMOs in certain areas, through decisions on express planning applications.
13. The Council's officer report states that the site does not lie within a conservation area, the dwelling is not a listed building and there are no other relevant planning constraints on the property. On the face of it, the appellant therefore benefits from the permitted development set out in Class L. However, this is on the basis that the use of the property was firstly as a dwelling falling within Class C3. There appears to be no disagreement between the parties that this was not the case.
14. The appellant states he purchased the house in January 2011. After he acquired it, he used a local builder to create an en-suite bedroom within the former garage, to change the 1st floor WC into two en-suites and to fit a door at the top of the staircase to section off two rooms and a bathroom on the 2nd floor from the rest of the house to be used by one tenant.
15. He states he began using the property as an HMO from May 2011 but there is no documentary evidence to support this claim. There are no tenancy agreements dating back to this time and no copies of bank statements to show the payment of rent from each tenant, even though the appellant states that he had "no missed payments".
16. The earliest tenancy agreement is dated 25 June 2013 and was for 12 months for Tenant 1. It is not clear whether Tenant 1 remains living in the property on a periodic tenancy or whether they were replaced either before the tenancy expired or at the end of the tenancy agreement. There is an email dated 22 November 2019 purporting to be from Tenant 1 but she states she began renting the en-suite room from July 2014 and that this continues to the date of the email. This though is inconsistent with the tenancy agreement signed by Tenant 1 on 23 June 2013. There is no explanation from the appellant as to why this might be the case and he refers to "my previous" and "existing tenants" but has not explained which category Tenant 1 falls within or which room they occupied.
17. The second tenancy agreement is dated 10 May 2014 and was also for a year. There is a letter from this tenant (Tenant 2) dated 22 November 2019 stating that she still lives at the property. The appellant does not state which room this tenant occupies but it would appear from the higher rent being charged, compared to the rents set out in the other agreements, that this could relate to the occupation of the 2nd floor.

18. For the purposes of Class C4, an HMO has the same meaning as in section 254 of the Housing Act 2004. A building is used as an HMO under section 254(1) if it meets the “standard test” under section 254(2). This test requires that two or more households share one or more basic amenities or that the living accommodation lacks one or more basic facilities.
19. The application of this to the appellant’s circumstances is that I consider it has not been demonstrated, on the balance of probabilities, that the material change of use to a small HMO occurred in May 2014 when the tenancy agreements show Tenant 1 and Tenant 2 overlapped. This is because it is not clear whether Tenant 1 was in occupation in May 2014, given the email stating that the occupation did not start until July 2014. The material change of use may have occurred in July 2014 as Tenant 2 was still in occupation at this point but there is no tenancy agreement of any other document to support this other than the email.
20. Notwithstanding the position with regard to Tenant 1, the material change of use may have occurred in July 2014 due to Tenant 3 beginning their occupation of the property. Their use would have overlapped with Tenant 2. Although Tenant 2’s tenancy agreement ends in May 2015, her November 2019 letter states she continues to live there. The letter is, however, unsigned and so it is not possible to compare her signature with the tenancy agreement. If there was only one tenant in occupation after May 2015, then the standard test is no longer being met and the HMO use has ceased at this point.
21. Tenant 3’s agreement expired July 2015 and without knowing whether they continued living at the property, Tenant 4 does not begin their tenancy for nearly two years. In the absence of any other documents, it appears there is a significant period when it is not established that there are at least two or more households sharing one or more basic amenities in order to enjoy the benefit of a Class C4 use.
22. The appellant claims that the HMO use has subsisted to date but there is no documentary evidence to support his claim of no other intervening uses, such as a reversion to a Class C3 use. It is well established planning law that the onus rests with the appellant to make out his case. It is for the appellant to provide evidence to substantiate his case and it is not for the Council, or indeed the Planning Inspectorate, to request more evidence. The property may be laid out as en-suite bedrooms but it is the use of the building that is pertinent in this case.
23. Although the appellant’s evidence does not have to be corroborated by “independent” evidence to justify the grant of a certificate, it does have to be sufficiently precise and unambiguous. That is not the case here and so taking all these matters into account, I consider that the appellant has not demonstrated, on the balance of probabilities, that there has been a material change of use to a small HMO falling within Use Class C4. Furthermore, he has not demonstrated, even if the material change of use occurred, that the use has continued without any other intervening uses until the date of the application, so as to be immune from enforcement action.
24. As with all LDC applications it is open for fresh applications to be made if, for example, other evidence comes to light.

Conclusion

25. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use as a small HMO for up to four residents, falling within 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