



Appeal Decision

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 08 June 2021

Appeal Ref: APP/P4605/X/21/3268431
5 Sherborne Grove, Birmingham B1 2PU

- 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 Mrs Sharon Noble against the decision of Birmingham City Council.
 - The application Ref 2020/07250/PA, dated 15 September 2020, was refused by notice dated 8 December 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 Small House in Multiple Occupation (Use Class C4).
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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 existing use which is found to be lawful.

Preliminary Matter

2. I am content that the written representations, submitted by the parties, provide a satisfactory basis on which to make my decision, and that accordingly it would not be necessary for me to visit the site in this case. Neither of the parties have objected to this approach.

Reasons

3. The change of use from a single dwelling (Use Class C3) to a House in Multiple Occupation (HMO) for up to six residents (Use Class C4) is normally permitted development under the terms of Schedule 2 Part 3 Class L of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO). This permitted development right was first introduced through an amendment to the previous version of the GPDO¹, which came into effect on 1 October 2010².
4. It is undisputed that the Council made an Article 4 Direction which came into force on 8 June 2020, the effect of which was to remove this permitted development right in relation to residential properties City-Wide. Accordingly

¹ The Town and Country Planning (General Permitted Development) Order 1995.

² The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010.

- the existence of the Direction means that any such development proposed after this date would require express planning permission in order to be lawful.
5. From the representations, the Council does not appear to dispute that the appeal property is currently in use as an HMO with five bedrooms, having previously been a single dwelling. The decision therefore turns on when it can be said, on the balance of probability, that the change of use occurred.
 6. The appellant's case is that because the change of use occurred prior to the date of the Article 4 Direction coming into effect, then the development is lawful. Various supporting evidence is provided. This includes a Building Regulations Completion Certificate, issued by the Council in relation to the HMO³, and copies of email communications from an estate agent referring to persons potentially interested in occupying the property⁴. A copy of correspondence with the Council's licensing department confirming that, from a licensing perspective, it was acceptable to go ahead with the letting of the property is provided⁵, together with copies of tenancy agreements relating to the various rooms being let, dating from July and August 2020.
 7. The appellant acknowledges that the property did not become occupied by tenants, as an HMO, until after the Article 4 Direction had come into effect. She says, however, that the marketing and occupation of the property was delayed due to the outbreak of the ongoing public health emergency and the subsequent initial 'lockdown' imposed by the Government in March 2020. Had this previously unforeseen event not occurred she is confident that the property would have been let in advance of the June deadline.
 8. The Council's position is that the test for change of use is the date of occupation of the property, and the various certificates provided do not evidence multiple occupancy.
 9. I have had regard to relevant case law and in particular, the judgement in the case of *Impey*⁶. Whilst that judgement considered the timing of the change of use of a building to units of residential accommodation, and not specifically a dwelling to an HMO, the case does give rise to some important principles. *Impey* is authority for the propositions that (a) physical works may be relevant to the question of whether there has been a material change of use; and (b) use of a dwelling may be found to have commenced prior to any physical occupation.
 10. It therefore seems to me that the question of when a change of use has commenced should be looked at 'in the round', having regard to when the building provided the facilities for day to day living as an HMO arrangement, and when the use 'actually' commenced. The question of when the building was capable of being used as an HMO, as a matter of fact and degree, is important, bearing in mind that it is possible to find that a change of use took place before the building was actually occupied.
 11. There is no dispute that 'actual' use in the form of physical occupation had not occurred at the time of the Article 4 Direction, albeit that it would appear from the documents provided that the first tenants took up occupation relatively

³ Dated 17 February 2020

⁴ Dated 9 and 12 March 2020 respectively

⁵ Dated 29 May 2020

⁶ *Impey v SSE & Lake District SPB* [1981] JPL 363, [1984] 47 P&CR 157

- soon afterwards. However the appellant has been able to demonstrate, through the Building Regulations certification, that the necessary physical works to allow the property to be used as an HMO had been completed by February 2020; also that efforts had been made to formally market the property for occupation in March 2020. The Council confirmed in May 2020 that it was acceptable to let the property from a licensing perspective. I consider these 'milestones' indicate that by this time the building had been equipped with the facilities for day to day living as an HMO arrangement for five people, and furthermore that it clearly demonstrates intended and attempted use as such, albeit not actual use.
12. I have taken into account the time during which the ability to move house was suspended during the initial lockdown period, and subsequent to this the time taken for the rooms in the property to be let, as evidenced by copies of tenancy agreements provided. It seems very likely to me that, had it not been for the lockdown period, then the occupation of the property in the HMO format would have commenced prior to the Article 4 Direction coming into effect on 8 June 2020.
13. Furthermore I am mindful that planning practice guidance states "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.*"
14. Drawing the above considerations together, on the balance of probability and as a matter of fact and degree when looked at 'in the round', I find that the appellant's evidence is sufficiently precise and unambiguous to demonstrate that the change of use of the dwelling (Use Class C3) to an HMO (Use Class C4) occurred prior to the Article 4 Direction coming into force and was therefore permitted development.
15. 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 Small House in Multiple Occupation (Use Class C4) 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.

Roy Merrett

INSPECTOR



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

IT IS HEREBY CERTIFIED that on 15 September 2020 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 material change of use of the dwelling (Use Class C3) to a small House in Multiple Occupation (Use Class C4) occurred prior to the Article 4 Direction coming into effect on 8 June 2020. It would therefore have been permitted development and no breach of planning control will have occurred.

Signed

Roy Merrett
Inspector

Date 08 June 2021
Reference: APP/P4605/X/21/3268431

First Schedule

Small House in Multiple Occupation (Use Class C4)

Second Schedule

Land at 5 Sherborne Grove, Birmingham B1 2PU

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 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 use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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: 08 June 2021

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Scale: Not to Scale

