Appeal Decision

Site visit made on 11 January 2022

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 February 2022

Appeal Ref: APP/V4630/X/21/3276944
88 West Bromwich Street, Walsall WS1 4DB

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Mohammed Asif against the decision of Walsall Metropolitan Borough Council.
- The application ref 21/0384, dated 19 February 2021, was refused by notice dated 30 April 2021.
- 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 the change of use from dwellinghouse to 2 flats and office.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appellant has confirmed in writing that an informal name was used on the application form and that is actual name is Mr Mohammed Asif. I have therefore used the appellant's formal name in the heading above.

3. The appellant ticked the 'Section 192' box on the appeal form, when selecting the section under which the application was made. However, it is clear from the application form and the evidence provided that the appellant submitted the application under section 191(1)(a) to ascertain whether the existing use of the building is lawful. I shall therefore deal with the appeal on this basis.

Main Issue

4. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well-founded.

Reasons

5. An application under S191(1)(a) of the Act seeks to establish whether any existing use of buildings or other land was lawful at the time of the application. S191(2)(a) and (b) sets out that uses and operations are lawful at any time if: i) No enforcement action may 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 ii) They do not constitute a contravention of any enforcement notice then in force.

6. Planning permission 12/1320/FL, dated 2 January 2013, granted planning permission for change of use from dwelling house (C3) with incidental office use to a mixed use for a two bedroom flat (C3) and office (A2). Condition 1

sets out the implementation period, condition 2 restricts the use of the office to a named individual and condition 3 restricts the opening hours of the office. There are no other conditions which restrict the use of the site.

7. The planning permission is for a mixed use comprising an office and two bedroom flat whereas what has been established on site is a self-contained office and two self-contained flats. Each flat comprises a kitchen, bathroom and living area/s, with its own lockable front door and so, has the facilities required for day-to-day private domestic existence. There is physical and functional separation between the office and the two flats and so there is no mixed use.

8. Whether a planning permission has been implemented is a matter of fact and degree. There has to be some conscious step towards implementation before the conditions imposed took effect. Development involving a material change of use will be begun when the change of use begins to be made, unless the planning permission was granted by an Order such as the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

9. In this case, however, the planning permission was for a mixed use, whereas the office comprises its own planning unit. Condition 2, which restricts the use of the office to a named individual and requires the rooms to be converted back to residential once the business use had ceased points towards the use being a mixed use, since it is unlikely to be possible for the appellant to convert the rooms back if it were a separate unit of occupation. There is a material difference between an office use and a mixed use comprising an office and residential. Consequently, in my view, it has not been demonstrated that the planning permission has been lawfully implemented.

10. Under section 171B(2) of the Act, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach consisting in the change of use of any building to use as a single dwellinghouse. Section 171B(2) applies where a building is being used as a dwellinghouse in breach of a condition which serves to prevent that use. Therefore, even if there is a condition restricting the change of use of the building, including any part of the building, to two flats, each flat has the protection of the four year rule.

11. The Council alleges that the time for applying for an order under section 171BA(1) (a Planning Enforcement Order) in relation to the matter has not expired. However, this section sets out time limits in cases involving concealment. I have nothing before me to suggest the change of use has been concealed by the appellant. I therefore see no reason to consider a time period other than that set out under section 171B(2) for the two flats.

12. Since the flats would be subject to the four year rule, as explained above, the appellant would need to demonstrate, on the balance of probabilities, that the material change of use of the flats began on or before 19 February 2017[1] and, if so, whether it continued without significant interruption for at least 4 years thereafter. A use can only become lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time.

[1] Namely 4 years prior to the date of the LDC application.

13. The Council has confirmed that Council Tax has been paid for 2 separate flats since the building was converted in 2013. However, there is a paucity of evidence to show who has occupied the building, when or how. While payment of Council Tax points towards the building being occupied, it not unusual for Council Tax to be paid during periods of non-occupation and so it cannot be determinative of continuous occupation.

14. The office, on the other hand, would fall to be considered under 171B(3), which states in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. Since the office would be subject to the ten year rule, the appellant would need to demonstrate, on the balance of probabilities, that the material change of use of the office began on or before 19 February 2011[2] and, if so, whether it continued without significant interruption for at least 10 years thereafter.

15. The appellant states that the front part of the building has been used as an office since 2008 and has provided some evidence to support this business use, including invoices for business insurance, software, UKPLC, a link to business rates valuations and an email from an individual requesting work experience. However, while I don't doubt there has been an office use of some description taking place at the site since 2008, from the planning history, it appears that prior to 2013, this would have incidental to the use of the dwellinghouse. Indeed, the submitted plans for application 12/1320/FL, show the 'existing plans' with office sharing the same access and presumably toilet facilities, as the remainder of the building.

16. In my view, the appellant's evidence is not sufficiently precise and unambiguous and has therefore not demonstrated, on the balance of probabilities, that the material change of use of the building to two flats began on or before 19 February 2017 and continued without significant interruption for at least 4 years thereafter, nor has it been demonstrated that the material change of use of the building to an office began on or before 19 February 2011 and continued without significant interruption for at least 10 years thereafter.

Conclusion

17. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the change of use from a dwellinghouse to 2 flats and office 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.

M Savage

INSPECTOR

[2] Namely 10 years prior to the date of the LDC application.