



Appeal Decision

by **Richard S Jones BA(Hons), BTP, MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 28 February 2022

Appeal Ref: APP/H5390/X/21/3278029

514 Fulham Road, London, SW6 5NJ

- 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.
 - The appeal is made by Mr Saleh Durani against the decision of London Borough of Hammersmith and Fulham.
 - The application ref 2021/01038/CLE, dated 30 March 2021, was refused by notice dated 27 May 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 use of existing rear ground and lower ground floor as a C3 dwelling.
-

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 Matters

2. I advised the parties that I did not need to conduct a site visit as the case turns on legal points and the parties have submitted sufficient evidence to understand the nature of the site given the points in dispute. The appellant confirmed that he was happy for me to proceed on that basis. No response was received from the Council.
3. The certificate of lawful use or development (LDC) is sought for the use of the existing rear ground and lower ground floor of No 514 Fulham Road as a Class C3¹ dwelling.
4. Under s191(2) of the Town and Country Planning Act 1990 as amended (the 1990 Act), uses and operations 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 an enforcement notice then in force.*
5. Planning merits form no part of the assessment of an application for a LDC which must be considered in the light of the facts and the law. The burden of proof lies with the appellant and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough.

¹ 'Use classes' are set out in Schedules 1 and 2 to the Town and Country Planning (Use Classes) Order 1987 as amended (UCO). A dwellinghouse falls under Class C3.

Main Issue

6. The main issue is whether the Council's decision to refuse to issue a LDC for the use of the rear ground and lower ground floor of the appeal premises as a Class C3 dwellinghouse was well-founded.

Reasons

7. The Council's reason for refusal is that the relevant works would not comply with Section 191(2) of the 1990 Act by virtue of being subject to an enforcement notice. It is not clear why reference is made to 'works' as the LDC relates to use.
8. Although the Council has not been able to produce the enforcement notice, it was subject to an appeal under s174 of the 1990 Act, and that appeal decision is provided². The appeal was dismissed in February 2006 and the enforcement notice was upheld with variations. It is clear from that decision, that the rear ground and lower ground floor of the appeal property was subject to an enforcement notice. The allegation and requirements (as varied) are also clear. The former is: "*without planning permission, the conversion of the rear part of the ground floor and part of the basement to use as a self-contained residential unit; and the installation of a new shopfront.*" For the purposes of this appeal, the focus is placed on the residential aspect.
9. In paragraph 2 of the decision, the Inspector found that although there was evidence that the conversion of the appeal premises to incorporate a self-contained flat was in progress at the time the enforcement notice was issued, that conversion had not been completed and the residential use had not commenced. On that basis, the Inspector deleted the requirement of the notice to cease the use as residential accommodation. Nevertheless, other requirements, relating to physical works were retained and/or varied, including requirements to remove all kitchen fixtures and fittings from the ground floor rear area and to remove all fixtures and fittings from the bathroom in the basement (requirements c.(iii) and c.(v)).
10. Following that appeal decision, planning permission was granted in August 2006 for the change of use of the rear part of the ground floor and part of the existing basement from retail shop to an office³. The Council subsequently confirmed in writing in May 2007 that the internal works had been carried out in accordance with the approved plans and that the enforcement notice had been complied with and discharged. The former is consistent with the appellant's evidence which also confirms that the office use was implemented.
11. Taken on face value, compliance with the notice would, in effect, have granted planning permission for the use as a self-contained residential unit under s173(11) of the 1990 Act. That is because the requirements, as varied, did not address that particular aspect of the breach⁴. However, as the office use was commenced in accordance with the 2006 planning permission, that material change of use would have started a new chapter in the planning history of the

² Appeal Ref: APP/H5390/C/05/2002514

³ Planning permission ref: 2006/01849/FUL

⁴ S173(11) of the 1990 Act provides that in circumstances where an enforcement notice could have required any activity to cease, but does not do so, and all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of s73A in respect of development consisting of the carrying out of the activities.

property and the benefit of the planning permission for residential use under s173(11) would have been lost.

12. Moreover, S181(1) of the 1990 Act provides that compliance with any of the requirements contained in an enforcement notice '*shall not discharge the notice*'. In other words, the requirements of an enforcement notice have an enduring effect; if a notice is complied with but there is a later breach of its requirements, s181(1) means that the breach remains enforceable under s179 of the 1990 Act. Accordingly, the requirements of the enforcement notice⁵ to remove all kitchen fixtures and fittings from the ground floor rear area and remove all fixtures and fittings from the bathroom in the basement, remain in force.
13. I note that the ground floor plan (drawing number 514/01) from the 2006 planning permission shows a 'coffee making area' which appears to include a sink. That is not the same as a residential kitchen and the enforcement notice could still require the removal of fixtures and fittings beyond the sink and coffee making facilities, such as a cooker. Similarly, although the floor plan for the basement (drawing number 514/02) shows a toilet and hand basin with the annotation 'toilet for office above', the requirements of the notice could still require the removal of a bath and/or shower.
14. Therefore, the provision of the kitchen and bathroom facilities beyond those shown on the approved floor plans of the 2006 planning permission, constitute a contravention of the requirements of an enforcement notice then in force. Their provision is not therefore lawful as enforcement action may be taken in respect of them. Requirement c.(iv) to reinstate the blocked off doorway at basement level may also be in force, although it is likely that requirement c.(ii) to reinstate the blocked doorway at ground floor level will have been superseded by the 2006 permission.
15. Nevertheless, as the requirement to cease the use as residential accommodation was deleted from the requirements of the enforcement notice, that use could be lawful, albeit without facilities required for day-to-day private domestic existence (a kitchen and bathroom). That is, if it is demonstrated, on the balance of probabilities, that the rear ground and lower ground floor of the appeal property has been used as a Class C3 dwelling for more than four years before the LDC application was made, so as to be immune from enforcement action under s171B(2) of the 1990 Act.
16. There is some inconsistency in the appellant's evidence as to when the breach occurred (the material change of use from office to Class C3 residential). The appellant submits that the residential use began on 1 January 2009 whereas Council tax bills for the ground floor rear flat at No 514 detail charges for the period between 13 November 2008 and 31 March 2012. A Council tax reminder dated April 2012 and a gas safety certificate for the ground floor flat dated 20 August 2012 extend the duration of the breach further, but, even if it commenced in November 2008, the period remains less than four years.
17. A utility bill and an electrical installation work certificate from June 2008 are provided but they are not specifically addressed to the ground floor flat, and again are inconsistent with the appellant's start date. They are not therefore sufficiently precise and unambiguous to make up that four-year period.

⁵ C.(iii) and C.(v)

18. The next batch of Council tax bills are for the period between 1 September 2018 up to the date of the application on 30 March 2021, and beyond⁶. Various utility bills also support a residential use during the same period. Again, however, that timescale is less than four years.
19. There is limited evidence for the intervening period between August 2012 and September 2018. The British Gas leaving letter of October 2015 is addressed to No 514 and not specifically to the ground floor flat. The Thames Water letter from May 2015 is addressed to Flat 3 at No 514, but it is not clear what part of the building that relates to. The 'rear ground floor flat' is added in pen but those two pieces of evidence together, are not sufficient to bridge the gap between the 2012 and 2018 years.
20. A twelve-month tenancy agreement is provided for the ground floor flat, dated 10 September 2011. Although no renewal or continuation agreements are provided, a copy is provided of a notice served by solicitors dated 7 March 2018 requiring the same tenants named in the October 2011 agreement to leave No 514. That document does not specifically refer to the ground floor flat but it is more likely than not that the tenants did not move to another flat within the same building. That evidence points to a continued use linking the periods of November 2008 to March 2012 and September 2018 to March 2021.
21. I therefore find the appellant's evidence to be sufficiently precise and unambiguous to demonstrate, on the balance of probabilities, that the rear ground and part of the lower ground floor of No 514 has been used as a Class C3 dwelling for more than four years, without material interruption, before the date of the LDC application, so as to be immune from enforcement action under s171B(2) of the 1990 Act.
22. However, the scope of the LDC is limited because whilst the use is immune from enforcement action through the passage of time, the provision of kitchen and bathroom facilities⁷, which are required for day-to-day living are not - for the reasons explained. Effectively therefore, the LDC is of little practical benefit. I understand the appellant's concerns over the reasonableness of such an outcome but, such matters can form no part of the assessment of an application for a LDC which, as noted, must be considered in the light of the facts and the law.
23. I shall issue a certificate in those terms, modifying the description to accord with the facts and evidence, under the powers afforded to me by s191(4) of the Act.

Conclusion

24. 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 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.

Richard S Jones

INSPECTOR

⁶ Lawfulness is determined at the time of the application, which is usually the date on which it is made. Evidence beyond the time of the application does not fall to be considered.

⁷ And potentially a blocked up doorway at basement level

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 30 March 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched in black 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 reasons:

The use of the rear ground and part of the lower ground floor as a Class C3 dwelling does not contravene the requirements of any enforcement notice in force.

It has been demonstrated, on the balance of probabilities, that the rear ground and part of the lower ground floor had been used as a Class C3 dwelling for more than four years, without material interruption, by 30 March 2021 and so the time for taking enforcement action under s171B(2) of the Town and Country Planning Act 1990 had expired.

However, the scope of the Lawful Development Certificate is limited because the requirements of enforcement notice 2004/00135/TERRAC, issued on 26 April 2005, and varied under Appeal Decision Reference: APP/H5390/C/05/2002514, remain in force, including c.(iii) and c.(v) which require the removal of all kitchen fixtures and fittings from the ground floor rear area and the removal of all fixtures and fittings from the bathroom in the basement (lower ground floor). Consequently, the provision of kitchen and bathroom facilities beyond those shown on drawing numbers 514/01 and 514/02 of planning permission reference 2006/01849 are in contravention of the requirements of the enforcement notice in force.

Signed

Richard S Jones

INSPECTOR

Date: 28 February 2022

Reference: APP/H5390/X/21/3278029

First Schedule

Use of the rear ground and part of the lower ground floor as a Class C3 dwelling, subject to the requirements of enforcement notice 2004/00135/TERRAC, issued on 26 April 2005, and varied under Appeal Decision Reference: APP/H5390/C/05/2002514, including, but not limited to, c.(iii) and c.(v), which require the removal of all kitchen fixtures and fittings from the ground floor rear

area and the removal of all fixtures and fittings from the bathroom in the basement.

Second Schedule

Land at 514 Fulham Road, London, SW6 5NJ

IMPORTANT NOTES – SEE OVER

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

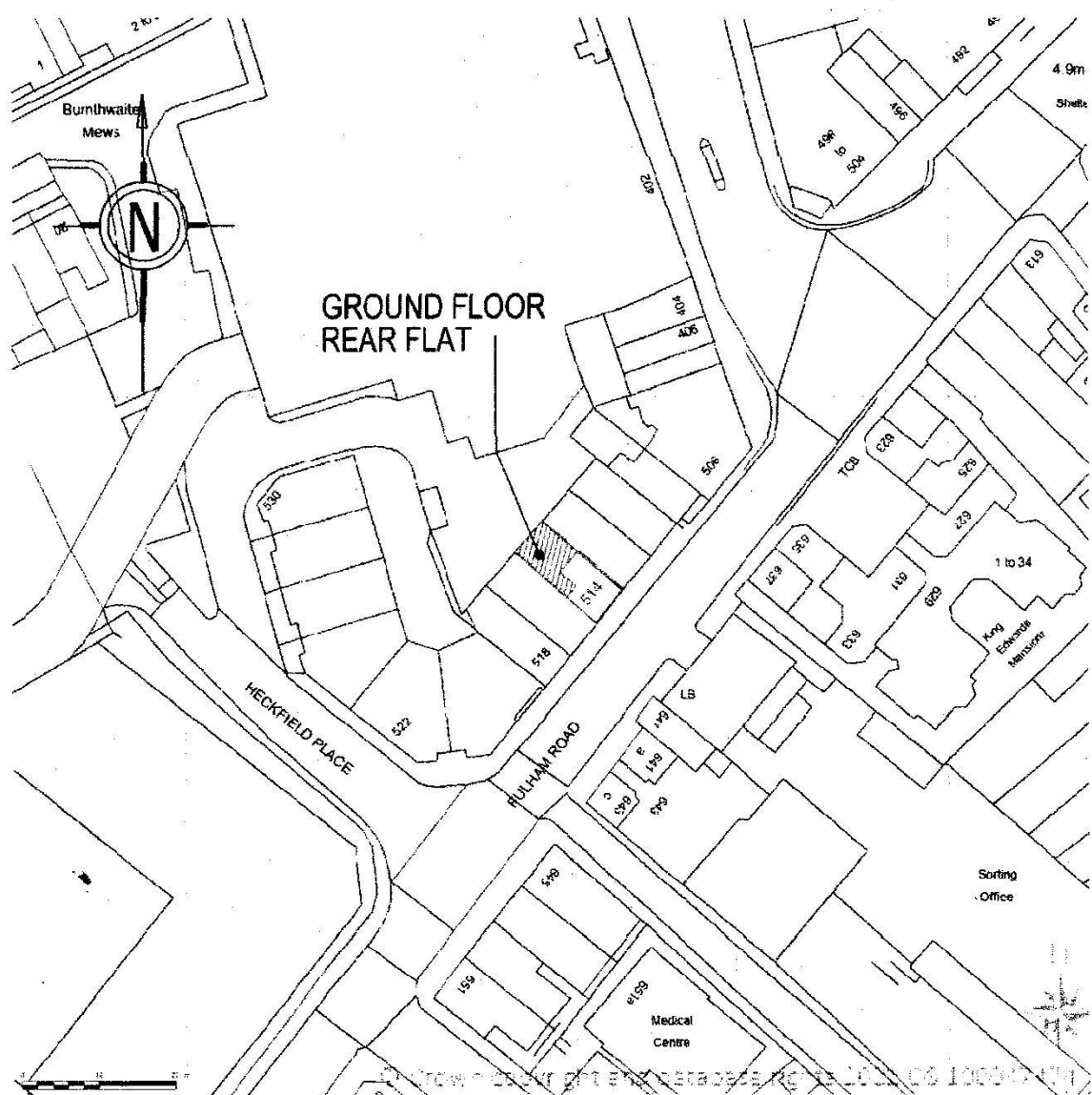
This is the plan referred to in the Lawful Development Certificate dated: 28 February 2022

by **Richard S Jones BA(Hons), BTP, MRTPI**

Land at: 514 Fulham Road, London, SW6 5NJ

Reference: APP/H5390/X/21/3278029

Scale: Not to Scale



Location plan at 1:1250 @ A3 0 10 20