The Planning Inspectorate

# Appeal Decision

Site visit made on 8 February 2022

**by J Whitfield BA (Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 11 Marh 2022**

**Appeal Ref: APP/X5990/X/21/3278691**
**112 Tachbrook Street, London SW1V 2ND**

- 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 Adrienne Burgess against the decision of City of Westminster Council (the LPA).
- The application Ref 20/07584/CLEUD, dated 26 November 2020, was refused by notice dated 9 February 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 commercial holiday lets.

## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. I attended the appeal site at the appointed date and time to carry out my site visit. However, no representative of the LPA attended. As such, in the interests of fairness, I decided not to proceed with an internal inspection of the property. Having considered all the evidence before me, I am satisfied that, since the appeal turns on legal matters, that I am able to consider the appeal without the need to visit the internal areas of the property.

## Main Issue

3. The main issue is whether the LPA's decision to refuse the LDC application was well-founded.

## Reasons

4. Section 191(2) of the 1990 Act states that uses are lawful at any time if (a) no enforcement action may be taken in respect of them, because, amongst other things, the time for enforcement action has expired; and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force. There is no evidence that Section 191(2)(b) applies in this case.

5. Section 171B of the 1990 Act relates to time limits for enforcement action to be taken. Section 171B(3) relates to changes of use and states that no action can be taken after the end of the period of ten years beginning with the date of the breach.

6. There is no dispute between the parties that a material change of use of the property to commercial holiday lets took place in August 2008. However, whether that use has been continuous throughout the relevant ten year period thereafter is a matter of dispute.

7. The main issue at hand for this appeal therefore is whether the commercial holiday let use has taken place substantially uninterrupted for ten years such that the LPA could have taken enforcement action against the use at any time in the ten year period.

8. The property is said to accommodate groups of up to 13 people throughout the calendar year for short periods of occupation. Statutory Declarations of the appellant, the joint freehold owner of the property and a person who provided administrative services, say that the property has been in continuous use as a holiday let since August 2008.

9. However, since August 2008, there have been several periods when internal building works have been undertaken to the property. They were:

    1) 1 February to 5 March 2009 (33 days)

    2) 5 to 22 November 2016 (18 days)

    3) 1 to 14 December 2016 (14 days)

    4) 11 to 27 January 2017 (17 days)

    5) 4 to 21 February 2017 (18 days)

    6) 19 March to 5 April 2017 (18 days)

    7) 13 to 15 May 2017 (3 days)

    8) 1 January to 16 February 2018 (47 days)

    9) 24 February to 7 March 2018 (12 days)

10. The appellant states that apart from the periods 6) and 8) above, the property was available to be used by guests. Indeed, the appellant says that it was continuously marketed and advertised as a commercial holiday let throughout the entire period 1 August 2008 to 17 December 2020. Invoices relating to the advertising of the property have been provided. It is also said that those building works carried out were all done to facilitate the use of the property for a holiday let. The appellant points towards times when guests have not booked the accommodation, despite it being available and advertised for such use.

11. However, the fact that it was available for use or indeed marketed as such, does not mean that it was actually in use. The principles laid out in *Swale*[1], *Thurrock*[2] and *Islington*[3] are clear that it is not enough for the property to have been available or suitable for the holiday let use, it must have been actually used as such.

[1] *Swale BC v FSS & Lee* [2005] EWCA Civ 1568
[2] *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226
[3] *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)

12. The Statutory Declarations state that the use comprised only "frequent" letting out of the property as holiday accommodation for which the appellant received payment. Rental invoices are provided which cover significant periods of time from August 2008 to the date the LDC application was submitted.

13. Nevertheless, the extent to which invoices demonstrate the property was used for holiday lettings during those times is limited since there is no evidence that those guests invoiced went ahead with their stay. It could well be that some of those booked cancelled beforehand. Moreover, a spreadsheet has been provided which shows dates for lettings and works throughout the period. Again, there is nothing from the spreadsheet which shows the property was actually used as a holiday letting during those periods.

14. Filed accounts have been provided which are said to show income from the accommodation letting. However, the accounts only show income as turnover. They do not state where the turnover is derived from nor is there any reference to the property itself. Nonetheless, the appellant's tax returns show income derived from the letting of the property.

15. Ultimately, I am satisfied, on the balance of probabilities, that the correlation of the spreadsheet with the invoices, along with the other evidence provided such as the housekeeping diaries, points towards the property having been used as a holiday let during those periods shown as bookings on the spreadsheet.

16. Nevertheless, the same evidence shows numerous periods when the property was not booked by guests. Short periods of non-use for internal works, such as 13-15 May 2017, or indeed one or two days between bookings may not necessarily result in a break of the continuity of the breach.

17. However, it seems to me that periods of several months would amount to a significant break in the use of the property. For example, a period of non-use of 47 days took place from 1 January 2018 to 16 February 2018. This would, as a matter of fact and degree, have resulted in the cessation of the unauthorised use for that period, particularly since the property was not capable of occupation as a holiday let during that time. Indeed, the property was occupied for only 21 days in a 91 day period beginning on 31 December 2017 and ending on 31 March 2018.

18. Moreover, there is evidence of periods during November and December 2016 and January and February 2017 amounting to several weeks where the property was not in use again due to refurbishment works.

19. The evidence also shows substantial periods of non-use in January, February and March 2009. The appellant states that such periods are irrelevant as a ten-year period of continuous unauthorised use needs to be demonstrated from 17 December 2010 to 17 December 2020 – the date the LDC application was received by the LPA.

20. However, Section 171B of the Act is clear that it is a period ending 10 years from the date on which the breach occurred, not 10 years prior to the date of the LDC application. Given the appellant states the initial breach took place in August 2008, the evidence needs to demonstrate that the use was continuous from August 2008 to August 2018. Alternatively, it needs to be demonstrated that, if there was a break in the use in January to March 2009, that a fresh

breach occurred at that point and continued for 10 years up until March 2019. Either way, as I have set out above, that is not the case.

21. In any event, were the breach to be taken from December 2010 to December 2020, there was no use of the property as guest accommodation at all from 16 February 2020 up until the LDC application was submitted in December 2020. The planner shows bookings in March – September 2020 as cancelled. Presumably, these cancellations were due to restrictions resulting from the Covid-19 pandemic. Whilst these cancellations were not any fault of the appellant, if one counts that period within the relevant 10 year time scale, it is clear on the face of it that there was no use of the property as a holiday let for 10 months. That is a substantial break in the continuity of the use.

22. Overall, it seems to me that during those significant periods of non-use highlighted above, the ten year clock would have reset. Therefore, it would not have been open to the LPA to have taken enforcement action during those periods since no such breach would have taken place, previous breaches having been remedied by cessation of the use. The fact that the property may have appeared to anyone entering the property as having been used at some point for holiday accommodation, due to the presence of, amongst other things, guest literature, guest book, fire safety information and insurance certificates carries little weight. Such matters in themselves cannot be sufficient to demonstrate that a breach had taken place as a matter of fact.

23. Ultimately, one cannot rely on intention and capacity to use the property as a commercial holiday let to acquire lawfulness. As the case law makes clear, one must look to actual continuous use. As it is here, the evidence suggests that the new activity ceased at various points since 2008. Thus, the breach of planning control was remedied. Subsequent use as a commercial holiday let would have been a fresh breach of planning control and the clock restarted.

24. I recognise that periods of enforced cessation are part and parcel of uses such as this. As the appellant contends it is perfectly common for commercial holiday uses to cease to accept guests during short periods of renovation works. However, a distinction must be drawn. This is not a case of abandonment where the lawful use of the property as a holiday let has been achieved and then later resumed without intervening uses. The appellant has chosen to carry out works to facilitate an unauthorised use and in doing so, has, either intentionally or otherwise, ceased the use during those periods. Indeed, the appellant uses the phrase "cease to accept guests" during such periods. Ceasing to accept guests to use the property as holiday accommodation is effectively ceasing to use the property as holiday accommodation.

25. The appellant raises the *Moore*[4] case, in addition to a 2019 appeal decision from Cambridge. However, both the *Moore* case and that appeal decision largely rested on the issue of whether or not a material change of use had occurred from a dwelling to a holiday let. That is not a matter in dispute here. Thus, there is limited relevance of those cases to that before me here, and they do not lead me to any alternative conclusion.

26. I conclude, therefore, that it has not been demonstrated on the balance of probabilities, that no enforcement action may be taken in respect of the use of

[4] *Moore v SSCLG & Suffolk Coastal* [2012] EWCA Civ 2010

the property has a commercial holiday let because the time for enforcement action has expired. Thus, the use would not have been lawful at the date the LDC application was made.

**Conclusions**

27. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of commercial holiday lets 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.

*J Whitfield*

**INSPECTOR**