
Appeal Decision

by B.S.Rogers BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 March 2022

Appeal Ref: APP/Q3060/X/21/3281640
29 Forest Road East, Nottingham NG1 4HT

- 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 G.Watmore against the decision of City of Nottingham Council.
 - The application Ref: 21/00969/PCLE, dated 28 April 2021, was refused by notice dated 2 July 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 as a Class C4 House in Multiple Occupation.
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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 considered to be lawful.

Preliminary Matter

2. Because the parties' cases are confined to written evidence of the historical use of the premises and legal submissions, it was agreed that there was no need for a site visit to be undertaken.

Reasons

3. Planning Practice Guidance indicates that the onus is on the applicant to provide sufficient information to support his case. If a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the appellant'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.
4. The appellant's case relies on S 191(2)(a) of the Act which states that uses are lawful if no enforcement action may then be taken in respect of them because they did not involve development or require planning permission. He submits that when this three-storey, mid-terraced Victorian house was last in use in mid-2009, it was lawfully used as a small House in Multiple Occupation (HMO). In mid-2009, the property was vacated, and has not been occupied since, but the lawful use has not been abandoned.

5. In the version of the Town and Country Planning (Use Classes) Order 1987 [UCO], that was in force prior to 2010, *Class C3: Dwellinghouses* included use as a dwellinghouse either (a) by a single person or by people living together as a family; or (b) by not more than 6 residents living together as a single household (including a household where care is provided for residents). A change from use (a) to use (b) would have been lawful. The April 2010 amendment to the UCO introduced *Class C4: Houses in Multiple Occupation*, defined as 'Use of a dwellinghouse by not more than six residents as a "house in multiple occupation"'. As such, it is submitted that the lawful use has, from that time, fallen within Class C4.
6. The appellant bought the property in 2019 and has no direct personal evidence of its use prior to that date. The available evidence is as follows.
7. A letter from the Council dated 8 April 2021 in response to a freedom of information request states that: *"Council Tax records show the following information that indicates that the property was being used as a HMO:
* Record of phone call made 2 August 2006 in which the owner advised that the property was let to 5 tenants under separate tenancy agreements each with locks on their doors;
* The owner was treated as the person liable for the Council Tax, although not resident, in accordance with class C of the Council Tax (Liability for Owners) Regulations 1992:
* A benefit application made on 15 June 2007 which states that the applicant has use only of the 3rd floor on a 3 storey property."*
8. The letter goes on to indicate that the Council's Housing Licencing and Compliance team records only go back to 2011 and are unable to be provided for the period in question. However, it states that *"Environmental Health and Safer Places records for an inspection in 2009 indicate the property was considered to be a HMO when it was inspected."*
9. This last reference appears to relate to an inspection which led to the serving of an Improvement Notice under the Housing Act 2004 on 4 June 2009. This required a very extensive list of improvements to be made. Amongst the requirements was the fitting of internal fire doors which seems unlikely to have been required for a normal family dwelling. The case officer who carried out the inspection, Mr Hobbs, now the Council's Selective Licensing Manager, stated on 12 August 2021: *"At the time of my involvement in spring/summer of 2009 the property was operating as a HMO. At the time of my inspection in April 2009 to serving the notice in early summer 2009 there were more than 3 unrelated students living in the property. I can confirm that my understanding is that the property was a house in multiple occupation (HMO) and then became vacant. I am not aware of any other occupation of the property in the interim."*
10. The present floor plans appear to be consistent with the details of the above improvement notice, indicating shared, rather than self-contained facilities.
11. An extract from the electoral register of 2009 shows 3 residents listed at this address, each with a different surname, which appears consistent with the claimed use as a HMO.
12. The Council has not provided any evidence to contradict the appellant's case but submits that there is insufficient clarity as to whether the property was

occupied as a HMO as per Class C3 or whether it was a *sui generis* use. The Council's submission that there is an "element of doubt" appears to me to exceed the scope of the balance of probability test. I have seen no indication that the use of the property fell outside of the meaning of a HMO set out in the UCO, as operating before 2010 and give significant weight to the evidence of Mr Hobbs. He has both relevant professional expertise and detailed personal knowledge of the use of the premises. Although Mr Hobbs makes no direct reference to planning legislation, there is a considerable overlap with housing legislation, with which he must have been familiar. Indeed, the April 2010 amendment to the UCO relies on S.254 of the Housing Act 2004 for the interpretation of Class C4.

13. On the balance of probability, it is my view that the appeal property was last in lawful use as a HMO, as defined in Class C3(b) of the UCO, in mid 2009 when it was vacated. It was held in *Panton & Farmer*¹ that a use may be regarded as 'existing' as per S.191(a) of the Act even if it is dormant or inactive.
14. I shall now turn to the question of abandonment. The concept of abandonment applies if a building or land remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned². Abandonment involves a cessation of use in such a way and for such a time as to give the impression to a reasonable onlooker, applying an objective rather than a subjective test, that it was not to be resumed³. In *Castell-y-Mynach*⁴, the Court suggested four criteria for abandonment: i. the period of non-use; ii. the physical condition of the land or building; iii. whether there had been any other use; and iv. the owner's intentions as to whether to suspend the use or to cease it permanently.
15. Here, it is common ground that the property was vacated in mid 2009 and has not been occupied since; this amounted to a period of some 12 years to the date of the application. It appears to have been in very poor condition, as detailed in the 2009 Improvement Notice. However, it appears that all its internal sanitary and electrical fittings were retained, such that it appears to have been physically capable of being occupied, albeit not to the standards required by the Housing Act. It appears materially different from the property in *Castell-y-Mynach* which was in almost total disrepair and dereliction.
16. There is no evidence that the property has been put to any other use in the intervening period prior to the April 2021 date of the application.
17. There appears to have been no attempt by the previous owner to comply with the Council's Improvement Notice but his overall intentions remain unclear as to whether the use was to be suspended or abandoned. The present owner clearly intended to resume the HMO use as evidenced by his first application for an LDC to that effect in 2020. I do note that he used the term 'abandoned' in relation to that first application but accept that, as a layman, he would not have appreciated the planning law meaning of the term.
18. The appellant places some weight on the present owner's application to replace the front dormer of the premises in 2020 (ref: 20/01080/PFUL3) in which the officer's report refers to a "residential property". It is submitted that this

¹ *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] LPL461

² *Hartley v MHLG* [1970] 1QB 413

³ *Nicholls v SSE and Bristol CC* [1981]

⁴ *Trustees of Castell-y-Mynach Estate v Taff-Ely BC* [1985] JPL 40

indicates that the use had not been abandoned. Whilst this is supportive of the appellant's case, it is not decisive as it does not appear that the officer was explicitly considering the issue of abandonment. The reference to the recent payment of Council tax is similarly supportive but again not decisive as it would not be part of the relevant department's remit to consider the question of abandonment in planning terms.

19. Taking the above factors into account, it is my view that the lawful use of the property in 2009 was not abandoned.
20. In conclusion, I recognise that the appellant has a difficult task to make out his case, given the shortage of records over the relevant period around 2009. Nonetheless, on the available evidence, I find that he has demonstrated on the balance of probability that the lawful use was as a small HMO when last used in 2009 (then in Class C3 of the UCO), that the use was not abandoned and that the use as a small HMO (now in Class C4) remains lawful. Accordingly, the Council's decision to refuse to grant an LDC was not well-founded and the appeal should succeed.

B.S. Rogers

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 28 April 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The lawful use was as a small house in multiple occupation (HMO) when last used in 2009, a use which was then in Class C3 of the Town and Country Planning (Use Classes) Order 1987 [UCO]. The use was not abandoned and the use as a small HMO (now in Class C4 of the UCO) remains lawful.

Signed

B.S. Rogers
Inspector

Date 10 March 2022

Reference: APP/Q3060/X/21/3281640

First Schedule

Use as a House in Multiple Occupation by not more than 6 residents, as defined in Class C4 of the Town and Country Planning (Use Classes) Order 1987.

Second Schedule

Land at 29 Forest Road East, Nottingham, NG1 4HT

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 /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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.