
Appeal Decision

Site visit made on 11 January 2022

by **P H Willows BA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 26 January 2022

Appeal Ref: APP/Q3060/X/21/3271733

2 Rathmines Close, Nottingham NG7 2LS

- 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 Hemal Gohil against the decision of City of Nottingham Council.
 - The application Ref 20/01698/PCLE, dated 10 August 2020, was refused by notice dated 24 September 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 follows:
2 Rathmines Close, Lenton, Nottingham has been in use as a C4 small HMO occupied by three unrelated persons, since September 2006. Initially under permitted development rights. However, Article 4 Direction was removed in March 2012, unbeknownst to us. Where two tenants appear on a tenancy agreement, from 2006 to 2014, the third occupant was Rohit Gohil. Some bills are included bearing Mr Rohit Gohil's name
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Decision

1. The appeal is dismissed.

Preliminary matter

2. Although the description entered in Section 5 of the application form is rather lengthy, it is described more succinctly at Section 4 as 'C4 Small house in multiple occupation, providing accommodation for 3 unrelated persons'. This better captures what is actually sought and I have considered the appeal with it in mind.
3. The reference to Class C4 means Class C4 of *The Town and Country Planning (Use Classes) Order 1987* (as amended) (the 'Use Classes Order'). Class C4 is: *Use of a dwellinghouse by not more than six residents as a 'house in multiple occupation'*. While Class C4 permits up to 6 people at a property, it is clear that the certificate that is sought is specifically for an HMO for 3 people only.

Main Issue

4. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded. This turns on whether the use of the property as a C4 small house in multiple occupation, providing accommodation for 3 unrelated persons, was lawful when the application was made.

Reasons

General approach to LDCs

5. Advice relating to LDCs is provided by the Government's Planning Practice Guidance (PPG). This establishes that the applicant is responsible for providing sufficient information to support an application. 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. A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is lawful. Planning merits are not relevant.

The requirements to establish lawfulness in this case

6. For the purposes of the Use Classes Order, 'house in multiple occupation' has the same meaning as in s254 of the Housing Act 2004. That section includes a series of tests to be applied to decide if a building or part of one is an HMO. The appellant does not state which test is relied on, but the Council refers to 'the standard test' in s254(2). Whichever test is relied on, s254(5) applies. This states: 'But for any purposes of this Act (other than those of Part 1) a building or part of a building within subsection (1) is not a house in multiple occupation if it is listed in Schedule 14.' The list at Schedule 14 includes 'Any building which is occupied only by two persons who form two households'. Thus, irrespective of other considerations, the property was not in use as an HMO at any time when it was occupied by only 1 or 2 people.
7. In accordance with s191(2) of the Town and Country Planning Act 1990 (as amended), uses are lawful at any time if:
 - (a) 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); and
 - (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
8. No enforcement notice was in force at the date when the application for the LDC was made. Accordingly, my decision hinges solely on s191(2)(a). The time limits for enforcement action referred to in s191(2)(a) are set out in s171B.
9. Both parties say that the requirement in this instance is to demonstrate use for a 4 year period, as specified in s171B(2) of the Act. However, that only applies where there has been a breach of planning control consisting of the change of use of any building to use as a single dwellinghouse. This case, however, does not relate to any change to use as a single dwelling house. Rather, it concerns a claimed Class C4 use, which is use *of* a dwellinghouse as an HMO. In the Use Classes Order, Class C3 is labelled 'Dwellinghouses', whereas Class C4 is labelled 'Houses in Multiple Occupation', reflecting the fact that it relates to a different use, even if the property remains a dwellinghouse in physical terms (as per *Gravesham*¹, to which the Council refers). Accordingly, I am not

¹ *Gravesham BC v SSE & O'Brien* [1983] JPL 306

persuaded that s171B(2) applies. Rather, s171B(3), which specifies a ten year period for 'any other breach of planning control', applies.

10. It is common ground that prior to March 2012, the property benefited from permitted development provisions which would have enabled it to move between use as a dwellinghouse (Class C3) to use as a Class C4 HMO. However, on 11 March 2012 an Article 4 Direction which prevented change from Class C3 use to a Class C4 use in this particular area came into effect. Consequently, the HMO use would have been lawful when the LDC application was made if:
 - The property was in use as an HMO when the Article 4 Direction came into effect; and
 - The use was not subsequently abandoned or changed.
11. Thus, the use of the property when the Article 4 Direction came into effect is central to my decision. If the property was not in use as a C4 HMO at that point in time, it cannot have subsequently become lawful due to the passage of time, since there was less than 10 years between the date of the Article 4 Direction and the date of the LDC application. The evidence relating to earlier periods is of little relevance, since any amount of previous C4 use could not make the use lawful if it had ceased before the Article 4 Direction came into effect.

Assessment of the evidence

12. The appellant has provided a Timeline document, supported by evidence including various tenancy agreements; Deposit Protection Service documents; Council Tax bills; a utility bill; a Building Control completion certificate; a letter from a neighbour and a letter confirming a proposal to grant an HMO license.
13. The Timeline document suggests that the building was occupied by 3 people when the Article 4 Direction came into effect. However, the 2 assured shorthold tenancy (AST) documents provided in support of this shows that the property was let to only 2 people (for a 12 month period from 1 August 2011 and ending 31 July 2012). The Timeline refers to a further person – 'RG', a reference to a family member, Dr Rohit Gohil. However, I can find no substantive evidence to show that Dr Gohil was resident at the property at the relevant point in time. I have been provided with Council Tax bills and a utility bill addressed to Dr Gohil at the appeal property, but those documents relate to an earlier period.
14. Moreover, the ASTs are for 'letting a furnished dwelling house'. In this respect they differ from most of the earlier agreements, which referred to letting 'part of furnished dwelling-house' (my underlining). The 2011 ASTs each name 2 tenants and one is signed by each of them. There is no mention of Dr Gohil. This suggests to me that the whole of the property was available to the 2 tenants and they were not sharing it with a third person. In my view the year in which the property was occupied in this way was a significant period of time and cannot be regarded as a *de minimis* departure from its normal use, irrespective of how it was occupied previously.
15. The long-term occupier of a dwelling opposite has written in support of the application. Amongst other things, the letter states 'As at present, to the best of my knowledge, there has always been three students occupying the property, apart from a short period recently.....'. It is clear that the writer, who advises that he tends to keep an eye on the property and let tradesmen in if

required, had knowledge of the property throughout the relevant period. However, the letter is put in equivocal terms, using the phrase 'to the best of my knowledge'. That is perhaps not surprising, since the letter covers a lengthy period of time, during which tenants of the property will have come and gone. The critical period during which the Article 4 Direction came into effect was about 9 years before the letter was written, and it seems to me that it would be difficult for a neighbour to recall the number of occupants of the property so long ago with any great certainty. Consequently, I give only limited weight to the letter as evidence regarding the number of occupants at that critical time.

16. For these reasons, the appellant's evidence on this point is not sufficiently precise and unambiguous and I am unable to conclude, on the information before me, that the property was occupied as an HMO for 3 people when the Article 4 Direction came into effect. Consequently, regardless of the question of the nature of the occupation (which the Council queries) it did not meet the definition of an HMO at that point in time. Since that was less than 10 years before the application for the LDC was made, it follows that the use could not have subsequently become lawful due to the passage of time. Accordingly, the lawfulness of the use has not been established, on the balance of probability.
17. I am mindful that both parties consider that the 4 year period specified in s171B(2) should apply but, even if I had accepted that view, my conclusion would have been the same. This is because:
 - i) It would have no bearing on my finding regarding the use of the property at the point the Article 4 Direction came into effect. Consequently, it would be necessary for the use to have continued free from significant interruptions for a 4 year period subsequently in order to become lawful.
 - ii) The ASTs submitted by the appellant indicate that fewer than 3 people occupied the property between 1 December 2013 and 7 August 2014. There is also a gap of about 5 months in the period 8 August 2016 to 16 February 2017 when it appears that nobody was in occupation. Both these periods are significant breaks in any C4 use and should not be regarded as *de minimis*. It is clear, therefore, that there was not a continuous C4 use for any 4 year period between the Article 4 Direction coming into effect and 16 February 2017.
 - iii) Even if the property was subsequently (after 16 February 2017) occupied as a C4 HMO, that would not leave sufficient time for 4 years of continuous use before the LDC application was made on 10 August 2020. Any subsequent period (after the application) is not relevant to this determination.
 - iv) Accordingly, the evidence before me suggests that there was no continuous 4 year period before the application was made in which the property was occupied by 3 or more people. I understand that the periods of vacancy or reduced occupancy were due to necessary building works being carried out. Nevertheless, they were significant periods of time, sufficient to interrupt the continuity of use.
18. The appellant has pointed out the difficulty in obtaining certain kinds of evidence. However, the burden of proof falls on the appellant and I can only base my decision on the evidence available. None of the other evidence available leads me to any different view regarding the number of people at the property when the Article 4 Direction came into effect.

19. I understand that the Council granted an HMO licence for the property in March 2021, but that has no bearing on the question of lawfulness in planning terms. I have no reason to doubt that the appellant has been a good landlord but neither that, nor the demand for housing, has any bearing on the question of lawfulness.
20. I have considered whether any change between use as a C3 dwellinghouse and an HMO for 3 people at the property could be said to be 'non-material'. However, the fact that the C4 use class includes HMOs with as few as 3 people reflects the fact that the character of the use can be different to that of a C3 dwellinghouse, and I can see nothing about the appeal property to suggest otherwise in this instance.

Conclusion

21. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a C4 small house in multiple occupation, providing accommodation for 3 unrelated persons 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 and dismiss the appeal.

Peter Willows

INSPECTOR